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REPORTS
OF
CASES ARGUED AND DETERMINED
IN
CIRCUIT COURTS
OF OHIO

SUPPLEMENT TO
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF OHIO.

CONVEYANCES—DOWER—FRAUD.

[Wayne Circuit Court, February Term, 1900.]

Adams, Douglass and Voorhees, JJ.

SAMUEL MANLEY v. ALEXANDER CARL.

1 CONVEYANCE OF PROPERTY SUBJECT TO UNASSIGNED DOWER INTEREST.

S. M., tenant in common with R. M., conveyed to said R. M. by deed of release or quitclaim certain tracts of land described in the deed, which were subject to an unassigned dower. S. M. and his wife, in the deed, remised, released and forever quitclaimed unto the said R. M., his heirs and assigns forever, all their title, interest and estate, legal and equitable, except their right and title in the widow's dower in the premises described. Afterwards the widow's dower was assigned in 120 acres, a part of the lands described in the deed. *Held*, that S. M.'s grant to R. M. excepted the fee in that part or portion of the premises described in the deed, to-wit: in the 120 acres, in which said dower was assigned, and R. M. did not get title thereto under his quitclaim deed.

2. EXCEPTION NOT VOID FOR UNCERTAINTY.

The exception in said deed was not void for uncertainty. The quantities or boundaries of the land excepted could be shown by evidence, and the assignment of the dower.

3. FRAUD IN NEGOTIATING PURCHASE OF REAL ESTATE.

The buyer of real estate, who assumes to have special knowledge of the value and condition of the property, in regard to which the seller is ignorant, for the purpose of misleading him and inducing him to sell the same at less than its value, told him of facts and conditions calculated to depreciate the value of the premises, but omitted to disclose other facts within his knowledge which would have given correct information of their value, and by such means succeeded in buying the same at much less than their value. Such conduct on the part of the buyer is fraudulent, entitling the seller to set aside the conveyance.

APPEAL.

VOORHEES, J.

Plaintiff in his first cause of action set forth, that about October 25, 1894, he conveyed to the defendant his interest in the lands described in the petition, for the sum of \$120. He claims at the time said conveyance was made he was the owner in fee of one-sixth of a tract of 120 acres

Wayne Circuit Court.

described, also the owner in fee of one-fifty-sixth part of certain other lands, described in the petition, as one of the heirs of his brother, James K. Manley, who died in 1864, without issue, unmarried and intestate; that the defendant misrepresented to him the condition and value of said lands; that they were worn out, of poor quality, etc.; that if plaintiff, who lived in Missouri, should go to Ohio to sell his interest in the lands he would be in danger of his life, claiming and representing that there were a dangerous and rough set of people living on the lands; that the amount he offered for said plaintiff's interest, to wit: \$120, was more than his interest was then worth.

Plaintiff relying upon the statements of defendant as to the condition and value of said lands, and of the danger attending him should he return to Ohio to look after his interest, on October 25, 1894, executed and delivered to the defendant a quitclaim deed, and thereby conveyed to him all his interest in the lands described in the petition for said sum of \$120; that plaintiff's interest therein was of the value of \$2,000.

No claim being made or relief asked, under the second cause of action, it need not be considered; and the third cause of action is for rents and profits of plaintiff's share of the 120 acres, of which defendant was and has been in possession since 1874.

For a fourth cause of action, partition of the 120 acres is demanded, one-sixth thereof to plaintiff and five-sixths to the defendant.

The prayer for relief is: That the deed of October 25, 1894, be set aside; the defendant account for rents of the 120 acres from February 23, 1874, and that partition be made of the premises.

Defendant by answer puts in issue all the allegations of the petition, except he admits that plaintiff on October 25, 1894, was seized of one-seventh of one-eighth or one-fifty-sixth part of the 120 acres, as heir-at-law of his brother, James K. Manley, deceased; and one-sixth of one-seventh or one-forty-second part of said 120 acres as heir-at-law of his brother, Perry Manley, deceased. He further admits that James K. and Perry Manley each died without issue, unmarried and intestate; that on February 23, 1874, he, the defendant, purchased from Henry Shreve, as administrator of Robert Manley, deceased, all the interest of said Robert Manley in said 120 acres, and that he became a tenant in common with the plaintiff therein; that about 1864, plaintiff became seized of one-fifty-sixth part of the other lands described in the petition other than the said 120 acres, as heir of said James K. Manley, deceased, to-wit: in about 268 $\frac{7}{8}$ acres.

The contention centers upon three propositions:

First. What interest, if any, was excepted by the plaintiff, Samuel Manley, in the deed of January 24, 1852, to his brother, Robert Manley?

Second. Had plaintiff, on October 25, 1894, any interest or estate in the 120 acres, except the interest he inherited from his two brothers, James K. and Perry Manley, being the one-fifty-sixth and one-forty-second or one-twenty-fourth? If he excepted his interest in the 120 acres from the operation of the deed of October 25, 1852, then as heir of his father he would have one-eighth more, making his entire share one sixth?

Third. Was there fraud practiced by the defendant in the purchase of the land in October, 1894?

The first question is to be determined by construction of the deed from Samuel Manley to Robert Manley of date of October 25, 1852.

Manley v. Carl.

At the time this deed was made Samuel Manley and Robert Manley were tenants in common in the lands of which their father died seized, each owning in fee one-eighth part of all the lands described in the deed of October, 1852. All of these lands were subject to the dower of the widow of their deceased father, which dower at the time said deed was made was unassigned. The deed in question is a quitclaim. Omitting certain unimportant recitals, it contains the words following, to-wit: "In consideration of the sum of \$600 in hand paid by Robert Manley, we do hereby remise, release and forever quitclaim unto the said Robert Manley, his heirs and assigns forever, all our title, interest and estate, legal and equitable, except our right and title in the widow's dower, in the following described premises, etc."

It was not the purpose or intention of the grantors by this exception, to exempt themselves from liability against an incumbrance of the dower estate in the lands conveyed; the deed contains no covenants of warranty. But did the grantors, by the use of the words, "except our right and title in the widow's dower in the premises described, etc.," retain the fee in any part of the premises described in the deed? It may be assumed that the parties to this deed understood that the dower of their mother could be assigned in any part or portion of the lands of which their father died seized, and that the dower estate would not be an estate in fee. If they so understood that the dower might be so assigned, and it would not include the fee, then, by excepting from the operation of the deed, their right and title in the dower, did they not intend to retain their estate in that portion of the premises described in the deed in which the dower should thereafter be assigned, wherever that might be? Such an exception would not be void for uncertainty. An exception is not void for uncertainty, because the boundaries of the land excepted must be shown by evidence. *Painter v. Pasadena, L. & W. Co.*, 91 Cal., 74.

Afterwards the widow's dower was assigned in a portion of the premises described in the deed of October 1852, to wit, in the 120 acres here in controversy.

It is an obvious rule in the construction of grants containing an exception or reservation, that the thing excepted or reserved must be out of the thing granted, or parcel of that which would have passed by the grant, if not thus excepted or reserved. An exception or reservation of something not embraced in the premises would be simply void, there being nothing for it to operate upon. The words exception and reservation are often used indiscriminately, though there is a known distinction between them. An exception is separating part of that embraced in the description, and already existing in specie; as excepting a particular parcel of land from a farm granted by general words. A reservation is something newly created, out of the granted premises by force and effect of the reservation itself, as an easement out of land granted, or rent out of land demised. In this deed the words are peculiar; they are, "except our right and title in the widow's dower." The meaning and intention could not be, that the grantors meant only the dower estate of the widow, because they had no right or title in the dower estate, either before or after assignment; if the dower had actually been assigned by metes and bounds, such an exception would have been void either as an exception or reservation of the dower estate, because there was nothing for either to operate upon; the grantors had no estate or interest in the dower.

But, when applied to the fee in that portion of the premises embraced in the deed, in which the dower estate could or should be assigned to the widow, then they are excepting or reserving something of their own, and existing at the time the deed was made.

With this view of what the grantors had, by force of the exception in their deed, their right and title in the widow's dower, it is clear the intention was to retain a fee in the premises embraced in the deed in which the widow's dower should thereafter be assigned. Such a construction brings the case within the scope or meaning of an exception, viz; that it must be a portion of the thing granted, or described as granted, and can be of nothing else; and must also be of something which can be enjoyed separately from the thing granted. If the exception be valid, the thing excepted remains with the grantors with the like force and effect as if no grant had been made. Such a construction of the deed of October 1852, is sustained by the following cases and authorities. *Sloan et al. v. Lawrence Furnace Co.*, 29 Ohio St., 568; *Craig et al. v. Wells*, 11 N. Y., 315; *Hurd v. Curtis et al.*, 7 Met., (Mass), 94, 110; *Cutler v. Tufts*, 3 Met. (Mass), 272, 277; *Devlin on Deeds*, Vol., 2 (2d Ed.), sec. 979; 4 Kent's Com., 468.

Counsel for defendant rely upon the case of *Cincinnati v. Lessee of Newell's Heirs*, 7 Ohio St., 37-40. That case is plainly distinguishable from this. There the exception was not in favor of the grantor but for the use of the public. For themselves in particular, the grantors excepted and reserved nothing. The public being a stranger to the deed, the exception could not operate in its favor. The law will never imply a covenant in favor of a stranger to the deed. It is well settled that an exception or reservation to a third person not a party to the deed is void. *Craig v. Wells*, 11 N. Y., 315, 323, and authorities cited on page 323.

The only case we have been able to find which tends to a contrary construction is *Swick v. Sears*, 1 Hill (N. Y.), 17. In that case it was a *warranty deed*. Tunis Swick died seized of the premises in question, leaving a widow named Charity, who afterwards married Eldreth Covert; and leaving also five children, of whom the plaintiff was one. All the other heirs had conveyed their interest to the plaintiff. The plaintiff then, by warranty deed, conveyed the premises to the defendant in fee, describing the same by metes and bounds, and immediately after the description was a reservation in the following words: "Reserving the equal undivided one third part of above described premises that is covered by the dower right of Charity Covert."

The case can not be regarded as a well considered one, no authorities are cited in support of the conclusion reached, and no discrimination is made between an exception and a reservation notwithstanding the obvious difference in their legal effect. The judge who announced the opinion says: "But we must look a little more closely to the reservation." "Reserving the equal undivided one-third part of above described premises." If the clause had stopped here, there would have been a plain exception of one third of the thing granted, and it would be difficult to resist the plaintiff's claim. But we are not at liberty to take one half of the clause, and reject the residue. We must read, and, if possible, give effect to every word which it contains. The remaining part of the clause points directly to the right of dower, as the subject which the parties had in mind—reserving one third of the premises that is covered by the dower of Charity Covert. Looking at the entire clause, I am

unable to resist the conclusion, that the plaintiff intended to convey the whole estate subject to the existing right of dower. It requires but a very slight change in the phraseology to make the matter quite plain. The plaintiff says by the deed, "I grant the two parcels of land 'reserving' excepting or subject to the dower right of Charity Covert, which covers the equal undivided one third part of above described premises. If the plaintiff intended to reserve one third of the estate to himself, why did he mention Charity Covert or her right of dower? I do not see what answer can be given to the question. In truth, the plaintiff is driven to the necessity of taking one half of the clause, and rejecting the residue, before he can make out his case. We think he is not at liberty to do so, and that upon the true construction of the deed, the plaintiff has parted with the entire estate which he had in the land."

This case came under review by the court of appeals of New York in *Munn v. Worrell* 53 N. Y. 44, in which it was held: "A deed containing this exception, 'saving and excepting from the premises hereby conveyed all, and so much, and such part and parts thereof as has or have been lawfully taken for a public road or roads.' Held, that the exception was of the land covered by a public highway across the premises, not simply of the public easement therein; that the fee of the land, so covered remained in the grantor and passed by a subsequent conveyance thereof to a third person. Referring to the case of *Swick v. Sears*, 1 Hill, pg. 17, Rapallo, J. says: The reservation was of "the undivided third of the premises, which was covered by the dower right of C." and was held to describe only the interest of the doweress. "If the dower had been at the time actually admeasured, and the deed had excepted "from the premises conveyed that part thereof which had been set off to C. on the admeasurement of her dower," the case would have been analagous to the present one and I apprehend the conclusion would have been different.

"None of the cases referred to present the features which exist in the present case, of an exception, from the premises described of a specific portion of such premises."

It is urged that, because the portion excepted is described as that part of the premises which has been lawfully taken for a public road, and only an easement therein could only be so lawfully taken, therefore an easement only was excepted. We cannot so understand the language; the word "premises," we think, clearly means, in the connection in which it is used, the tract of land described in the deed, and not the estate or interest of the grantor and the exception was of a portion of such premises, and not of an interest therein. By describing the excepted part as that portion which has been lawfully taken for a public road or roads, lands used as private road, or roads not lawfully established were excluded from the exceptions.

The court below found that the premises in controversy at the time of the conveyance from Tillou to Warner were included in and formed part of public roads passing over the property. We think that the fee therein was excepted from the conveyance and remained in Tillou and passed by his subsequent conveyance to the plaintiff, and that the court therefore erred in the conclusion that the plaintiff was not the owner thereof or of any right, title or interest therein."

Keeping in view the difference between a reservation and an exception as we have seen, viz: That a reservation is never of any part of the estate itself, but of something issuing out of it, as for instance, rent or

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some right to be exercised in relation to the estate; as to cut timber upon it, and that an exception on the other hand, must be a portion of the thing granted or described as granted, and can be of nothing else, and must also be of something which can be enjoyed separately from the thing granted, (Shep. Touch, 77, 78, 80; Cunningham v. Knight, 1 Barb. S. C. Rep., 399; Starr v. Child, 5 Denio 599; Doe v. Lock, 4 Nev. & Man., 807), it is plain that there was more than the interest of the dower-ess excepted in the deed in controversy in this action. It is material also, to consider that the deed in Swick v. Sears, *supra*, was a warranty deed, while here it was a quitclaim, and the limitation are words of exception and not reservation, and to give effect to them as words of exception, we think that the fee in 120 acres was excepted from the conveyance of 1852 and remained in Samuel Manley.

Another rule of construction should be applied here. How did the parties themselves understand and interpret the deed?

The exception in Samuel Manley's deed must be construed according to the meaning of the parties, if not inconsistent with the rules of the law.

Samuel Manley always supposed he had an interest in his father's estate, notwithstanding the deed to his brother Robert of October 1852. He so claimed to the defendant Carl, and the defendant so understood it, because when he went to the plaintiff to make the purchase, he says "he wanted to purchase his, Samuel Manley's interest in his father's and brother's estates." If there were no exceptions in the deed of 1852, Samuel Manley had no interest whatever in his father's estate. If this deed conveyed the entire fee in the premises described in the deed, he had nothing left but the interest he had inherited from his two brothers. The parties did not so understand it. Mr. Carl went to Missouri for the purpose of buying the interest of Samuel Manley in his father's estate, as well as in that of his two brothers. It is true Mr. Carl was not a party to the deed of 1852, but this does not entirely destroy the force of the rule of construction just mentioned. The acts and conduct of the parties following the parties who made the contract, must in the nature of the case be only their own construction of the words used, and not an acting out of the understanding of the words by the parties who used them. While the practical construction of a contract by the parties who made it, is entitled to great weight, in case of doubt, the construction placed thereon by those who follow is of much less weight, but of some weight, the difference is only in degree.

This rule of construction is recognized by the Supreme Court in Cincinnati v. Gas Light and Coke Co., 53 Ohio St., 278, 286, 287 and 288.

Our conclusion on the first proposition is, that Samuel Manley excepted from the deed to Robert Manley of October, 1852, his one-eighth interest in the 120 acres in which the dower was assigned.

Second: He owned then in October, 1894, a one-eighth interest in the 120 acres inherited from his father, and also one-twenty-fourth interest therein inherited from his two brothers, making his entire interest at the time of the conveyance to defendant, Carl, one-sixth or twenty acres.

The value of the twenty acres in October, 1894, from a fair preponderance of the evidence was not less than \$60 per acre, or \$1,200. But the plaintiff's title was not clear from incumbrance, being subject to an inchoate right of dower in favor of Samuel Manley's first wife. Taking into consideration the age of Samuel Manley and the probable age of

his wife, a reduction in the value of the land by reason of this inchoate right of dower should be made of \$300.

The proof shows that a fair rental for the twenty acres, deducting taxes and repairs, would be two dollars per acre, \$40 per year, and for the purpose of fixing the value of the estate and property sold and conveyed to the defendant for the consideration of \$120, the net rental of the twenty acres for seven years amounts to \$280, the value of the plaintiff's interest in the 120 acres, less the dower incumbrance \$900 aggregating \$1,180. The value of the one-fifty-sixth part of the $263\frac{7}{8}$ acres at \$40 per acre is \$188.40 and the net rental at two dollars per acre for six years, \$56.50.

We therefore find the total value of the lands subject to the inchoate dower and the net rentals to be \$1,424.90. This amount of property in October, 1894, was secured by the defendant from the plaintiff for the sum of \$120.

Third—Was there fraud practiced by the defendant? This is mainly a question of fact; but looking at the whole transaction, and the situation of the parties at the time the purchase was made, it involves important legal questions as well as facts. The plaintiff lived in Missouri, he had not seen the lands in question for near forty years; he had not been in communication with any person in the neighborhood where the lands were located; he had no knowledge of their condition or value in 1894. The defendant lived on the premises, and had knowledge of their condition and value. It seems from the proof in the case that the plaintiff left Ohio some time in the sixties and went to the state of Missouri. He left a wife in Ohio or Indiana. He married a wife in Missouri, without being divorced from his first wife. Mr. Carl was in possession of this information as to plaintiff's domestic relations, and that his first wife was still living. He ascertains Mr. Manley's whereabouts in Missouri. He goes to Missouri for the purpose of buying the plaintiff's interest in these lands. He secures the assistance of attorneys and a party to ascertain the identity of the plaintiff as being the Samuel Manley who had formerly lived in Ohio, and the owner as a tenant in common with him in the lands in controversy. Whether Mr. Manley knew it at the time the deal between him and defendant was made, that his first wife was living, the testimony does not disclose. Mr. Carl had such information but he disclaims having any communication with Mr. Manley on that subject. The plaintiff's domestic relations became the subject of consideration and talk between the parties at same stage of the deal. Mr. Manley says he was then apprised of the fact that his first wife was living, and by reason of leaving Ohio as he had, it would be dangerous for him to return to Ohio. It would be dangerous for him to go there for the purpose of looking after his interest in these lands. And not being advised as to the condition or value of the lands he was unwilling and refused to fix a price upon the same in his negotiations with the defendant. Mr. Stuber, the attorney for the defendant in the transaction, says in his deposition, that Mr. Manley refused to fix the value. There is some conflict in the testimony as to who fixed the price at \$120, but looking at the transaction in view of all the circumstances and surroundings of the parties, we are led to the conclusion that the offer came from Mr. Carl. He makes an offer first of \$100, and then says if the deed is made that day he will give \$120. What was he trying to buy? The interests of the plaintiff in these lands which were of the value of from \$1,300 to \$1,500.

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He knew their condition and value. He had lived in the neighborhood and had lived upon the premises, and no one had any better opportunity of knowing their value than himself. The parties were not upon an equal footing in this regard. Mr. Manley, realizing his situation as to his lack of knowledge on the subject of value and condition, refused to fix a price on the property, although he was the seller.

When Mr. Carl made the offer of \$120 he stated that the lands were worn out, in bad repair, and that they were of little value. He, as buyer, could have refused to offer, or fix a price, or give any information as to the condition or value of the land. He could have done this and would have been safe. But if he was more than silent, if he undertook to speak upon the subject as to their value and condition he must speak the truth. Neither can the defendant say that because he was not bound to answer the plaintiff's inquiry, he was not bound to answer it truly. *Kelly v. Rogers*, 21 Minn., 146.

If one of the parties to a sale assumes to have special knowledge of the value of the property, in regard to which the other being known to be ignorant, trusts entirely to the good faith and knowledge of the former, it may be very proper to treat representations of value as standing upon the same ground of representations of fact. 1 Bigelow on Fraud, p. 496 and authorities cited in note 2.

In an action by a seller of property for fraudulent representations and concealment made by the purchaser in regard to its value, by stating only a part of the truth, with the view of deceiving the other party, and inducing him to act differently from what he otherwise would, such acts are equivalent to false representations and will avoid a contract thereby induced. *Mallory v. Leach*, 35 Vt., 156.

When Mr. Carl made his offer of \$120 for the interest of plaintiff in the lands, as an inducement for the plaintiff to accept his price, he said they were worn out, in bad repair, and that they were of little value. He knew then that these statements were untrue, just as well as when he returned to Ohio, and as he testified on reviewing the situation, and looking over his bargain, he came to the conclusion that he had gotten property for \$120 worth at least \$1,300. This was not fair dealing and may be properly characterized as a fraud.

Can a court of equity, looking at this transaction and viewing the parties as they were situated, give its sanction and uphold a contract that is so manifestly inequitable by reason of its gross inadequacy of consideration? It is true that parties must take some care of themselves, but the law will not tolerate a transaction in which advantage has been taken by one over the other, whereas in this case their means of information was so unequal.

We think there was fraud; that the plaintiff was wronged; that advantage was taken by reason of the gross inadequacy of consideration; that there must have been some advantage taken of him to lead him into such an inequitable and unconscionable bargain. The deed will be set aside, and judgment for rents and profits less the \$120 paid.

It is contended that plaintiff to repudiate the contract and have the deed set aside, was bound to refund to the defendant the money as its consideration, or at least tender it back. This was not necessary. *Insurance Co. v. Hull*, 51 Ohio St., 270-288; *Bebout v. Bodle*, 38 Ohio St., 500, 504.

The defendant Carl being liable for rents and profits, the money can be adjusted by deducting the amount from the rental of the 120 acres,

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and the judgment will be accordingly. The question of repairs and taxes paid were taken in to account in fixing the rental value of the lands.

The plaintiff is entitled to a decree setting aside the deed of October 25, 1894, and for an order of partition and an accounting for rents in accordance with this decree.

McClure & Smyser, for plaintiff.

Frank Taggart & A. D. Metz, for defendant.

MUNICIPAL CORPORATIONS—BICYCLES.

[Tuscarawas Circuit Court, May Term, 1900.]

Adams, Douglass and Voorhees, JJ.

HENRY L. CUSTER V. NEW PHILADELPHIA.

1. BICYCLE—INJURY TO PEDESTRIAN—NON-LIABILITY OF CITY.

A municipal corporation is not liable for injuries to a pedestrian resulting from being struck by a bicycle ridden on the sidewalk thereof; or for the failure to pass an ordinance prohibiting such use of its sidewalks.

2. PROHIBITING IS DISCRETIONARY, AND FAILURE CREATES NO LIABILITY.

There is no obligation upon the authorities of a municipal corporation towards any one of its citizens to exercise the legislative discretion with which they are invested, to enact ordinances prohibiting any specific act concerning the streets and sidewalks of the city or village. Such matters are discretionary, and a right of action against a city or village does not accrue to one who was injured by a person riding a bicycle on the sidewalk, because the authorities had failed to prohibit such riding.

3. MUNICIPAL CORPORATION, WHEN AGENT OF THE STATE.

In relation to the exercise of legislative powers and privileges, which are to be exercised by a municipal corporation for the care and control of its streets and sidewalks, such corporation is, in the absence of statutory provision to the contrary, the agent of the state, and is not liable for a failure to perform, or negligence in performing, duties in that particular imposed by statute.

4. RIDING BICYCLE ON SIDEWALK NOT NUISANCE UNDER SEC. 2640, REV. STAT.

Such corporation is not liable for an injury to a pedestrian by being struck by a bicycle ridden on the sidewalk, although sec 2640, Rev. Stat., provides, that the council shall have the care, etc. of the streets, "and shall cause the same to be kept open and in repair, and free from nuisance," and it will make no difference that the authorities of such corporation, with knowledge of such use of the sidewalks, took no steps to prevent the same; the word *nuisance* in this connection does not include a running bicycle, but refers to something which is, in a sense, fixed or permanent, as a defect in the street or sidewalk.

5. CONSTRUCTION OF PLEADING.

In an action against a municipal corporation to recover damages for injuries sustained from being struck by a bicycle, ridden on the sidewalk of a public street, an allegation in the petition that the city, its officers and agents had unlawfully, carelessly and negligently, and in disregard of their duty, caused and permitted bicycles to be operated and run upon the sidewalks, may be construed, in view of the whole pleading, as an allegation that the authorities took no steps to prevent such riding.

HEARD ON ERROR.

VOORHEES, J.

This action is one to recover damages for injuries received by plaintiff while walking on the sidewalk of East avenue, a public street in the city of New Philadelphia.

It is alleged in the petition that the defendant city, is a municipal corporation; that by sec. 2640, Rev. Stat., the council of said city have and had the control of its streets and sidewalks, and it was the duty of the municipal authorities to keep the streets, sidewalks, etc., open and in repair, and free from nuisance.

At the time of the injury the plaintiff was a resident of said city; that said corporation, its officers and agents prior to, and on October 20, 1897, did unlawfully, carelessly and negligently, and in disregard of their duty, fail to keep open and in repair and free from nuisance the sidewalks of said city, but did knowingly allow, cause and permit bicycles to be operated and run at a high and dangerous rate of speed thereon, at all times and hours at the pleasure of the riders thereof, so that with the knowledge of said defendant, its officers and agents, the lives and limbs of pedestrians upon said sidewalks were constantly endangered.

That prior to October 20, 1897—the date of the accident—the attention of defendant, its officers and agents, was called to said nuisance, and the danger arising therefrom; and they were urged and requested to cause the riding and use of bicycles upon the sidewalks of said city to be discontinued and said nuisance abated. But said defendant and its officers refused to take any steps to do so; but knowingly and wilfully caused and permitted said bicycles to be thus ridden upon said sidewalks and said nuisance to continue until the happening of the accident to the plaintiff herein complained of.

That on October 20, 1897, the plaintiff was struck and injured by a bicycle that was being ridden upon the sidewalk of said East avenue of said city, and this action is brought to recover damages for the injury.

A demurrer to the petition was sustained by the common pleas, and the case is in this court on petition in error.

Stating the cause of action more concisely it is: that on October 20, 1897, the plaintiff, while walking on the sidewalk, by reason of the negligence of the defendant city, was struck and violently thrown down and injured by a bicycle ridden at a rapid and dangerous rate of speed; that the city permitted bicycles to be ridden on the sidewalk at dangerous speed, and to such an extent as to create a nuisance.

The complaint is not that the injury was caused by a bicycle that was standing upon the sidewalk, and had been negligently allowed by the city to remain there, but that it was due to the propulsion of the bicycle against the plaintiff, while in motion under the direction and control of its rider. It is manifest, therefore, that if the city be liable in damages for the injury, its liability results not from a defective condition of the sidewalk, but from the improper and dangerous use that was being made of it by the bicycle rider.

It is contended on behalf of the plaintiff in error, that the city by permitting bicycles to be operated and run at a high and dangerous rate of speed upon the sidewalks of said city, was guilty of maintaining a public nuisance, and because no steps were taken by it, through its officers and agents under sec. 2640, Rev. Stat., to prevent the same, it did not cause the streets and sidewalks of said city to be kept open and in repair and free from nuisance.

The allegations of the petition fairly construed charge no more than that the authorities of the city permitted, that is took no measures to prevent, such riding on the sidewalks.

The word nuisance, as used in the section of the statute just quoted, does not nor was it intended to include or contemplate such a use of the

sidewalk as riding a bicycle thereon, but it refers to something which is, in a sense, fixed or permanent, as a defect in the street or sidewalk.

The condition of the street or sidewalk is one thing, and the manner of its use by the public is quite a different thing. For their safe condition the city is responsible, but for their unlawful or improper use it is not.

The doctrine of the exemption of a municipal corporation from liability for injuries resulting from the unlawful or improper use of its streets and sidewalks, and not from any defect in their state or condition, has been applied where municipal corporations have been held not liable to persons who have been injured by firing cannon in a public street, or by "coasting," a practice so similar to the use of sidewalks by a bicyclist, that a different conclusion cannot be reached in the case of an injury caused by a collision with a bicycle.

Robinson v. Greenville, 42 Ohio St., 625; Mayor etc. of Wilmington v. Vandegrift, (Del. Err. & App.), 25 L. R. A., 538; Jones v. Williamsburg, (Supreme Court of App. of Va.), 34 South Eastern Re., 883; Tart button v. Tennesseville, (Supreme Court of Georgia, March 1, 1900) 3 Municipal corporation cases, April 1900, 2pg, 140; Howard v. Brooklyn, (Supreme Court App., N. Y. May 24, 1898), 51 New York Supreme Court 1058; City of Lafayette v. Timberlake, 88 Ind., 330; Faulkner v. Auora, 85 Ind., 130; Pierce v. New Bedford, 129 Mass., 534; Steele v. Boston, 128 Mass., 583; Shepherd v. Chelsea, 4 Allen, 113; Schultz v. Milwaukee, 49 Wis., 254, s. c. 5 N. W. 342; Burford v. Grand Rapids, 53 Mich., 98, s. c. 18 N. W. 571; Hutchinson v. Concord, 41 Vt., 271; Weller v. Burlington, 60 Vt., 28, s. c. 12 Atl., 215; Roy v. Manchester, 46 N. H., 59. The case of Frederick v. City, 58 Ohio St., 538, is in harmony with the doctrine and principles of these cases.

The Supreme Court of Indiana in *City of Lafayette v. Timberlake*, *supra*, in a case of injury resulting from coasting upon a side walk, the court said: "The manner in which a highway of a city is used is a different thing from its quality and condition as a street. The construction and maintenance of a street in a safe condition for travel is a corporate duty, and for a breach of such duty an action will lie; but making and enforcing ordinances regulating the use of streets brings into exercise governmental and not corporate powers, and the authorities are well agreed that for a failure to exercise legislative, judicial or executive powers of government, there is no liability."

An injury caused by a bicycle ridden upon a sidewalk is not distinguishable from an injury caused by "coasting", and the ground of exemption from liability applies equally in the former case as in the latter.

In *Howard v. Brooklyn*, 51 N. Y. Supp., *supra*, it was held, that "a municipal corporation which has merely failed to pass an ordinance forbidding bicycles to be ridden over a sidewalk of the city, not having in any way authorized it, it is not liable to a person walking upon the sidewalk for injuries resulting from being run into and thrown down by a bicycle."

The enactment of ordinances for an incorporated town is a legislative act, and the duty to exercise the legislative power is a very different matter from a failure to perform a duty required by the laws or the charter of the town, such as keeping its streets in good repair and condition, so that pedestrians and others using the street may do so with reasonable safety.

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Judge Dillon in his work on *Municipal Corporations*, Vol. 2, sec. 949, says: "A municipal corporation is not liable to an action for damages either for the non exercise of, or for the manner in which in good faith it exercises discretionary powers of a public or legislative character; and the reason is that such powers are compelled to be exercised or not as the public interest is deemed to require, and there is no implied liability for deciding either the public interest does not require action or that if it requires action in a particular way. Mr. Tiedman in his work on municipal corporations, section 327, declares that "it is a well settled rule that for the non-performance of a discretionary duty, particularly if the duty be of a public nature, no private action for damages can be maintained against the corporation for the reason, that the discretionary powers are intended to be exercised only when the interest of the public demand their exercise; and the question whether the public interest do or do not demand it, is one for the municipality to determine."

In *Sherman & Redfield on the Law of Negligence*, sec. 262, it is said: "In the absence of an express statutory declaration fixing a liability therefor, a municipal corporation is not bound to provide for, and secure, a perfect execution of the laws of the state or of its own ordinances within its limits; and it is not liable in damages for the consequences of its officers' failure to enforce them, although, but for such neglect, the injury complained of would not have happened. The enforcing, no less than the adoption, of ordinances such as the regulating of building operations, or the use of streets, or the forbidding the display of fire works, or the engaging in dangerous sports in public streets and places, is a public governmental duty, as to which actionable negligence cannot be predicated. Such a failure to execute the laws is neglect of a duty owing to the public, not to individuals. It necessarily follows that the corporation is not responsible for the acts of persons engaged in the violation of a law or ordinance, resulting in an injury to a third person, though such illegal acts might and ought to have been prevented by the officers of the corporation, and although the officers themselves, and even a majority of the citizens, actively participated in the illegal proceeding. Thus, a municipal corporation is not liable for injuries caused by persons unlawfully coasting upon its streets, even when the authorities had tolerated the sport, or had publicly set apart a particular street for that purpose. Having a discretion as to what ordinances it will adopt, the corporation has a like discretion and power to suspend the operation of its ordinances temporarily or indefinitely."

The most that can be claimed in this case is that the city failed to exercise power, which the plaintiff contends it might have exercised, in preventing the use of the sidewalks for bicycles.

Our conclusion, therefore, is that the petition does not state a case of legal liability, and that the demurrer was properly sustained.

The judgment of the common pleas court dismissing the petition must be affirmed.

J. W. Yeagley, Richards & McCullough, for plaintiff.

E. S. Douthitt, for defendant city.

TAXATION.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

STATE EX REL. CAREW V. EUGENE L. LEWIS, AUDITOR.**1. AUDITOR MAY GO OUTSIDE RECORD TO ASCERTAIN FACTS.**

It is competent for the county auditor, in ascertaining the assessed valuation of a new building, where it is claimed that an error has been made by the annual assessor in returning same for taxation, to go outside the records of his office to ascertain the facts.

2. EXTENSIVE ALTERATIONS NOT A "NEW BUILDING."

New partitions and new decorations for walls and ceilings, as an inducement to and in accordance with the tastes of tenants in a large office building, although involving large expenditures, do not constitute a new building or structure within sec. 2807, Rev. Stat.

3. PROPERTY OWNER PAYING TAXES ON INCREASED VALUATION—ESTOPPEL.

A property owner having knowledge of the action of the board of equalization in making additions to the valuation of a new building as it was completed, and having regularly paid taxes in accordance therewith, should not, at the end of five years, be permitted to obtain a refunder or have the duplicate corrected by deducting additions for those years.

APPEAL—MANDAMUS.

SWING, J.

We are not agreed as to the rights of the parties as presented in this cause. In my opinion the plaintiff is not entitled to the relief prayed for.

The record facts appear to be that in 1891 the structure in question was returned by the annual assessor at \$60,000 as an unfinished structure; that in 1892 the annual assessor added \$30,000 to said structure, making \$90,000 as the value of the structure, and that he returned the same, as appears from the "fair book," as a finished structure; that no affirmative action was taken on the return of the assessor by the board of supervisors, other than that the clerk of the board of supervisors checked off this amount in red ink, thereby indicating that it was to go to the auditor in that amount for taxation for the year 1892 (December) and 1893 (June); that in the year 1893 said structure was returned by the annual assessor as a completed structure, having added \$10,000 to the previous valuation of the year 1892 of \$90,000, making the return of the annual assessor \$100,000 as a completed structure; that the board of supervisors added in said year to the return of the assessor the sum of \$14,000, making a total valuation of \$114,000.

The evidence outside of the record clearly shows, I think, that after the return of the annual assessor, in 1892, which he returned as a completed structure at a total valuation of \$90,000, a committee of the board of supervisors, acting for the board, went to Mr. Carew with a view to ascertaining a proper valuation to be placed on the building as a completed structure, but they were informed by Mr. Carew that he had had trouble in erecting the building, and that it was not wholly completed; that some portions were to be erected and some painting to be done, and that if they would let it go over to the following year the building would then be fully completed, and that the board of supervisors agreed to this suggestion, and that the said board did not take any final action in

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said year upon said structure as a completed structure; that in the following year (1893) the annual assessor returned the valuation at \$100,000, and that in accordance with the understanding of the previous year the board of supervisors met Mr. Carew in regard to the valuation to be placed upon said structure as a completed structure; that Mr. Carew furnished said board with a statement of the costs of said structure, which was \$198,000, and that after deducting \$8,000 by reason of the old building, the cost was found to be \$190,000, and that said board of supervisors fixed the value of the structure at \$114,000 adding \$14,000, to the return of the annual assessor, said sum being sixty per cent. of the actual cost of the structure, which amount was deemed a proper sum for taxation.

No complaint was made by Mr. Carew to the valuation as thus fixed until this action was brought in February, 1899.

I think we all agree that the structure was substantially completed in the spring of 1892, and should have been so returned by the annual assessor, as was done, and the board of supervisors would have been justified in fixing a valuation on the building in that year as a completed structure, although there were many alterations made after that time and during that year, amounting, as shown by the evidence, to more than \$6,000, being an amount considerably more than the ordinary repairs would amount to; but the evidence clearly shows that said board did not pass on said structure as a completed structure for the reason that it was prevailed to defer said action until the following year at the request and solicitation of Mr. Carew, and for this reason Mr. Carew should not now be heard to complain.

It was competent for the auditor to go outside of the record for the facts above stated and having found them, it was his duty to refuse to make the correction. *Lewis, Audr., v. State ex rel.*, 59 Ohio St., 87.

SMITH, J.

I concur with Judge Swing in the conclusion reached by him. Mr. Carew having had knowledge of this action of the board of equalization, and having regularly paid the tax on the valuation as thus raised, ought not in equity at the end of five years be allowed to come in and obtain a refunder of the amounts so paid by him; and have the duplicate corrected by deducting therefrom the addition made with his knowledge and practically with his consent.

GIFFEN, J.

It is sought by the relator to compel the auditor under sec. 1038, Rev. Stat., to call the attention of the county commissioners to erroneous charges on the tax duplicate for the years 1893, 1894, 1895, 1896 and 1897 against the Carew building, at the southwest corner of Fifth and Vine streets, Cincinnati, and correct the duplicate by deducting \$24,000 from the valuation thereof. In the year 1891 the assessor returned the value of the new building at \$60,000 and as unfinished. In 1892 the same assessor returned an additional valuation of \$30,000. In 1893 another person as assessor returned an additional valuation of the building of \$10,000 and as finished. And to this amount the board of supervisors, sitting as an annual board of equalization, added \$14,000, making the total additions for that year \$24,000, and the total valuation of the building \$114,000. It is claimed by the relator that the assessor for 1892 returned the building as finished prior to the day preceding the

second Monday of that year, and that the board of equalization and assessor of the following year were without authority to add to the valuation of 1892 without notice to the owner.

The record in the auditor's office, known as the "fair book," for 1892, in the column designated at the top "Finished Structures," has on the line describing this property and on lines for other property above and below it, "ditto marks" under the word finished, except two lines in which there are no marks of any kind. Whatever doubt may arise by reason of one of these blank lines being above the line in which the property of relator is described, is removed by the oral testimony, which shows that the building was, in fact, finished at that time.

It is true that in the year 1893 and subsequent years new partitions and new decorations for the walls and ceilings were made in many of the rooms. This was done as an inducement to and in accordance with the tastes of the tenants, and was not a new building or structure within the meaning of Sec. 2807, Rev. Stat.

The building being completed prior to April, 1892, as shown by the "fair book," and the board of equalization having taken no action upon the return of the assessor for that year, it was without authority to increase the valuation for the following year, unless a new building or structure had in the meantime been placed on the premises. Sec. 2807, Rev. Stat., Lewis, Auditor, v. State, ex rel. Mullikan, 59 Ohio St., 37. It is urged, however, that "the relator had full knowledge that his property was placed upon the tax duplicate for the year 1893, and maintained thereon for subsequent years at a valuation of \$114,000, and had knowledge of the return as made by the assessor for the year 1893 and of the action of the board of equalization for said year; that with said knowledge the said relator has voluntarily and without protest paid the taxes assessed each year on the sum of \$114,000." But it does not appear that he had any knowledge that the assessor for 1892 had returned the building as finished, and that it was carried on the "fair book" of that year as such, and unless he had full knowledge of all the facts the payment would not be so far voluntary as to work an estoppel. Mr. Daugherty, a member of the real estate committee of the board, testifies that Mr. Carew, at the latter's store, informed them in the summer of 1892 that the building was not finished, but he also told them that the delay was occasioned in constructing the partitions and making the decorations which, we have already said, did not preclude a finding that the building was finished prior to April, 1892, and did not constitute a new structure. It does not appear that the board, in 1892, relied or acted upon such information, and besides it was itself required to ascertain from the return of the assessor and an inspection of the building whether the same was finished, and if so to make such correction in the valuation as was just and proper; but it failed to act on such return, and in 1893 proceeded, together with the assessor, as though the record of the previous year disclosed an unfinished structure. While it seems clear from the evidence that the sum of \$114,000 was a reasonable valuation, yet the question before us is whether that valuation was placed on the duplicate, by authority of law, and if not, was it such an error as the auditor may correct. The error consisted in the assessor and the board treating the structure as unfinished, while the record of the previous year showed that it was finished, and the correction by the auditor, requiring only the deduction of the sum by which the valuation was increased in 1893,

contrary to the statutes, was merely clerical. *Insurance Co. v. Cappeller*, 38 Ohio St., 560; *State ex rel. Poe, v. Raine*, 47 Ohio St., 447.

It is further claimed that the testimony of Mr. Daugherty shows that the relator requested the board to postpone action until 1893; that the latter did as requested, and that the relator was thereby estopped to question the authority of the board. No such issue was tendered, and the testimony was not relevant to any fact in issue.

The law of pleading an estoppel is stated most favorably for the defendant in *Schurtz v. Colvin et al.* 55 O. St., 274, to-wit: "The rule that one who would avail himself of an estoppel must plead it, is fairly complied with where, upon the whole case made by the pleadings, it appears that the party intends to rely on it if certain facts averred by the other party, and denied by him for want of knowledge, are made to appear. And in any case the rule only applies where the party has had an opportunity to plead it."

The defendant in this case pleaded as an estoppel the knowledge of relator of the action of the board in 1893, and his voluntary payment of taxes thereafter; but there is no averment that he requested or induced the board to delay action in 1892. There was no want of opportunity to plead it. There is reference to it in the deposition of Mayor Foley, another member of the real estate committee. There is no memorandum of it on the minutes of the board. The necessity, therefore, of advising the relator of this defense is apparent, and the evidence in support thereof should not be considered, nor can the pleading be now amended to conform to the facts found.

Miller Outcalt, for the relator.

Wilson, Cosgrave & Jones, for the auditor.

STREET IMPROVEMENTS—INJUNCTION.

[Butler Circuit Court, October, 1899.]

Smith, Swing, and Giffen, JJ.

KATE C. MINOR v. BOARD OF CONTROL OF HAMILTON (CITY) ET AL.

1. TAXPAYER'S ACTION TO ENJOIN STREET IMPROVEMENT.

The fact that the cost of a proposed street improvement will fall upon the city, by reason of such irregularities in the preliminary proceedings as would render invalid an assessment upon the abutting owners, is sufficient ground for a taxpayer's action to enjoin the improvement, the city solicitor having refused to bring the action.

2. MUNICIPAL AUTHORITIES CANNOT CHANGE IMPROVEMENT.

Where a petition is presented by abutting owners asking for a specific street improvement, municipal authorities have no power, acting upon such petition, to lengthen or decrease the improvement and if such a change is made, the proceedings are invalid.

3. A CORPORATION CANNOT BE COUNTED AS PETITIONER, WHEN.

A corporation cannot be counted as among the petitioners for a street improvement when it does not appear that the signature was within the scope of the powers of the officer making it, nor that there had been any ratification, either express or implied, of previous similar acts.

4. RATIFYING SIGNATURE AFTER SUIT IS BROUGHT—INSUFFICIENT.

The fact that a corporation, after suit is commenced to enjoin an improvement on the ground of the insufficiency of the petition, by reason of the unauthorized signature of the corporation, ratifies the acts of its officers in signing the same, though it might estop the corporation from subsequently denying the validity of the acts of its officers in that regard, does not affect the rights of other parties or validate the act of the authorities in authorizing the improvement upon a petition which was insufficient.

APPEAL.**SMITH, J.**

This is an action brought by the plaintiff as a tax payer of said city, on the refusal of the city solicitor on her request to do so, against the board of control of said city and the members thereof, seeking to enjoin them from awarding, or entering into any contract by virtue of proceedings then pending before said board, for the paving of Second street in said city, from the north side of Court street to Black street.

We state the conclusions at which we have arrived after a consideration of the evidence submitted in the case, very briefly.

First—We find that the petition in the case, which was the predicate and foundation of the proceedings taken by the board of control, was not signed by the property holders owning a majority of the front feet on the part of the street which the petition asked to be improved, or of that part of said street which was ordered by the board to be improved. It is conceded that to make such a majority, the property of the Niles Tool Works Company, which abutted thereon, or some part thereof, should have been represented on such petition—that is, that the company, the owner thereof, should have legally signed the same. It is true, that such petition was signed in this form :

“The Niles Tool Works Company,

“By R. C. McKinney, General Manager and Treasurer

“James C. Cullon, Secretary.”

We find, however, from the evidence, that those officers had no express authority from the board of directors of said company to sign this petition, and thus make the property of the company liable for the payment of this assessment if one should be levied, for the reason that it was not shown to be within the scope of their powers as such officers, or even that such authority had theretofore been exercised by them, and either expressly or impliedly been ratified by the company. The fact that the company in this case, after the commencement of this suit, did, by a resolution of the board of directors, expressly ratify and confirm this action of its officers, while it might estop such company from denying the validity of the act of such officers, can not avail to affect the rights of other parties. The question in this case is—was there a petition presented to the board of control for this improvement properly signed by the property holders owning a majority of the front feet abutting on the proposed improvement? If so, the board was authorized to act. If not, it had no such right. And we find that such was not the case.

This conclusion would render it unnecessary for us to consider other claims made by the plaintiff, as matters which would invalidate the proceedings in the case, but we mention one or two which seem to us to be of a serious character.

The petition which was presented to the board of control, March 28, 1899, prayed for the improvement of Second street, from the south side

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of Court street to the north side of Black street. On April 12, following, the city engineer, by resolution of the board, was instructed to report plans, specifications and estimates of the cost of improving that part of the street petitioned for. It appears that this was never done; and for this alleged reason; that a petition had been pending some time previous before the board for the improvement of Second street from Black street, much farther south than Court street, and the engineer had prepared plans, specifications and estimates for that improvement, but this proceeding had been abandoned. On April 12, after the adoption of the resolution directing the engineer to prepare plans, specifications and estimates for the improvement, it appears that he reported a modification of his former report, making it applicable to that part of Second street between the north side of Court street and the north side of Black street. That seems to have been done by him of his own motion, and for the reason that he was of the opinion that it would be better to make the improvement in this way, rather than in the manner petitioned for, and for which he was instructed to prepare the plans, specifications and estimates. Thereupon, on the same day, the board of control passed a resolution declaring it necessary to improve Second street "from Court to Black street." This probably may have meant from the north side of Court street to the south side of Black street, and on May 9, 1899, said board passed an ordinance to improve Second street from the north side of Court street to the north side of Black street.

It seems quite clear that in many respects those proceedings are exceedingly irregular, to say the least. Manifestly the petitioners for the improvement of this street are not getting what they asked for. They desired to have the improvement extend to the south side of Court street, and this is what the board in the first instance proposed to do and required the engineer to report plans and estimates of the cost of the improvement to be presented to council for approval or rejection. It is essential that this be done before the improvements are commenced. It was not done in this case as directed. It is to be presumed that the petitioners knew what improvement they desired made, and that they were waiting to be assessed for the making of that particular improvement, and no other. We are of the opinion then, though no authorities were cited to us on this point, that when there is a petition presented for the improvement of a particular part of the street, that the board of control has not the power, acting on such petition, to lengthen or decrease the part of the street which the petition seeks to have improved. And as this was done in this case, the whole subsequent proceedings were invalid, without reference to the difference between the provisions of the resolution declaring the intention to improve, and the ordinance providing for the improvement.

The board of control then, having no right to proceed to improve this street on the petition filed, the plaintiff as a tax payer of the city, has a right to enjoin the proposed improvement. If the board has not the right to improve, the assessments will be invalid, and the city itself will have to pay the cost of it. And this affords good ground for the maintenance of an action by the solicitor of the city, or, on his refusal to bring it, for one brought on behalf of the city by a tax payer.

Millikin, Schotts & Millikin, for plaintiff.

Neal, and Morey, Andrews & Morey, for defendant.

Buser v. Burkhardt.

COSTS.

[Hamilton Circuit Court, 1900.]

Smith, Swing, and Giffen, JJ.

F. H. BUSER V. LEOPOLD BURKHARDT.**COSTS—CERTAIN FUND NOT LIABLE FOR.**

Where a fund in controversy is claimed in another suit by a person not a party to the suit at bar, and the parties to the suit at bar are remitted to the other case to settle their rights to the fund, the costs of the suit at bar should not be ordered paid out of the fund.

HEARD ON ERROR.**SMITH, J.**

The defendant in error has filed a motion to strike the petition in error from the files on the ground that it was not brought within four months from the making of the order sought to be reversed thereby.

Burkhardt commenced an action before a justice of the peace against four persons, of whom Buser was one, to recover rent claimed to be due from them. The case was appealed to the court of common pleas, and on June 25, 1897, the plaintiff recovered a judgment against the defendants for \$154.62 and costs. On this judgment an execution issued and was returned unsatisfied, and proceedings in aid of execution were commenced before a judge of the common pleas court to subject to the payment of the claim of Burkhardt, about \$261, deposited in the Western German Bank, to the credit of Buser, and on October 16, 1899, said judge made an order that said bank and Buser appear before Edwin Gholson, appointed as referee, to answer under oath concerning said property, said referee to report the evidence to the court. On November 3, 1899, the report of the referee, with the evidence taken by him was filed, and on December 8, 1899, Anna Wellner was made a party defendant, and she filed an answer, which is not with the papers, but which we suppose from the other papers, asserted that \$200. of the money in the Western German Bank in the name of Buser, belonged to her.

On January 12, 1900, an order was made by the court on the evidence reported by the referee finding that as between her and the creditors of Buser, she had no lien on the fund in the bank, but was a general creditor of Buser; that the said deposit of \$261.03 is applicable to the payment of the debts of Buser, but was tied up by injunction in another suit in said court brought by the wife of Buser in which she claims said fund. Wherefore the court refused to make an order disposing of said fund, and referring the parties in this case to that case for the settlement of their rights thereto, but directing the costs of the case to be paid from that fund. Anna Wellner excepted and gave notice of appeal, but did not perfect the appeal. Nor was any petition in error filed to reverse this judgment within four months from its entry.

On February 2, 1900, an additional entry was placed on the journal fixing the fees of the referee at \$25, and of the stenographer at \$15.25, and ordering said sums to be taxed in the costs and paid from the deposit in the bank to the credit of Buser, and ordering said bank to pay all the costs of the proceeding, \$69.96, to the clerk, to which Buser, excepted.

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On June 1, 1900, Buser filed his petition in error in this court to reverse the judgment of February 2, 1900. This was within four months, from the entry of said order, and, therefore, is not open to the objection urged against it.

The question whether the judgment entered on February 2, and which it was sought to reverse, is one to which error will lie, or if it will, whether the plaintiff in error, having taken no steps to bring before the court the evidence on which the allowance to the referee and stenographer was based, is entitled to a reversal of such order, or whether the order of February 2, 1900, is anything more than was contained in that of January 12, 1900, were not presented and will not be passed upon. As the court by its first order found that this fund was claimed in another suit by a person not a party to this cause, and remitted the parties to that case to settle their rights to this fund, it would seem that it should not have ordered the costs of this case to be paid from that fund. But no petition in error was filed to reverse that order of January 12. It is doubtful, too, whether Anna Wellner is not a necessary party to this proceeding, in error. But we now content ourselves by overruling the motion to strike the petition in error from the files on the ground set up in the motion.

W. J. Davidson, for the motion.

George W. Hengst, for Buser.

ASSESSMENTS.

[Muskingum Circuit Court, 1900.]

Douglass, Voorhees and Wilson, JJ.

WILLIS BAILEY V. ZANESVILLE (CITY) ET AL.

1. RULE IN DETERMINING CHARACTER OF CITY PROPERTY.

In determining whether a particular parcel of land, for purposes of assessment, is land in bulk or city lots, within the meaning of sec. 542 of the municipal code of 1869, now sec. 2269, Rev. Stat., regard must be had not merely to the recorded plat of the town, but to the size of lots generally in the municipal corporation; and where the property is not the size of lots generally in the city or in the neighborhood, it must be regarded as land in bulk.

2. PROCEDURE IN ASSESSING LAND IN BULK.

Before a municipal corporation can levy an assessment upon land in bulk, either according to appraised value, or according to the front foot, it must give to the land to be assessed the average lot depth in the neighborhood, and after having fixed the taxing district, the land must be given a value for taxation, in order that the limitations of sec. 2270, Rev. Stat., may be applied. The council is not permitted to depart from this rule or to levy an assessment by the front foot deeper than lots in the neighborhood or above the average value of lots in the neighborhood.

APPEAL.

WILSON, J.

The case of Willis Bailey against the city of Zanesville comes into this court on appeal. It was submitted upon an agreed statement of facts. The statement of facts, as it comes to us, is in the form of a finding of facts made by the judge who tried the case in the court below.

The plaintiff, in his petition, avers that, he is the owner of lot No 87 in the city of Zanesville, fronting on Maple Avenue 240 feet, being in depth 500 feet on one side and about 600 feet on the other, containing an

area of about five acres of land ; that this lot No. 87 is appraised for taxation, at the sum of \$9,200; that on March 14, 1892, the city council passed a resolution to improve Maple Avenue, and on August 12, following, it passed the improving ordinance, specifying the manner in which the avenue should be improved. On September 12th succeeding, it passed an assessing ordinance, assessing the cost of this improvement, except two per cent. thereof, and except the cost of paving between the railway tracks, and the cost of paving at the street intersections, upon the abutting property on the avenue, by the foot front, at the rate of \$4.26 per foot; that under this ordinance, it assessed plaintiff's property for \$1,001.37; that this property was not subdivided into city lots, and that the average depth of city lots in the neighborhood was about 148 feet, and that the average assessed value thereof was about \$9.36 per front foot. He avers that he has paid \$600.18 on this improvement, and that the city is still claiming \$400 from him under the assessment, and that unless restrained by the order of the court, the city clerk will certify, as he may under the ordinance, to the auditor of the county, the amount assessed and still unpaid, in order that it may be collected as other taxes, against him. He avers that he has paid all that he can be legally assessed for this improvement, and asks that the authorities may be restrained from collecting any further sum from him, as they threaten to do.

The city answers, denying that it has assessed the property beyond the limit allowed by law, and says that the property assessed is appraised at \$9,200.00, and the assessment does not exceed twenty-five per cent. of that value; they deny that this lot is not subdivided, and say that it is a lot numbered and platted according to the plats of the city, and that it has been appraised as such. They also plead, as a further defense, that on June 1, 1897, they passed a re-assessing ordinance, finding that the first assessment was not legal, and that they then appraised the property of the plaintiff at \$17.04 per front foot, and assessed him the one fourth of that sum, for the payment of this improvement.

A motion was made and sustained in the court below, to strike this last defense from the answer. That motion was not argued here, and this court has not found it necessary to pass upon the sufficiency of the defense. We have, however, considered it as one of the facts admitted in the case, and have applied the law to such state of facts.

The question raised here involves the construction of Secs. 2269 and 2270 Rev. Stat.

Section 2269 reads:

"In making special assessments, according to the valuation, the council shall be governed by the assessed value of the lots, if the land is subdivided and the lots are numbered and recorded; but if the lots are not assessed for taxation, or if there is land not subdivided into lots, the council shall fix the value of the lots or the value of front of such land to usual depth of lots, by the average of the two blocks, one of which shall be next adjoining on either side; and if there are no blocks so adjoining, the council shall fix the value of the lots or lands to be assessed so that it will be a fair average of the assessed value of other lots in the neighborhood, and if, in making a special assessment by the foot front, * * * by the abutting foot, there is land bounding or abutting upon the improvement not subdivided into lots, the council shall fix the depth of such lands so that it will be a fair average depth of the lots in the neighborhood, which shall be subject to such assessment * * *."

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The court below found that this lot was land in bulk. The parties here have agreed to this as a fact in the case, notwithstanding the contention of the answer that it is not land of that character, and if that fact had not been conceded by the city, the law would so determine it under the authority of *Springer v. Avondale*, 35 Ohio St., 625. The doctrine of that case is, in determining whether a particular parcel of real estate was land in bulk within the meaning of sec. 542 of the municipal code of 1869, which is sec. 2269 Rev. Stat., regard must be had not merely to the recorded plat of the town, but to the size of the lots generally in the municipal corporation; so that, as matter of law, it must be decided that this was land in bulk, and not land divided into lots, because the size of this lot is not the size of lots generally in the city, or in the neighborhood.

The city, therefore, had in this case, land in bulk, upon which it was authorized and empowered to levy an assessment, and before it could do so, either according to the appraised value, or according to the foot front, it must give to the land assessed, a lot depth, and that lot depth must be what the average lot depth is in the neighborhood. After it has thus fixed the taxing district and designated the land which may be assessed for the improvement, never having had an assessed value for taxation, the city must give it a value. It is required to do that, in order that the limitation of sec. 2270 may apply, as that section provides: "In municipal corporations other than cities of the first class, or in incorporated villages in counties containing a city of the first or second grade of the first class, the tax or assessment specially levied and assessed on any lot of land, for any improvement, shall, in no case, amount to more than twenty-five per centum of the value of the property, as assessed for taxation."

The land must be assessed for taxation before it can be determined whether or not the assessment exceeds the limit which is prescribed by this section. Therefore, it was the duty of the council, after it determined the depth of the lots in this neighborhood and the depth of the land which could be assessed out of this land in bulk, to then determine what its assessed value for taxation should be. The power to determine the assessed value is not arbitrary. It must in every instance, whatever the method of assessment may be, be uniform and equal; in other words, where the land is in bulk, it must be governed by the assessed value of the lots in the blocks on the sides, or if there are no blocks on the sides, then in accordance with the assessed value of the lots in the neighborhood. The council is not permitted to depart from this rule in determining the value of the property for taxation. It would not be equitable, just, or legal to determine that when you levy an assessment by the foot front, you may levy it upon land in bulk deeper than the lots in the neighborhood or that you may value it at a price above the average price of the lots in the neighborhood as assessed for taxation, because it is an underlying and fundamental principle in the exercise of the power of assessment, that whatever rule is prescribed it must be uniform equal, and according to the benefits, so that all will be treated alike under the law.

Before the statute was in its present form, the Supreme Court, in *Cincinnati v. Oliver*, 31 Ohio St., 371, held: "The limitation upon the power of making assessments contained in sec. 542 of the municipal code, is applicable to assessments levied upon the property abutting on

the improvement in proportion to its frontage, as well as to assessments levied upon such property in proportion to its taxable valuation."

So the court there determined that if you make the assessment according to the valuation or according to the foot front, the power of the council is regulated by the provision as of this section. In the body of the opinion, Judge White says: "The mode of apportionment." *i. e.*, whether they levy by the foot front or according to the assessed value or according to the benefits, is not the means intended for ascertaining the extent of the area of the abutting property subject to assessment. And it seems to us to be wholly inadmissible to suppose that the legislature intended that the assessment upon the same tract or parcel of land, if levied according to its taxable valuation, should be limited to the usual depth of lots by the average of the two adjoining blocks; but if levied by the frontage, the assessment should extend through the entire tract without reference to its depth."

That construction of the statute, he says, is wholly inadmissible because it would be a violation of every principle which should govern the assessment of property.

Now, with this view of the law, let us apply it to the facts in this case. The defendant, the city, is here admitting that the average depth of the lots in that neighborhood is 148 feet; that their average assessed value for taxation is \$9.86. Notwithstanding these admissions, it says it passed a re-assessing ordinance, assessing this property \$17.04 a front foot and 200 feet in depth.

Had it the power to do this? It appears that it was necessary to assess the property that much, in order to escape the limitations of sec. 2270. Is not this the exercise of an arbitrary power? The constitution directs the legislature to restrict, not to enlarge the powers of assessment, by municipal corporations, and all the provisions of the statutes in that behalf are restrictive in their nature, not enlarging, and must be so construed.

When the city passed an ordinance assessing the land in bulk for a depth greater than the average depth of the lots in the neighborhood and for an amount greater than the average valuation of the lots in the neighborhood, it exceeded its legal authority. It had no authority in law to assess this property at a valuation greater than the average valuation of the lots in the neighborhood, or to assess this land in bulk for a depth greater than the depth of the average lot in the neighborhood, and when it did so, it exceeded its authority, and for this reason its ordinance is void. We have reached this conclusion after a careful consideration of *Parmelee v. Youngstown*, 48 Ohio State, 161, and *Findlay v. Frey*, 51 Ohio State, 390.

The city is here admitting facts which show that if it had proceeded with its assessing ordinance in accordance with the law, it could not have valued this property, by the front foot, for a sum greater than \$9.86 per foot. It is admitting that the plaintiff has already paid on the improvement, more than twenty-five per cent. of this amount, and notwithstanding these admissions, it is claiming the right by the assessing ordinance which we find to be illegal, to collect from him the further sum of \$400.

We concede to it the power at any time, to pass a legal assessing ordinance, when the first ordinance is found to be illegal, but in doing so, it must be governed by the rules laid down in the statute; it must appraise this lot of land as other lots of land are appraised, so far as the

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value is concerned, and it must assess to a depth, as other lands are assessed in that neighborhood; and when it has passed an ordinance in accordance with the law, it is authorized to assess twenty-five per cent. of the appraised value for taxation. But it is admitting a state of facts which discloses that it has already collected all it could assess under the law, and that being true, we think that the plaintiff has clearly made out a case in equity, which will justify this court in enjoining the city from collecting any further sum.

For these reasons, the decree will be for the plaintiff, accordingly.

NEGLIGENCE—EVIDENCE—VERDICTS.

[Lorain Circuit Court, June 11, 1900.]

Caldwell, Marvin and Hale, JJ.

ALBERT HOPPE, AN INFANT, ETC., V. WILLIAM PARMALER ET AL.

1. EMPLOYMENT OF MINORS—OMISSION TO CHARGE AS NEGLIGENCE PER SE.

Where a charge as given be unexceptionable, the fact that the court failed to give other instructions which might properly have been given, does not constitute error unless such instructions were specifically requested and refused. Thus, in action by a minor under nine years of age, for injuries sustained while the act 82 O. L., 161, sec. 6986, Rev. Stat., prohibiting the employment of minors in manufactories, was in force, a failure to charge that the violation of said statute constituted *prima facie* negligence, if proper (a question not decided), in the absence of a special request and refusal, was not erroneous.

2. EVIDENCE IMPROPERLY ADMITTED—CURED BY DIRECTION TO DISREGARD.

The improper admission of evidence in such action to the effect that money had been received from defendant for the benefit and education of plaintiff, cannot be regarded as constituting prejudicial error where the court subsequently directed the jury to wholly disregard all such testimony.

3. EVIDENCE THAT NO ACCIDENTS HAD OCCURRED.

Under the rule which, to show defendant's knowledge that accidents were likely to occur at a certain machine, permits plaintiff to prove that other accidents have occurred under like circumstances, it is competent for a defendant to prove that, during the operation of a machine for many years, no accidents have occurred.

4. EVIDENCE AS TO EMPLOYMENT OF MINORS IN OTHER FACTORIES.

In an action for personal injuries, in which it is alleged that the defendants, in the operation of a manufactory, were negligent in employing plaintiff because of his tender years, it is proper to show that at other factories children of the age of plaintiff were employed for the same purpose, in order to show that the defendants exercised such care and prudence as was ordinarily exercised by others under similar circumstances.

5. WHEN A VERDICT CANNOT BE SET ASIDE AS AGAINST EVIDENCE.

A verdict cannot be set aside as being against the weight of evidence, unless the court is warranted in saying that the jury were clearly wrong in coming to the conclusions arrived at by them; the fact that the reviewing court or another jury might have arrived at a different result, is not sufficient to justify a reversal of the judgment.

HEARD ON ERROR.

MARVIN, J.

The plaintiff in this proceeding was the plaintiff below. The suit was brought to recover for injuries which the plaintiff sustained while in the employ of the defendants on August 25, 1888, at which time the plaintiff was about nine years of age.

The defendants at that time were the owners and operators of a woolen factory at Liverpool, Medina county, Ohio. Among the machinery connected with said factory was a machine known as a "wool picker." This machine was for untangling the fibers of wool and was run by some power other than that of the operator. On the day of the accident the plaintiff was engaged in feeding the wool to this machine, and while so employed, his hand and arm were caught in the machine, resulting in such injury as necessitated the amputation of the arm above the elbow.

The charge in the petition is that the defendants were negligent in employing him by reason of his tender years, his entire want of experience in operating such a machine, in the failure to afford proper protection and guards about said machine, and in the failure to properly instruct and direct the plaintiff as to the manner in which he should perform his work at said machine.

The defendants admit the employment of the plaintiff; that he was injured and lost his arm while in their employment at this machine. A ver that he was given proper instructions, that the machine was not dangerous, and that the injury to plaintiff was brought about by his negligence and want of proper care.

The result of the trial was a verdict and judgment for the defendants.

At the time of this accident a statute was in force in this state, found in 82 O. L., 161, which reads:

"No minor under the age of twelve years shall be employed in any factory, workshop, or establishment, wherein the manufacture of any goods of any kind is carried on."

This was sec. 6986, Rev. Stat. Section 6986 *bb* of the statutes, as then in force, provides for punishment by fine or imprisonment, of any person or corporation employing a minor in violation of the provisions of the act.

It is urged as error in this case, that the court in its charge to the jury did not say that the violation of this statute by the defendants, in the employment of the plaintiff, was, in itself, negligence, or, at least, that the court should have said that such employment, in violation of the statute, raises a presumption of negligence on the part of the employers and that there was error in the charge in what the court did say on the subject of the application of this statute to the case on trial. In its charge, the court used this language:

"Were the defendants guilty of negligence and want of due care in employing said plaintiff at the age at which he was at the time of said employment, and setting him to run said machine, and in failing and neglecting to give the plaintiff proper instructions with reference to running said machine?"

Again, the court said:

"You will consider the testimony relating to the age of the plaintiff at the time of the injury, his experience, and knowledge of the machine

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which he undertook to operate and run, the instructions which the defendant gave to the plaintiff on the day of his alleged injury, the knowledge he had of operating said machine before that, together with all other facts and circumstances connected with this case, as shown by the evidence given you upon the trial."

Again, the court said:

"If you find from the evidence given you in this case, that said defendants failed and neglected to use such care in employing said plaintiff and setting him to work upon said machine, and instructing him with reference to the same, as men of ordinary care and prudence would have done under the same or similar circumstances, then I say to you, said defendants would be guilty of negligence" in the failure to use such care.

"On the 28th day of August, 1888, at the time of the injury to the plaintiff there was a statute of the state of Ohio in force, which provided that 'no minor under the age of twelve years shall be employed in any factory, workshop or establishment wherein the manufacture of any goods of any kind is carried on.'

"It was made a criminal offense to violate the provisions of said statute and employ in any factory, workshop or establishment, wherein the manufacture of any goods of any kind was carried on, a minor under the age of twelve years.

"I, therefore, say to you that it would be proper for you to consider said statute in the determining whether said defendants were guilty of negligence in employing the plaintiff to work in the place and at the machine where he was at work at the time of his injury.

"If you find from the evidence given you in this case, that the defendants violated a provision of the statute, prohibiting the employment of children in factories, that fact may be considered by you in determining whether said defendants were guilty of negligence in employing said plaintiff and permitting him to work in their woolen factory at the time he received the injuries complained of in his petition in this case.

"This statute may be considered by you in connection with all the other facts and circumstances of this case."

That what was said by the court in reference to the statute, is the law, can not be questioned, is not questioned by the plaintiff in error. But it is urged that the court mislead the jury in not using language stronger than that used.

In *Meek v. Pennsylvania Co.*, 38 Ohio St., 632, the first clause of the syllabus reads:

"In an action to recover for an injury alleged to have been caused by cars moving on a railroad track, proof that the company was moving its cars in violation of a city ordinance at the time the injury was inflicted, while not sufficient *per se* to create a liability, is yet competent to go to the jury as tending to show negligence." And in the same case, in the opinion on page 638, this language is used in speaking of the ordinance which it was claimed had been violated by the company:

"It was a command to those operating trains within the city limits which it was their duty to obey, and a disobedience, either wilfully or negligently, resulting in injury, is some evidence to be considered in determining the defendant's liability."

In *Davis v. Guarnieri*, 45 Ohio St., 471, which was a case in which the plaintiff in the court of common pleas, as administrator, sought to

recover for the death of his intestate caused by the acts of the defendant, who was a druggist, in the selling of a poisonous drug; the druggist in violation of a provision of the statute which required such drug to be labeled "Poison," omitted so to label the drug. The court (p. 477) charged the jury:

"If in the putting up of this drug (And I say to you that part of the putting up is the matter of labeling it), this statute was violated, then there was negligence on the part of Foster which would make the defendant, if you find that Foster was his agent, liable for the injury resulting from that, unless by reason of the negligence of others as I will hereafter explain."

In speaking of this charge, the court in its opinion at p. 485 quotes, with approval, the language of the opinion in *Meek v. Pennsylvania Co.*, *supra*, and then uses this language, on p. 486:

"It was a question fairly addressed to the jury, in determining the issue of negligence, whether the omission to label the fatal drug contributed to the wrong complained of, and such omission was certainly none the less a negligent act because it is denounced as a crime by the statute. The charge of the court clearly submitted to the jury whether this particular act of omission contributed to the injury complained of."

Without citing further authorities in Ohio, it is certainly true that our Supreme Court have never yet gone so far as to say that an act done in violation of a statute or an ordinance is negligence *per se*. Nor has that court gone so far as to say that the violation of such statute or ordinance raises a presumption of negligence, although there are many authorities outside of Ohio in support of each of these propositions.

In *Shearman and Redfield on Negligence*, 5th Ed., sec. 467, this language is used:

* * * But the true rule is perfectly plain. The violation of such law, if left without explanation or excuse, is conclusive proof of *negligence*, but it may be excused, or it may afford no proof at all that this negligence was the cause of plaintiff's injury. If it is proved that, as a proximate consequence of such negligence, the plaintiff was injured, without contributory negligence, the jury have no right to find for the defendant. If this is the only negligence proved against the defendant, and it did not proximately contribute to the plaintiff's injury, the jury have no right to find for the plaintiff. Or if some good excuse appears, which would be a sufficient defense to an action for the penalty imposed by the law, or which would show greater care in technical violation of the law than in obeying it, then the law is not really violated.

We make no holding as to whether it would have been error for the court to charge that the violation of this statute made *prima facie* a case of negligence against the defendants, because no request was made that such a charge should be given to the jury. As has already been said, what was said to the jury was clearly the law and, if the plaintiff desired the court to charge further on the subject of this statute, a request for such charge should have been made and, none having been made, we hold that there was no error in failing to give any other proposition on the subject, whether such other proposition would have been warranted or not. In support of this, attention is called to the following cases: *Taft v. Wildman*, 15 Ohio, 128; *Jones v. Ohio*, 20 Ohio, 84; *Schryver v. Hawkes*, 22 Ohio St., 308.

In this last named case the second clause of the syllabus reads: "Where the charge of the court is correct so far as it goes, but omits to

state a proposition of law involved in the case, but to which its attention was not called, otherwise than by a general exception to the charge, the omission is not error for which the judgment will be reversed, provided the jury are not misled by the charge."

And in *Smith v. Railroad Co.*, 23 Ohio St., 10, the second clause of the syllabus reads:

"If the charge as given be unexceptional, it is no ground for error that the court failed to give other instructions which might properly have been given, unless such other instructions be specifically requested and refused."

It is further urged that the court erred in its rulings upon the admission of evidence, and attention is especially called to the fact that the court permitted witnesses to testify that the defendants had paid to the father of the plaintiff a sum of money in settlement of the plaintiff's claim. One of the witnesses on this subject was Dr. Arthur Brintnall. This witness was not only permitted to testify that he saw money paid by defendants to the father of the plaintiff, but that he had a conversation with the plaintiff later in which he (the plaintiff) said that the money had been used for his benefit and education.

This evidence was all admitted over the objection of the plaintiff, but afterwards the court instructed the jury that it was not to be considered by them and should not, in any wise, affect the plaintiff's rights. The language, used by the court in this regard, is as follows:

"Gentlemen of the jury, I take from your consideration all the testimony which has been given to you with reference to the payment of money by defendants to the father of the boy. You need not consider that in determining your verdict. I withdraw from your consideration and you need not consider the question of any talk between the father and the defendants with reference to the settlement of this case."

Surely if the jury understood this language of the court—and it is difficult to see how it could have been more clearly expressed, the evidence now under consideration, could not have been used by the jury to the prejudice of the plaintiff.

Again, over the objection of the plaintiff, William Blackburn was permitted to testify in answer to a question put by the defendants, as follows:

Question.—During the time that you were employed in that factory, did you know of any accident at that machine or any of the pickers except this one?

"Answer.—No."

Blackburn had already testified that he had been familiar with the operation of this factory for a long time; that he knew of the use of this picker for years, and that it was fed by young children. And then came the question, before quoted.

We suppose it to be settled, that to show that the defendants had knowledge that accidents were likely to occur at this machine, it would have been competent for the plaintiff to show that other accidents had occurred under like circumstances,—and we know of no good reason why the converse should not be allowed, that is to say; to show by a witness familiar with the machine, that, during its operation for many years, no accident had occurred. This same question is raised with other witnesses.

There was no error to the ruling of the court upon this question.

Hoppe v. Parmalee.

When the defendant, Mr. Dwight Parmalee, was upon the stand, he was permitted to answer that at other woolen factories young children, not older than the plaintiff, were employed in feeding such machines as that at which the plaintiff was injured. This over the objection of the plaintiff. We think this was competent as tending to show that the defendants exercised such care and prudence as was ordinarily exercised by others under similar circumstances.

Without specifically considering other questions of evidence raised in the record, we find no error in any ruling of the court upon the question of evidence which was prejudicial to the plaintiff in error.

It is further urged that the verdict was so clearly against the weight of the evidence, that the judgment should be set aside on that account. We are unable to concur in this claim. That the case was very close, cannot be denied; but there was evidence tending to show that the plaintiff was instructed properly as to his duties and as to the dangers which might be apprehended if he left his place at the table from which the wool was fed to the picker.

Evidence was also given tending to show that the plaintiff had been about the factory and about this machine frequently when it was being operated by another boy of about his own age, and that he was entirely familiar with the operation of the machine.

And we think the jury might well have found, that, notwithstanding his tender years and his want of experience in feeding the machine, still he was possessed of sufficient intelligence and had been sufficiently advised of the surroundings, as that but for such negligence as even one of his extreme youth must be held responsible for, he would not have been injured.

It may be that we should not have come to the conclusion to which the jury came. It is quite likely that another jury might have come to a different conclusion. But we do not feel warranted in saying that the jury were clearly wrong in coming to the conclusion to which they did come,—and the judgment is affirmed.

TAXATION FOR SPECIAL IMPROVEMENTS.

[Summit Circuit Court, April, 1900.]

Caldwell, Marvin, and Hale, JJ.

JOHN W. WALSH ET AL. V. LOUIS E. SISLER, AUD'R.

LIMITATION OF SEC. 2689, REV. STAT., DOES NOT APPLY TO SPECIAL IMPROVEMENTS.

The power conferred by sec. 2835, Rev. Stat., on municipalities, townships and counties, to levy taxes for special improvements upon an affirmative vote of two-thirds of the electors at a general election, is independent of the limitation in sec. 2689, Rev. Stat., which refers to taxes for general purposes only; and taxes for such special improvements may be levied even though the total taxes levied exceed the limitation fixed by sec. 2689, Rev. Stat.

APPEAL.

HALE, J (orally).

This case comes into this court by appeal.

The case really requires a more extensive discussion than we will be able to give it this afternoon. It has been very ably presented upon briefs, which we have examined, but haven't time to go through the

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entire discussion, as perhaps, counsel are entitled that we should do, but I will state the conclusions.

The plaintiff, on behalf of himself and other tax payers of the village of Cuyahoga Falls, seeks to enjoin the auditor of Summit county from placing upon the duplicate for collection a tax levy of two and eight-tenths mills, authorized by the council of said village.

It is claimed, first, that the ordinance providing for the building of a system of water works and the levying of a tax was and is wholly void for the reason that the ordinance was not read on three different days as required by statute nor were the rules suspended, and the ordinance properly passed under such suspension of the rules. The record does not sustain this claim. While there was a slight irregularity in the proceedings of the council, it was by no means such as to invalidate the ordinance. The legislation is entirely complete and legal.

Second—It is claimed that this levy is wholly illegal and void for the reason that it is in excess of the amount which under the statute, the village is authorized to levy. Before the passage of the ordinance making this levy of two and eight-tenths mills the council had, by ordinance, levied for that year a tax for all purposes of ten mills, which was the limit, as claimed by the plaintiff.

Section 2689a, Rev. Stat., it is said provides such limitation.

"The aggregate of all taxes ordered by any other municipal corporation than cities of the first grade of the first class, including the levy for general purposes above the tax for the county and state purposes, and excluding the tax for school and school-house purposes, and in villages of the first class any tax levied for the creation of a library fund as provided in an act passed March 15, 1892," etc.

Now, I omit all portions of the statute, except those relating to the question we have. Coming down to villages it says:

"In villages of the first class eight mills, and in all other villages ten mills on each dollar of the value of any property as valued for taxation on the county tax duplicate."

So we see by this section of the statute the limit fixed for taxation for all purposes is ten mills upon the dollar. The object and purposes for which the village was authorized to levy a tax is fixed by prior sections of the statute, fixing the various purposes and objects for which levy can properly be made, and the statute provides, that annually in fixing the amount of the levy the municipal council shall provide, by ordinance, for the distribution of the tax levied among the several departments of the corporation. I believe formerly, by statute, the levy for each particular purpose, object and department was fixed and a limit fixed for the taxation for that particular purpose, but now the limitation is in general terms, ten mills upon the dollar, leaving the council to distribute among the different funds.

This section limits the levy to be made for the ordinary purposes at least and the general needs of the corporation, such as the council are authorized to levy without any authority by a vote of the electors of the corporation.

After the passage of this section, or the statute which is passed into the revision as section 2689a, and after that section has been construed by the Supreme Court at least two or three times, what is now known as sections 2835, 2836 and 2837 were passed. The original act, which has become those sections in the revision, was entitled "An Act to Authorize Municipal Corporations, Counties and Townships to levy a Tax for

Special Improvements and for the Payment of Debts," and it was passed January 12, 1879.

Section 2835 provides :

"The trustees of any township or hamlet or the council of any municipal corporation may issue and sell their bonds, in amount in denominations such as they may deem necessary for the special purpose in view, whenever it is desired by the voters of such township or municipal corporation to make any of the following improvements or to provide for any of the following public purposes:"

And among others, "For erecting or purchasing water works and supplying water to the township or corporation and the inhabitants thereof."

Section 2836 provides :

"For the payment of bonds issued under the preceding section, the township trustees or municipal council shall levy a tax in addition to the amount otherwise authorized, every year during the period the bonds have to run, sufficient in amount each year to pay the bonds falling due within that year, and the accruing interest."

Section 2837 prescribes the mode and manner of submitting the questions to the voters and people at the general election.

Now we have reached the conclusion that this section of the statute was intended to be and is independent of the limitation fixed by 2689a, and is in terms so expressed. After the ordinary expenses and needs of the corporation have been provided for in an amount fixed by the levy for such purpose, provision is made under which special improvements can be made. These improvements can only go forward when sanctioned by two-thirds of the electors, voting at a general election held for that purpose. The language of this section implies that taxes by other provisions of the statute have been authorized, and that this tax in amount is in addition to the taxes that have been thus authorized. It deals with a proposition in which the amount of a tax have been authorized by previous provisions of the statute, and then in addition to that amount, the taxes under the special provision of this section of the statute are authorized. The language of the statute is "in addition to the amount otherwise authorized." It is said that this amount is in addition to the objects for which a tax was heretofore authorized,—if that is what is meant it would have been very easy to say so, but it says here. "in addition to the amount otherwise authorized."

While there may be some doubt about this question, we have concluded that the tax authorized under this latter section is independent of the limit provided by 2689a, and that there is no ground made in the case for an injunction.

The petition therefore will be dismissed.

JUDGMENT—COLLATERAL ATTACK.

[Lucas Circuit Court, March, 3 1900.]

Haynes, Parker and Hull, JJ.

REUBEN S. GAW V. GLASSBORO NOVELTY GLASS CO.**1. JUDGMENT CONCLUSIVE OF FACTS WHICH MIGHT HAVE BEEN ASSERTED.**

A judgment is as conclusive as to facts which might have been asserted by way of defense or counterclaim as it is upon facts specifically found. Therefore, the decree in a foreclosure suit against a mortgagor and a corporation, upon averments that the latter had purchased the mortgaged property and assumed and promised to pay the indebtedness, the corporation being in default for answer, finding that the "statements of plaintiffs petition are true" and that there is due from the mortgagor and the corporation "the amount claimed in the petition," is conclusive against the stockholders of the corporation as to the assumption of the indebtedness, in a subsequent action to recover an unsatisfied balance, the mortgaged property having failed to satisfy the indebtedness, and such stockholders are thereby precluded from interposing any defense or counterclaim that might have been interposed in the foreclosure suit.

2. COLLATERAL ATTACK—NOT PERMISSIBLE UNLESS JUDGMENT VOID.

A judgment must be void and not merely erroneous to be open to collateral attack. Thus, while it does not appear that a trustee for mortgage bondholders, by virtue of the mortgage, had authority to do more than subject the mortgaged premises to the payment of the indebtedness, a judgment upon default in a foreclosure suit, brought by such trustee, upon proper allegations, against a corporation purchasing the property and assuming and agreeing to pay the indebtedness, is not void or subject to collateral attack in a subsequent action to enforce the judgment against stockholders.

3. AUTHORITY OF TRUSTEE TO PROCEED AGAINST CORPORATION.

Under the circumstances stated, where the mortgaged property was purchased by the corporation which assumed and agreed to pay the mortgage, it is the same as if the corporation had become a party to the mortgage subsequently to its execution by the original mortgagor and it therefore became not only the right but the duty of the trustee to proceed by all proper methods to the foreclosure of the mortgage and to the ascertainment and determination of any and every question that might be legitimately determined in an action of foreclosure, including the ascertainment and determination of the obligation of the corporation arising out of its assumption of the debt.

4. CORPORATION BOUND BY KNOWLEDGE OF AGENT.

Where it appears that, in the purchase of a manufacturing plant, the representative of the purchasing corporation, upon whom the company relied, knew that the deed of the property, in the warranty against encumbrances, excepted a certain mortgage or bonded indebtedness, the corporation is chargeable with notice thereof and by accepting the deed upon the statement of its representative that it was "all right," the corporation is, in absence of fraud or imposition, bound by a stipulation contained therein assuming and agreeing to pay such indebtedness.

5. RIGHT OF ACTION—SUBJECT TO DEFENSES.

The assumption of indebtedness by the corporation, in the purchase above referred to, gave the bondholders a right of action against the corporation, but this right of action is subject to any defense or counterclaim that might be interposed by the corporation at the proper time, if grantor were the holder of the claims and seeking their enforcement.

APPEAL.

PARKER, J.

This is an action brought by a creditor of the Glassboro Novelty Glass Company to enforce the statutory liability of the stockholders of that company. All of the facts necessary to a complete decree in the case are agreed upon, excepting those respecting the claims of certain so-called bondholders, *i. e.* creditors who are holding notes that were given by one Christopher W. McLean and made payable to George H. Ketcham, trustee, or bearer, and now held by various persons to whom Ketcham, as trustee, transferred them.

A brief history of the case will be necessary to an understanding of the points involved. We need not go back of September 15, 1888, at which time Christopher W. McLean executed and delivered to George H. Ketcham, as trustee, his thirty so-called bonds, of \$500 each, the aggregate being \$15,000, payable to Ketcham, trustee, or bearer, on September 15, 1898, with interest at six per cent. payable semi-annually, these semi-annual payments of interest being evidenced by coupons attached to the respective bonds. At the same time he executed and delivered to Ketcham trustee, his mortgage of that date, securing these notes or bonds on eighty-seven lots and nineteen acres of land in McLean's Glassboro addition to the city of Toledo. This mortgage was duly filed for record and recorded in Lucas county, Ohio. Soon thereafter McLean erected a glass factory on a part of these mortgaged premises.

In the summer of 1889 the Glassboro Novelty Glass Company was incorporated with an authorized capital of \$60,000, divided into 600 shares of \$100, each. McLean actively promoted the formation of this company, and it appears that he persuaded certain of these defendants who were bondholders to subscribe for stock and become interested in the company.

It appears that it was the purpose of this company to manufacture in this factory a certain kind of prismatic glass, and it was agreed between McLean and the company or, at least, McLean proposed to the stockholders of the company while it was in process of formation, that he would turn over to it certain contracts, which he said he had with an institution in the east, to take all of this prismatic glass that might be manufactured by the company, at certain prices which would return large profits to the company; and this contract, together with the factory and about three acres of this mortgaged property, was to be turned over to the company in consideration of \$30,000 to be paid by the company to McLean as set forth in a proposal made in writing by McLean, which I read:

"I, C. W. McLean, hereby agree to sell what is known as the McLean Glass Plant, as it now stands, located at Glassboro, Toledo, Ohio, together with three (3) acres of land, on which the buildings now stand and surrounding the same, and to assign the contracts made by me with The Alpha Prismatic Glass Company of New York, to The Glassboro Novelty Glass Company of Toledo, for the sum of \$30,000 subject to the \$15,000 bonded indebtedness which now encumbers the said plant as follows:

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Thirty \$500 3 10 year bonds bearing 6 per cent. interest, payable semi-annually on the 15th days of March and September..	\$15,000
Amount to account paid in cash.....	10,000
Amount to be paid in stock.....	5,000
Amount of stock to be offered for sale.....	30,000
	<hr/>
	\$60,000

Capital stock of said company, \$60,000.

C. W. McLEAN.

TOLEDO, O., July 1889.

This proposition is written upon the book of the company in which the stock subscriptions appear, and those who subscribed for stock appear to have been acquainted with this proposal and to have subscribed upon the faith of it.

After the organization of the company and in pursuance of this proposal, a deed was executed by McLean to the company of these three acres of land upon which the factory was located, and this deed was accepted by the company and placed on file. This is a general warranty deed containing covenants against all encumbrances, except as to this mortgage, with respect to which "contains this stipulation: "except a mortgage executed and delivered to George H. Ketcham, trustee, for the sum of \$15,000 upon the property herein described, which said grantee assumes and agrees to pay."

There is a question made as to whether the company knew that this stipulation as to the assumption of the indebtedness of \$15,000 was in this deed; but we find that the deed was read by a representative of the company, and that he stated to the company, when the stockholders or directors were in session, that the deed was all right, and we find that they relied upon his statement. Since the representative of the company knew what was in the deed on this subject, the company is chargeable with knowledge thereof and, furthermore, under the law, by accepting the deed, the company in the absence of any evidence of fraud or imposition is bound by this stipulation in it. *Kerr on Real Property*, § 2336.

Under the authorities in this state, this assumption of the debt gave the bondholders a right of action against the glass company. *Thompson v. Thompson*, 4 Ohio St., 333; *Emmitt v. Brophy*, 42 Ohio St., 82.

But the stockholders contend that the bondholders have this right (if at all) subject to any defenses or counter-claims that might be interposed by the company if McLean were the holder of the claims and were here seeking their enforcement. In support of this proposition, they cite: *Hayes v. Skidmore*, 27 Ohio St., 331, which seems to sustain it; and they have also presented some very potent arguments in support of this proposition and we are disposed to the view that it is correct. Then they say that they have such defenses and counter-claims, viz.

That fraud was practiced by McLean in inducing the company to accept an incomplete plant: That he represented to those who became stockholders, and represented to the company, that the plant was complete and equipped for the manufacture of this prismatic glass, whereas it was not complete, but required about \$7,000 to put it in condition to manufacture this glass. They say also that he practiced fraud in representing that he was skilled and experienced as a practical glass man, who understood the manufacture of glass and all that pertained to

it, and that that was not true; also that he was guilty of fraud in representing that he had this valuable contract with the Alpha Prismatic Glass Company of New York, to take the whole product of the factory, at remunerative rates, and that it was a solvent institution, and that therefore he had a very valuable contract, whereas in fact it was a corporation organized under the laws of New Jersey, where there was no statutory liability or assurance of solvency, and was an insolvent institution, and therefore this contract was not at all valuable. And they say that because of McLean not being a skillful glass man, and because of its being impracticable to manufacture this kind of glass profitably—though McLean represented to the contrary—and because this New Jersey concern was insolvent and failed to take their glass, or to pay for what they did take—that because of these various misrepresentations upon the part of McLean, the concern failed and went to the wall—and so it seems to have done very speedily. It collapsed and quit business, and this suit is one of the results.

Evidence was heard by this court upon the issue made by these averments of fraud and misrepresentation and the denial thereof. I will not stop to discuss this, but go to the consideration of another point, our conclusion upon which makes it unnecessary to determine whether these allegations of fraud are well founded. However, I should add that the stockholders also claim as a defense that this deed contains covenants against any and all incumbrances except this one which has been mentioned, but that as a matter of fact there was about \$1,000 back taxes on this property, the burden of which has fallen upon this company, and that the claim thus arising should be taken into consideration as an offset against these claims in the hands of these bondholders.

The pleadings do not make up an issue as to this, but we have heard the evidence upon it and have given it consideration.

It is also said that McLean now owns about \$10,000 worth of stock or did at the time the company became insolvent—and that if he were enforcing these claims on these bonds he must, as a holder of such stock, bear his proportion of this debt, and hence this proportion should be deducted so that this share will not fall upon the other stockholders. These are, in substance, the claims which are made by the way of defenses and counter-claims in opposition to the claims of the bondholders.

Besides denying the alleged fraud and misrepresentations, the bondholders say that these alleged defenses or counter-claims cannot be considered, for the reason that by the judgment of a court having jurisdiction of the matter it has been determined that the company owes this debt to the bondholders; that if these alleged defenses ever existed, they were in existence and might have been set up in the case in which this judgment was entered, and that whether then interposed or not, the judgment is conclusive against them so long as it stands unreversed and in full force.

The stockholders deny that the judgment in question has the force and effect claimed for it by the bondholders. The history of this alleged judgment is as follows: On August 10, 1892, George H. Ketcham, as trustee under this mortgage, began an action in the court of common pleas against Christopher W. McLean, N. R. McLean, his wife, The Glassboro Novelty Glass Company, and various other defendants, the main purpose of the action being the foreclosure of this mortgage on behalf of the bondholders. The petition contains all the necessary averments for a foreclosure, and the necessary prayer. It also contains certain other allegations, which were perhaps not strictly necessary to the foreclosure

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of the mortgage, as to the conveyance by McLean to the glass company of the land and lots by the deed before mentioned, and the following: "Said deed contained covenants of warranty on the part of said McLean except the mortgage for the sum of \$15,000 executed and delivered to this plaintiff, trustee as aforesaid, which it was by said deed recited that said grantee agreed and assumed to pay. Said deed, duly executed and delivered as aforesaid, was by said corporation left with the recorder of Lucas county for record, on October 14, 1889, and was by him duly recorded in volume 158 of the record of deeds of said county, page 478. Said corporation forthwith took possession of said last described land, and has since had the occupation, use and enjoyment of the same, and still holds the legal title thereto, and, as a part of its said contract of purchase and in consideration of said conveyance, said corporation agreed with said Christopher W. McLean, and with this plaintiff as such trustee, and with the respective holders of said bonds, that they would pay to the respective parties entitled thereto, the principal and interest of the mortgage indebtedness aforesaid, as the same should become due and payable."

The prayer, which is quite full and covers a great many objects to be attained, contains this: "That the court order the respective parties interested in said lands to pay the respective liens so found now due and payable, within a short time, to be by the court limited, and in default of such payment, then that upon the precept of any party in whose favor such lien has been declared due, or of his attorney, an order of sale issue directing the sale of said respective mortgaged lands as upon execution," etc., and then at the end is a prayer for all proper equitable relief.

The glass company was duly served with process, but it filed no answer in the case, and a decree was entered in part as follows:

"This day came the plaintiff and defendants" naming them and including the glass company", by their respective attorneys, all other defendants being in default of pleading, and no party requiring a jury this cause was submitted to the court upon the pleadings of the parties appearing as aforesaid, and upon the evidence. Upon consideration whereof, the court finds that the statements of plaintiff's petition are true. That there is due from defendants The Glassboro Novelty Glass Company and from Christopher W. McLean, to plaintiff, for interest upon the bonds in said petition specified."

Then follows a statement of the amount due, and also following that a finding as to the amounts that will in the future fall due upon these obligations from the Glassboro Novelty Glass Company to the bondholders or to the plaintiff as trustee; then, amongst other things, follows an order that unless McLean or the Glassboro Novelty Glass Company should pay this indebtedness, an order of sale should issue for the sale of this three acres owned by the glass company as well as for the sale of the lots and lands still owned by McLean.

There is no question but what if this decree is conclusive against the company, it is equally conclusive as against the stockholders of the company. Freeman on Judgments, sec. 177; 131 U. S., 290; Angell & Ames on Corporations, sec. 615; 1 Beach on Corporations, p. 233, note. Authorities might be multiplied upon this proposition, but these are deemed sufficient.

But the stockholders say that the judgment has no force or validity in so far as it touches the question of the indebtedness of the company to the bondholders because, they say, the trustee had no authority as such to proceed beyond the foreclosure of the mortgage, the subjection of the

mortgaged property, and, incidentally, to have determined such questions and such only as were strictly necessary to the carrying out of his duty in the attainment of this object, and that the determination of the indebtedness of the company to the bondholders, or to the trustee for them, was not essential to the foreclosure of the mortgage. That in thus proceeding beyond the authority vested in him as trustee he did not and could not represent the bondholders; that such bondholders were not bound by this finding; that they might have ignored or repudiated it if it had been against them, and that, therefore, since estoppel must be mutual, the company and the stockholders are not bound by this finding: And, in support of the claim that the trustee was not authorized to seek a judicial determination of this question, attention is called to the fact that the mortgage, which, (it is said), confers the only authority possessed by the trustee, limits his duty and authority to the subjection of the mortgaged property by foreclosure to the satisfaction of the debt. I will not take time to read from the mortgage, but we find that that claim is true so far as the mortgage on its face is concerned. It is also pointed out that this claim of the bond holders arising out of the assumption of this debt is something that has arisen out of a transaction subsequent to the giving of the mortgage wherein and whereby authority is given to the trustee, and it is said that this makes it evident that he, not being a party thereto or named therein, has no duty or authority in the premises arising out of this subsequent transaction.

But the question arises here, how is this question of the authority of the trustee in the premises to be determined? Is it to be determined by the evidence that may or may not have been submitted to the court in the foreclosure case, or is it to be determined by the facts asserted in the pleading therein, either directly or by implication, and the judgment thereon? Manifestly under the authorities it is to be determined by the latter method. I have already called attention to the fact that the trustee not only comes into court in that case and asserts his claim, thereby declaring his right to prosecute it, but that he sets forth in the petition that the undertaking of the company to pay this debt was to him as trustee. He does not say that the undertaking is contained in the deed, or that it arises out of anything contained in the mortgage, but says simply that there was an undertaking on the part of the glass company to him as trustee to pay this debt. Upon the question of the effect of this judgment I shall take time to read a few paragraphs or extracts from Van-Fleet's Collateral Attack. I cite the first paragraph in sec. 1, at the bottom of page 2 and at the top of page 3:

"And as no one would think of holding a judgment of the court of last resort void if its jurisdiction were debatable or even colorable, the same rule must be applied to the judgments of all judicial tribunals. This is the true theory of judicial action when viewed collaterally. If any jurisdictional question is debatable or colorable, the tribunal must decide it; and an erroneous conclusion can only be corrected by some proceeding provided by law for so doing, commonly called a "Direct Attack." It is only where it can be shown, lawfully, that some matter or thing essential to jurisdiction is wanting, that the proceeding is void collaterally."

Since the judgment in the foreclosure suit involves a determination of the liability of the company on the assumption of this debt, of course this is a collateral attack, and the real question here is as to the jurisdiction

of the court in the foreclosure suit over this branch of the subject matter, and in determining this question we must keep in view the alleged authority of the trustee to present it to the court for adjudication. I read from Sec. 58:

"The want of a clear conception of jurisdiction has caused much trouble, as the careful reader of the subsequent chapters herein will discover. The principal trouble has arisen from the mistaken conception that jurisdiction depends upon facts, or the actual existence of matters and things, instead of upon the allegations made concerning them. If certain matters and things are alleged to be true and relief prayed which the tribunal has power to grant, if true, that gives it jurisdiction over that proceeding, and it must proceed and determine it or neglect its duty. The matters and things alleged may have no actual existence, yet if the evidence given shows them to exist and the allegations concerning them to be true, the tribunal must grant relief. A mistaken conception of this kind has caused courts to hold that judgment on paid claims, or claims barred by the statute of limitations, were void."

And the author calls attention to the fact that these matters are discussed very fully in sections 61, 62, 63 and 526 to 559, inclusive. A single paragraph from sec. 60:

"Jurisdiction always depends upon the allegations and never upon the facts. When a party appears before a judicial tribunal and alleges that a certain right is denied him, and the law has given the tribunal the power to enforce that right—his adversary being notified—it must proceed to determine the truth or falsity of his allegations. The truth of the allegations does not constitute jurisdiction. The tribunal must have jurisdiction before it can take any adverse step. Its jurisdiction, necessarily, has to be determined from the allegations, assuming them to be true. This point is so important, and will be referred to so often hereafter, that I feel justified in quoting extensively from some well considered cases."

Which the author then proceeds to do. I also read a part of sec. 61:

"In this section it is assumed that the court has the power to grant the relief sought in a proper case, and the question is, do the allegations show such a case? The rule is this: Can it be gathered from the allegations, either directly or inferentially, that the party was seeking the relief granted, or that he was entitled thereto? If it can the allegations will shield the judgment from collateral assault. All the cases agree that if the allegations tend to show, or colorably or inferentially show each material fact necessary to constitute a cause of action, they will uphold the judgment collaterally."

Certain illustrations of this I will take time to note, in sec. 62:

"An early Indiana case, speaking of a collateral attack on proceedings in partition, said that on the filing of the petition," it became the duty of the court to ascertain—first, whether the facts therein alleged were substantially such as to authorize the remedy petitioned for; secondly, whether the requisite notice had been given to the other owners; thirdly, whether the facts alleged were stated with sufficient form and precision; and, fourthly, whether the statements contained in the petition were true. The Supreme Court of the United States, speaking of a collateral attack on an administrator's sale of land made in obedience to a private statute, said: "In making the order of sale, the court is presumed to have adjudged every question necessary to justify such order or decree—viz., the death of the owner," etc.

And then he calls attention to what is necessary, and continues:

"A judgment by default bars the parties as conclusively, collaterally, as though they had framed issues and had a trial and been defeated. The assumption of jurisdiction and the exercise of authority is a decision upon the question of notice without any formal entry declaring the notice sufficient. So where an objection was made to the right of the circuit judge to sit in the probate court, his assuming to act ignoring the objection, is an adjudication of his right to do so. The granting of an order to an administrator after approval of his final report, to make a conveyance impliedly determines that he is still administrator and that the approval did not discharge him. Collaterally, an administrator's order to sell land is an implied and conclusive adjudication that the sale was necessary, and that notice was duly given; and an order granting relief is an adjudication of every fact essential to the validity of the order.

Section 420 lays down the general principles which are illustrated in several of the following sections. I will read it:

"This title treats of the validity of the rights and titles derived through judicial proceedings where they were authorized in law or in fact either on behalf of the plaintiff or of the defendant. When such want of authority is a question of fact the record is always invulnerable collaterally, because it imports absolute verity; but when it is a question of law, it is likewise invulnerable, if there was any question for the court to decide."

Some of the cases cited by the author are in point, but I cannot take time to read from them. I cite secs. 421, 526, 626, 628 and 629, reading a paragraph from 626:

"Conceding that a cause of action exists or may exist against the defendant in favor of some person, it does not seem possible that the proceedings can be void because the plaintiff or petitioner is not that person. The court having the power to grant the relief sought, and the defendant being before it and owing that relief to some person, the sole and only point in controversy is whether or not he owes it to the plaintiff. That is a question which the court is competent to decide; and an erroneous conclusion will not be void."

And many cases are cited and commented upon. Now a majority of this court are of the opinion that the conclusions of the court in the foreclosure case—the finding of the court—as to the indebtedness of this Glassboro company to these bondholders, is not void; and therefore we hold that it is not open to this collateral attack. That the judgment must be void, and not merely erroneous, in order to render it subject to collateral attack, is clear from the authorities. I call attention to the authorities collected in the opinion of the court in the case of *Spoors v. Coen*, 44 Ohio St., 497.

That the indebtedness may be determined so as to become a debt of record, and not open to question, in a foreclosure case where no personal judgment is asked or granted, and no execution for balance awarded, is decided in *Doyle v. West*, 60 Ohio St., 438. I read the first paragraph of the syllabus:

"In a suit to foreclose a mortgage, there was a finding of the amount due and the usual order of sale, if not paid in a certain time named. There was no prayer for a judgment, and none was rendered, and no order for an execution for any balance that might remain after applying the proceeds. A sale was made and after applying the proceeds, a bal-

ance of \$102.21 remained. Held, that an action can be maintained on the finding for the recovery of this balance as a debt evidenced by record."

In the course of the discussion in the opinion by Minshall, Judge, (which should be read in order that the full force of this decision may be appreciated), it is said that this finding becomes binding and conclusive upon the parties and not open to question the same as any other judgment in any other form. Now that case rules this case, unless evidence *aliunde* is admissible to impeach the judgment or finding: I mean evidence outside of the allegations in the petition and the findings of the court in the foreclosure case to show that the trustee was not authorized to assert this claim, and we are of opinion that such evidence is not admissible. We have heard evidence in support of that claim, but it cannot be considered and given that effect. Manifestly, if one is sued upon a demand of which the plaintiff claims to be the owner, and allows judgment to go against him by default, he cannot afterwards collaterally impeach that judgment upon the ground or allegation that the plaintiff was not in fact the owner thereof and had no right to assert the claim—that he was not the real party in interest; the judgment is conclusive as to that; that is necessarily found and passed upon in the judgment of the court; and in all material respects the case supposed is, in our judgment, parallel with the case at bar. The rights of the bondholders, if judgment had gone against them, to attack it on the ground that the trustees had not authority in the premises and that they did not know of his attempting to exercise such authority, is a question not presented here. Ordinarily the *cestui que trust* is bound by the judgment against the trustee. 93 U. S., 155; 100 U. S., 605; 123 U. S., 233, 243; 133 U. S., 290. They claim under this judgment of the court, and therefore they are affirming it. It is sufficient to say that this company was given opportunity in the foreclosure suit to question the authority of the trustee and it did not do so, and want of authority does not affirmatively appear on the record. And the glass company also had an opportunity there to assert the defenses and counterclaims which it now attempts to bring forward, and the judgment is as conclusive as to the facts which might have been asserted by the way of defense or counter-claim as it is upon the facts specifically found. If, however, we should receive and consider this evidence, a majority of us are of the opinion that it does not sustain the contention of the defendants. The case stands the same, in our judgment, as if the glass company had become a party to this mortgage, as a mortgagor, subsequent to its execution by the original mortgagor, and it therefore not only became the right but it became the duty of the trustee to proceed by all proper methods to the foreclosure of this mortgage, and to the ascertainment and determination of any and every question that might be legitimately determined in an action of foreclosure including the ascertainment and determination of the obligation of the company arising out of its assumption of this debt. We are cited to *Conner v. Bramble*, 9 Dec., 516, in support of the proposition that after the foreclosure of a mortgage like this, the trustee has no farther authority in the case and cannot bring an action to recover a personal judgment upon the notes. But there the question was raised by answer and the court so determine upon the answer. The question would have been like the one at bar if the right to proceed to a personal judgment had been

asserted by the trustee and had not been disputed by the defendant, and had been determined by the judgment of the court as claimed by the trustee.

Other reasons might be given why it was proper for the trustee to set forth in the foreclosure suit the assumption of this liability by the company; I will not take time, however, to discuss them, but simply suggest that upon the assumption of this liability with respect to this debt, as between McLean and the glass company, the glass company became the principal debtor and McLean the surety. McLean was a party defendant. The trustee was proceeding to bring to sale the property of McLean which was covered by the mortgage, as well as the property of the glass company so covered. It would have been the right of McLean to set forth, if it had not been set forth in the petition, the facts upon which the law fixed his right as surety and the obligations of the company as a principal. The trustee having done that for him—very properly as we think—to expedite matters, there was no occasion for the defendant McLean to assert it; and the decree of the court seems to have recognized this obligation resting upon the glass company as principal debtor and the right of McLean as surety, in the form of the decree entered.

As I have said, we find ourselves somewhat at variance upon the question of the conclusiveness of this finding as against this collateral attack upon it; but a majority of the court are of the opinion that it has the full force and effect of a valid judgment upon the question, that it is not open to question by the collateral method here attempted, and that it is conclusive against the defenses and counter-claims here sought to be interposed.

Coming to the subject of this claim for taxes we have to say that notwithstanding the fact that there had been no eviction at the time the foreclosure suit was brought on account of the non-payment of taxes, and no payment by the glass company, so that no right of action had accrued under the covenants of the deed, yet under sec. 5780, Rev. Stat., that claim might have been interposed by way of counter-claim, because that suit was, as against the glass company, substantially the enforcement of a purchase money mortgage. That any right that the individual stockholders may have had on account of the fraud of McLean cannot be asserted as against these bonds, since judgment has gone against the company, seems to be decided in *Railroad Co. v. Smith et al.*, 48 Ohio Stat., 219.

Time does not permit us to enter into the discussion of other interesting questions involved in this case. The finding and decision that the judgment in the foreclosure suit is conclusive and not open to this collateral attack, in effect disposes of the whole matter, and therefore the decision will be entered in favor of the bondholders, as prayed for..

J. W. Lane, for the plaintiff.

King & Tracy, *C. W. Everett*, and *W. S. Thurstin*, for defendants.

BILLS AND NOTES.

[Franklin Circuit Court, January, 1900.]

Summers, Wilson and Sullivan, JJ.

RICHARD ALLEN ET AL. V. CARY W. JOHNSON ET AL.**1. NOTE PAID BEFORE MATURITY MUST BE CANCELLED.**

It is the duty of the maker of a negotiable instrument when he pays it before maturity to cancel or destroy it. If he neglects to do so, and it is payable to bearer, or bears a genuine endorsement in blank or to bearer and is transferred to a party who takes it before maturity, for a valuable consideration, in the usual course of trade, without knowledge that it had been paid, such payment is no defense in a suit upon it by the transferee.

2. DEFENSE OF PAYMENT BY MAKER—AVERMENTS.

In an action by an endorsee upon a negotiable note, obtained before due, against the maker, an answer averring only that the note had been paid and taken up and then lost or stolen is demurrable, it being essential to a good defense to aver also that the endorsee had knowledge of the facts thus pleaded, or that he gave no value.

3. NOTE GIVEN FOR PATENT RIGHT—STATUTES—DEFENSE.

The defenses which may be made, by virtue of the provisions of sec. 3178, Rev. Stat., to a negotiable instrument, having written across its face "given for a patent right," are limited to such matters of defense as grow out of the transaction in which the instrument originated.

HEARD ON ERROR.

The plaintiffs in error, Richard Allen and Dalton Allen, brought suit as endorsees against the defendants in error, Cary W. Johnson and Davis Gill, as makers, and Samuel A. Cochran, as endorser, on a promissory note of which and of the endorsements thereon the following is a copy:

"\$300.00 Westerville, Ohio, September 10, 1895.

"November 1, 1897, after date, we or either, promise to pay to the order of Samuel H. Cochran three hundred dollars. For value received negotiable and payable without defalcation or discount and with interest from date, at the rate of 8 per cent. per annum, and if the interest be not paid annually to become as principal and bear the same rate of interest. This note given for patent right.

"CARY W. JOHNSON."

"DAVIS GILL."

"Paid on the within note December 8, 1896, \$60.00.

"S. H. COCHRAN."

The plaintiffs averred in their petition that Cochran had endorsed and delivered the note to them before due; that on the date it became due it was presented to the makers and payment thereof demanded and refused, and that it was then protested for non-payment, of which Cochran had due notice.

Johnson answered that he had paid the note before due by payment to the payee, who surrendered the note to him and that thereafter he either lost the note, or it was stolen.

Gill makes a similar answer, with the additional averment that Johnson was principal, and he surety.

Cochran denies demand and protest and notice of protest, and avers that from failure thereof he is discharged.

No other or further defenses are made. General demurrers were interposed to the answers of Johnson and Gill and were overruled, and the plaintiffs then filed replies which were general denials to the answers of Jackson and Gill.

On the trial the court, over the objection of plaintiff, admitted testimony tending to prove payment, and charged to the effect that the plaintiff could not recover if the jury found that the note had been paid as averred in the answer, and refused to charge as requested by plaintiff to the effect that the defenses that the defendants could make because of the note having been given for a patent right, were limited to such matters of defense as grew out of the transaction in which the note originated; and to the effect that it is the duty of a party making payment on a negotiable instrument, to see that the same is endorsed as a credit on the note, and to take up and cancel the note when paid; and that if he neglect so to do he is estopped to plead such payment as a defense against one who takes it for value in the usual course of business before due and without notice.

The plaintiffs also requested the court to give the following charges:

"6. I charge you that if the note sued upon by the plaintiff in this action was lost, or stolen from the defendants, Cary W. Johnson and Davis Gill, and was thereafter endorsed by the defendant, Samuel H. Cochran, to the plaintiffs in this action, for a valuable consideration before due, without the plaintiff having any notice of the notes being stolen or lost, or without plaintiff being guilty of bad faith or fraud, the plaintiff is entitled to recover in this action the amount the note shows due."

"8. If the defendant, Cary W. Johnson, paid said note in suit on or about July 1, 1896 to the defendant, Samuel H. Cochran, and the note was not cancelled, but permitted to remain in Cochran's hands, and he thereafter transferred it to the plaintiffs by endorsing it in the regular course of trade before due, and they took the same for value without notice of such payment, they are *bona fide* holders thereof, discharged of said defense, and may recover the amount thereof notwithstanding such prior payment."

These charges also the court refused to give.

No proof was made of demand, protest and notice to Cochran. The testimony tended to prove payment by Johnson, and showed without contradiction that the plaintiffs obtained the note from Cochran before due in the usual course of trade, and without knowledge or notice of any facts tending to prove such payment.

SUMMERS, J.

Section 3178, Rev. Stat., reads: "A promissory note, or other negotiable instrument, the consideration for which consists, in whole or in part, of the right to make, use, or vend a patent invention, or an invention claimed to be patented, shall have written or printed, prominently and legibly, across the face thereof, and above the signature thereto, the words, 'given for a patent right'; such instrument, in the hands of any purchaser or holder, shall be subject to the same defenses as it would be in the hands of the original owner or holder; and any person who purchases or becomes the holder of a promissory note, or other negotiable

instrument, knowing it to have been given for the consideration aforesaid, shall hold the same subject to such defenses, although, the words 'given for a patent right' are not written or printed upon its face."

The contention of the defendants Johnson and Gill is that the note sued on, in the hands of the original holder or payee, would be always subject to the defense of payment, and that therefore, under the section, the note sued on was subject to this defense although it may have been transferred to the plaintiffs by endorsement of the payee for value before due in the usual course, and without notice or knowledge that it had been paid.

Three questions are presented.

First: Did the court err in overruling the demurrers to the answers of Johnson and Gill?

Second: Do the transferees of a negotiable promissory note, who receive the same *bona fide* for value without notice and before maturity, hold the same free from a defense that the note had been paid to the payee prior to such transfer?

Third: Do the transferees of such a note, given for a patent right and having written or printed across its face the words, "given for a patent right," hold the same free from such a defense?

Does the answer state a defense?

"The mere possession of a negotiable instrument, produced in evidence by the endorsee, or by the assignee where no endorsement is necessary, imports *prima facie* that he acquired it *bona fide* for full value, in the usual course of business before maturity, and without notice of any circumstance impeaching its validity; and that he is the owner thereof entitled to recover the full amount against all prior parties. In other words, the production of the instrument and proof that it is genuine (where indeed such proof is necessary,) *prima facie* establishes his case; and he may there rest it." Daniel on Negotiable Instruments, sec. 812.

But the principle is well established that if the maker or acceptor, who is primarily liable for payment of the instrument, or any party bound by the original consideration, under a pleading admitting of such proof, proves that the instrument has been lost or stolen, or that there was fraud or illegality in the inception of the instrument; or if the circumstances raise a strong suspicion of fraud or illegality, the owner must then respond by showing that he acquired it *bona fide* for value in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeach its validity. Daniels on Negotiable Instruments, section 815; Commissioners, etc., v. Clark, 94 U. S., 279-285; Pana v. Bowler, 107 U. S., 529-541; King v. Doane, 139 U. S., 166, 173; Jones v. Gordon, 2 App. Cas., 616.

This is the rule laid down in Davis v. Bartlett, 12 Ohio St., 534, and in Johnson v. Way, 27 Ohio St., 374.

That such is the rule of evidence established by the cases, English and American, is apparent, but it is not so easy to determine what facts must be pleaded in the answer to admit evidence that calls for an application of the rule.

The question is noticed but not determined in Kitchen v. Loudenback, 2 Circ. Dec., 129; *Ib.*, 48 Ohio St., 177.

In Lane v. Krekle, 22 Iowa, 399, 407, Judge Dillon, after stating the above rule, said: "But this is a rule relating to evidence, and not to pleading. Where the action is by a person not a payee, it is necessary to allege notice of the facts pleaded in defense, or that the holder gave

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no value, or received the paper after due. And this precise point was so ruled, as will be seen on a careful examination in *Clapp v. Cedar Co.*, 5 Iowa, 15, 59. And see also, *Uther v. Rich*, 10 Ad. & El., 784, s. c., 37 Eng. C. L., 232-233, per Lord Denman; *Fitch v. Jones*, 85 Id., 238, s. c., 5 El. & Bl., 238; *Bailey v. Bidwell*, 13 M. & W., 73."

In the *First National Bank v. Ruhl*, 122 Ind., 279, it is held: To an action by the endorsee of a promissory note, an answer showing that the note was obtained by fraud, without alleging notice to the plaintiff, states a *prima facie* defense, and the plaintiff in reply must show that he is a good faith purchaser.

To the same effect is *Thamling v. Duffey*, 14 Montana, 567; 43 Am. St. R., 658.

The holding that the rule is one relating to the evidence and that it does not affect the rules of pleading seems to be supported by the better reason.

In *Uther v. Rich*, *supra*, Lord Denman, C. J., says: "The only proper mode of implicating the plaintiff in the alleged fraud by pleading, is to aver that he had notice of it, leaving the circumstances by which that notice is to be proved, directly or indirectly, to be established in evidence; and we cannot treat the allegation, that the plaintiff was not a *bona fide* holder, as equivalent to such an averment."

In *Bailey v. Bidwell*, *supra*, the action was on a promissory note by the indorsee against the maker. The third plea was that the note was illegal in its inception and that the plaintiff took it without value. The fourth plea averred the same illegality, and that the plaintiff took the note with notice. The fifth plea also averred the same illegality, and that plaintiff took the note after it was due. To each of these pleas the plaintiff replied *de injuria*. On the trial the illegality being proved, the judge charged that the *onus* is cast upon the plaintiff of proving that he gave value. It was contended that this was error; that the question upon whom is the burden of proof, should be decided on the form of the issue, which was an affirmative allegation by the defendant, that the payee endorsed to the plaintiff without value; and that to sustain the charge would be to hold that the plaintiff's proof is to be regulated, not by form of the issue, but by the question whether a certain arrangement, of which he knew nothing, was illegal or not, and which is to afford a presumption against him. In the opinion, Alderson, B. says: "It appears to me that though the defendant is bound to aver in his plea both the illegality and want of consideration, yet if he proves the illegality, and the plaintiff does not prove the giving of the consideration, the plea is maintained, because the proof of the illegality shows, *prima facie*, that the instrument is without consideration. The statement of the plaintiffs being endorsee, in the declaration, is an ambiguous statement; it may mean that he is the mere endorsee, or the endorsee for value. Then the defendant in his plea says: 'It is an illegal bill, and I put it in issue whether you are an endorser for value.' The illegality being established in evidence, it then lies upon the plaintiff to answer the challenge as to the value given by him, which in this case he has not done."

In *Fitch v. Jones*, *supra*, the action was on a promissory note by the endorsee against the maker. Plea: that the defendant made the note and delivered it to the endorser in the payment of a bet on the amount of hop duty; and that plaintiff took it when overdue, without value, and with notice of the premises. The plaintiff took issue thereon. No question is made on the pleadings, but, on the trial, Coleridge, J., in sum-

ming up, stated that it lay on the defendant to prove the absence of consideration. The jury found for the plaintiff, and it was contended that this direction was erroneous, and what Lord Campbell, C. J., says in the opinion is helpful in determining the question of pleading. He says: "The other question is one of general importance. It is, whether in such a case as this, it lies on the plaintiff to show that there was consideration for the endorsements, or on the defendant to show that there was none; or in other words whether the facts proved raised a presumption that there was no consideration. It is clear that, when there is illegality or fraud shown in a previous holder, presumption that there is no consideration for the endorsement does arise; for the person who is guilty of illegality or fraud, and knows that he cannot sue himself, is likely to hand over the instrument to some other person to sue for him. It is not properly that the burthen of proof as to there being consideration is shifted, but that the defendant, on whom the burthen of proof that there was no consideration lies, has by proving fraud or illegality in the former holder raised a *prima facie* presumption that the plaintiff is agent for that holder, and has therefore, unless that presumption be rebutted, proved that there was no consideration. But no such presumption arises where there was in the former holder a mere want of consideration, without illegality or fraud."

The making of the note and its endorsement and delivery to the plaintiffs not being denied, their action could be defended against only by an answer setting up new matter impeaching their title, as that the note had been paid and lost and that they took it with knowledge of the facts, or without value, or after maturity. And, as is said in effect by Mr. Justice Clifford in *Commissioners v. Clark*, *supra*, and by Lord Campbell, C. J., in *Fitch v. Jones*, *supra*, a plea that the plaintiff is not a holder for value, or that he took with knowledge of the facts, is under the rules of evidence supported by proof of the illegality or fraud.

The averment of illegality, fraud, or, as here, of payment before maturity and that the note had been lost or stolen is not a *prima facie* defense to the petition, and when proved, does not defeat the plaintiffs if they prove that they purchased before maturity, in good faith, and for value. Proof of illegality, fraud, or that the instrument had been lost or stolen, when made under an answer admitting evidence tending to prove such fact, merely reverses the presumption that arises from the production of the note that the endorsee acquired it *bona fide* for full value in the usual course of business, before maturity and without notice of any circumstances impeaching its validity, and makes it necessary to a recovery for the plaintiff to show that he acquired the instrument *bona fide*, for value, in the usual course of business, while it was current, and under circumstances which do not show bad faith or want of honesty on his part; and if he makes such a showing the defendant can defeat him only by proving bad faith or fraud on his part in taking the paper. Daniel on Negotiable Instruments, section 819.

The conclusion reached is in accord with the forms given in Chitty on Pleadings, 16 Am. ed., vol. 2, pages 340, 345.

An opinion by Judge Dillon carries great weight, and we should have been content to rest the question upon his opinion in *Lane v. Krekle*, *supra*, without quoting from the cases cited by him, if *Clapp v. Cedar County* had not been questioned in *Union Nat. Bank of Chicago v. Barber*, 56 Iowa 559.

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It is proper however, to call attention to the fact that Lane v. Krekle is not mentioned in that case.

The second question must be answered in the affirmative. In Kernohan v. Durham 48 Ohio St., 1, 23, Dickman, J., said. "The rule is well established, that part payment, made on a negotiable instrument, should be minuted or entered on the paper itself; and when the instrument comes into the hands of a *bona fide* holder for value, before maturity with no memorandum or other notice of part payment thereon, it can not be set up as a defense against it."

The conclusion reached in that case supports the conclusion reached here.

The purchaser from a thief or finder of a lost negotiable security acquires a good title thereto as against the real owner where the purchase was *bona fide* for a valuable consideration before maturity and the instrument bore a genuine endorsement or is payable to bearer. Daniel on Negotiable Instruments, section 1469; 13 Am. & Eng. Enc. of Law, 1149, 1151; Randolph on Com. Paper, sections 1893, 1683.

It follows, therefore, that the maker, when he pays his note before maturity, must, in order to protect himself, cancel or destroy it.

The third question also must be answered in the affirmative.

The contention of counsel for the defendants in error is that the purpose of the statute was to destroy the negotiability of the note; that the legislature intended precisely what was written, that "such instrument, in the hands of any purchaser or holder, shall be subject to the same defenses as it would be in the hands of the original owner or holder," and that the answer states a good defense to the plaintiff's petition, since payment to the original owner or holder would be a good defense to the instrument in his hands.

It is said that a similar act of Pennsylvania has been so interpreted by the courts of that state, and Weaver v. Frantz, 1st Pennypacker (Pa.) 153, and Hunter v. Hemminger, 37 Legal Intelligencer, 412, are cited.

These reports are not at hand, but the official report of the case last cited is before us, Hunter v. Hemminger, 93 Pa. St., 373. This case does not so hold. True, in the opinion, Gordon, J., says the act of April 12, 1872, was intended to destroy the negotiable character of such notes, but it is evident from a consideration of all that is said that what was meant is, that the act was intended to so regulate the giving of such notes for patent rights as to prevent any defense arising out of the consideration being cut off from the maker by a transfer of the notes.

The same act was under consideration in Haskell v. Jones, 86 Pa. St., 173, and in the opinion Sharswood, J., intimates that an act making a negotiable instrument given for such consideration void in the hands of an innocent holder, would be unconstitutional, because no state may so interfere with the right of a patentee, secured to him by the acts of congress, to sell and assign his patent; and says "the sole object of the legislature was to secure, so far as could be done consistently with the rights of innocent third persons, that notice of the consideration should be given to all who should take the paper."

In Tod v. Wick Bros. & Co., 36 Ohio St., 370, 389, Boynton, J., says: "The word 'defenses' in both of these clauses has the same meaning, and is limited to such matters of defense as grow out of the transaction in which the note or other negotiable instrument originated."

Franklin Circuit Court.

But it is said that this is mere *dictum*, and that the *dictum* of Day, J., in *State v. Brower*, 30 Ohio, 101, where it is held that the statute includes only negotiable notes and instruments, supports the contention of the defendant, Day, J., page 103, says: "Manifestly the whole purpose of the act was to enable the maker of negotiable instruments, given for a patent right, to make the same defense thereon, against any holder thereof, that could be made against the original holder or party to whom it was given." This is in the nature of a quotation from the act, and does not suggest what is meant by "defense."

That the statement of Boynton, J., is something more than mere *dictum* we think is apparent on examination of the whole case, and that he correctly states the meaning of the word "defenses" as used in the statute, is apparent from the considerations following.

If the legislature intended to destroy the negotiability of a note given for a patent right, it would have prohibited the giving of such a note. Instead it recognizes the right to give such a note, and attempts no more than to regulate the giving of such a note by providing, in substance, that the note or instrument, if negotiable, shall bear the words "given for a patent right." And it is held in *Tod v. Wick Bros.*, *supra*, that a failure to place the words upon a note does not invalidate it even in the hands of a purchaser with notice, but merely makes it subject to the same defense that it would be open to if the statute had been observed.

To have prohibited the giving of a negotiable note, or to have provided that such a note in the hands of an innocent holder should be void, might have been unconstitutional; and furthermore, the act of 1869 (66 O. L., 93), secs. 3178, 3179 Rev. Stat., is entitled "An act to regulate the execution and transfer of notes given for patent rights and to repeal an act on the same subject passed May 5, 1868;" and the act of 1868 (65 O. L., 127), is entitled "An act to regulate the sale of patent rights in the state of Ohio and to prevent fraud connected therewith."

The abuse that it was sought to remedy was that of obtaining a negotiable instrument for a patent right, and then precluding a defense, in a suit on the note, of a want of consideration based on the invalidity of the patent or upon misrepresentations and fraud in the sale, by a transfer of the note before maturity for value to a person without knowledge of the facts that affected its validity, and this object could, perhaps, be just as certainly attained by the act in question as by one providing that a negotiable note given for such a consideration should be void.

The following cases throw some light upon the question determined: *Herdic v. Roessler*, 109 N. Y., 127; *Tescher v. Merea*, 118 Ind., 586; *New v. Walker*, 108 Ind., 365; 4 Am. & Eng. Ency. of Law (2nd Ed.), 136, note.

The judgment is reversed for error in overruling the demurrer to the answers of Johnson and Gill respectively, and for error in overruling the motion for a new trial on the ground that the verdict is against the weight of the evidence, and for error in the charge of the court. The judgment as to Cochran is affirmed, and the case remanded to the court of common pleas for further proceedings.

John Ferguson and L. G. Addison, for plaintiffs in error.

G. L. Stoughton and O. L. Aldrich, for defendants in error.

COUNTY ROADS.

[Seneca Circuit Court, May Term, 1900.]

Price, Norris and Day, JJ.

BACON ET AL. V. NOBLE ET AL.**1. BILL OF EXCEPTIONS—ENTRY TO MAKE BILL OF RECORD.**

An entry by the probate court: "This day came the said * * * petitioners and presented their bill of exceptions taken upon the hearing of this cause, and thereupon the same was examined, allowed and signed and ordered to be filed with the papers in said cause which is accordingly done," is not a proper entry making the bill of exceptions a part of the record, and in the absence of an order providing that the bill be a part of the record or ordering that the bill be made a part of the record, such bill of exceptions cannot be considered on error.

2. HIGHWAYS—PETITION FOR ALTERATION OF COUNTY ROAD.

The alteration of a county road and the vacation of that part of the old road rendered useless thereby, cannot be obtained under a single petition asking for both, when such alteration will effect such a radical change in the route of the road as practically to amount to a new road.

HEARD ON ERROR**NORRIS, J.**

This case comes into this court by petition in error. The proceedings sought to be affected by the action of this court originated before the board of county commissioners of this county upon a petition which reads as follows:

The petition is addressed to the board of county commissioners, and makes known the fact that the signers are freeholders of Seneca county, residing in the vicinity of the proposed improvement, and states in substance further that there is a county road running southwardly on the line between sections 28 and 29 in Clinton township, from the northeast corner of section 28 to the Coe road, and at the south end divides the Green Lawn cemetery; that public convenience requires the alteration of said road and asks that the same be altered as follows: Beginning for such alteration at the northwest corner of the southwest quarter of the northwest quarter of section 28, thence east to the east line of the west half of said section 28; thence south on said east line to the intersection of the same with the Coe road, and there terminating. Said alteration to be laid out on lands immediately south of the north line of said southwest quarter of the northwest quarter of section 28, and immediately west of the east line of the west half of said section, and wholly on the lands of the Green Lawn Cemetery Association, the road to be fifty feet in width and completed so as to make the same as good as the present county road.

The petition further asks for the consequent vacation of so much of the original road as in the opinion of the board of county commissioners may be rendered necessary by said alteration, as provided by statute. The petition is signed by more than the requisite number of petitioners.

Such proceedings were had before the board of county commissioners that the prayer of the petition was granted. The road was established over the route so as to intersect the Coe road at the point requested, and the old road was vacated as suggested in the petition.

Seneca Circuit Court.

An appeal was taken to the probate court by plaintiffs in error. The probate court upon hearing the case found that the proceedings before the commissioners were erroneous in this, that the petition of Warren P. Noble and others is a joint petition for the vacation of the old county road and the location and establishment of a new county road; that the proceedings thereunder are distinct and independent, requiring different modes of procedure, and are, therefore not joinable; and that by reason thereof said board of county commissioners were without jurisdiction in the premises, and proceeded to dismiss the petition upon this finding and adjudged the costs against the petitioners, and overrules their motion for a new trial. The case was heard as is evidenced by a transcript of the record of the probate court upon the petition and other papers which had been filed by the respective parties before the county commissioners on the hearing before that board, the report of the viewers and the testimony presented to the court.

To this finding and judgment of the probate court exceptions were saved by the defendants in error here, who prepared their bill of exceptions and prosecuted error to that action of the probate court in the court of common pleas of this county. The case was there heard upon error, upon a petition in error, papers, transcripts and bill of exceptions; and upon consideration of which, the common pleas reversed the judgment of the probate court, finding error in the record of the probate court in this, "that the probate court erred in finding that said petition for the alteration of said road contained a petition for the establishment of a new road and the vacation of an old road, and erred in finding that the said board of county commissioners had no jurisdiction in the premises, and erred in dismissing the said proceedings at the costs of the plaintiffs in error," defendants in error here.

To the action of the common pleas reversing the judgment of the probate court error is here prosecuted, and the case is submitted upon the same bill of exceptions and original papers that were presented to the court of common pleas. The errors here assigned are, in substance, that the finding and decision of the common pleas was contrary to law and against the weight of the evidence; that the common pleas erred in rendering judgment against plaintiffs in error for costs, and error in reversing the judgment of the probate court and in remanding the case to that court for further proceedings.

In the language of the Supreme Court, which is a recitation of the statute in that regard, "In order to entitle a bill of exceptions to be considered by a reviewing court, it must be shown by a proper journal entry that the bill was ordered made a part of the record." See *Riverside Rubber Co. v. Milan Manf'g Co.* Also Sec. 5302, Rev. Stat.

The bill of exceptions before us was allowed by the probate court and is identified and accredited by the following entry made by that court on March 15, 1900: "This day came the said Warren P. Noble and the others of the said petitioners and presented their bill of exceptions taken upon the hearing of this cause and thereupon the same was examined, allowed and signed and ordered to be filed with the papers in said cause which is accordingly done." This is not a proper entry making the bill of exceptions a part of the record. And the probate court makes no other order providing that the bill be a part of the record or ordering that the bill be made a part of the record, and by this failure the bill did not become and is not a part of the record of that court. So that it lacks the vitality requisite to bring up for criticism the error which

it is the office of a bill of exceptions to present for review. The bill recites the fact that the petition, transcript and papers used before the commissioners were presented to the probate court at the hearing of the case there as evidence and undertakes to make them a part of the bill by reference and by exhibits, as well as testimony of the witnesses offered in evidence at the trial. Now, if we must look only to the bill of exceptions for a reproduction of the condition in the probate court and the matters upon which that court acted and the causes that moved that court to the determination of the case as evidenced by its finding and decision, we are met at the very threshold by the fact that what the bill of exceptions purports to exhibit to this court is a part of no record in which this court may look for error. So that the case is not here for review upon a bill of exceptions, and was not presented to the court of common pleas by a bill of exceptions that the common pleas might review, and did not, and does not present any ground upon which a judgment of the probate court might be disturbed.

But upon the theory that the error complained of is error exhibited by the original papers upon which the county commissioners acted, and which by filing followed the case here and are a part of it, upon an examination of them, and aside from the bill, what is the color of the proceedings before the county commissioners which the probate court found to be in substance erroneous? It is claimed by the defendants in error that the proceeding is under sec. 4638, Rev. Stat., and as contemplated by that section and other sections, which provide what the petition shall contain, and point out the steps to be taken for the alteration of a county road, that the vacation of a portion of the original road is merely the incident to such alteration or change and is disposed of by sec. 4635, applying to county as well as state roads, which provides that so much of the original road as lies between the points at which the intersection shall be made shall be and remain vacant. Upon the other hand, the plaintiffs in error assert that the action of the county commissioners invoked by the subject-matter of the petition and the case necessarily presented by it, and by its prayer, is not only the alteration of a road but is the vacation of a county road also, not as a mere incident to the alteration and which follows it and is a part of the alteration, but which vacation is of itself a substantive proceeding, dependent however upon the granting of the prayer of the petition which asks for the alteration.

The petition at bar asks for the establishment of an open way to be laid out as a county road between the points designated; it calls the new way a change in route of the road to be affected and an alteration of it; it points out the ground over which it now passes and which when the change is made it will cease to pass, and while it does not in words call attention to the fact that so much of it as ceases to be a part of the road when the change is made will be no longer of use, yet in substance it points out and declares useless the part which ceases to be a portion of the road, and in a small but very distinct voice asks that that portion be vacated. The change in the route of travel, which is in this petition called an alteration of an old road, is so radical in course and distance as to in fact make a new course and outlet for public travel, and is substantially a new road over which to divert public travel to its intersection with the Coe road; and to make such alteration it would appear necessary to close up the old road which affords a shorter and more convenient access to the Coe road. Now, this is not the condition which of necessity vacates a

portion of an established highway, but is a condition which might be sustained or disapproved in a proceeding under sec. 4661, that provides for the vacation of a road or a part of a road considered useless, and is a matter which should be submitted and heard and determined under that section.

With this view of the petition and the case presented by the petition, and the remedy and the relief demanded by it, and the proceedings had under it and the action taken upon it by the county commissioners, we are of the opinion that the proceeding as conceived by the petition and conducted by the commissioners is one which unites the establishment of a new road with the vacation of an old road, the one dependent upon the other, and is inhibited by the law as given to us in the case of *Geddes v. Rice*, 24 Ohio St., 60. And for this reason, and for all of them, the judgment of the court of common pleas is reversed and that of the probate court affirmed, and this at the costs of defendants in error, and the case is remanded to the court of common pleas for execution.

WILLS—AFTER-BORN CHILDREN.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

* GERMAN MUTUAL INSURANCE CO. v. HARRY W. LUSHEY ET AL.

1. WILLS—SEC. 5961, REV. STAT., AS TO AFTER-BORN CHILDREN.

A clause disinheriting an unborn child does not constitute a provision for the after-born child within the meaning of sec. 5961, Rev. Stat., and the intention of testator, being contrary to law, does not control or defeat the inheritance provided for in that section.

2. DOES NOT REPEAL SEC. 5914, REV. STAT.

Section 5961, Rev. Stat., does by implication repeal sec. 5914, Rev. Stat., permitting a testator to bequeath his property to any person to whom he may desire, but simply places a limitation upon the general power conferred by that section.

HEARD ON ERROR.

GIFFEN, J.

On June 11, 1872, Caroline Lushey made her last will and testament, by which she gave all her estate, real and personal, to her husband, George Lushey. At the time they had one son, George Gabriel, living, and afterwards another son, Harry W. Lushey, was born. In June, 1878, the testatrix died, leaving the husband and two sons surviving her. In September, 1892, George Lushey executed and delivered to the plaintiff in error a mortgage on certain real estate so devised to him, to foreclose which mortgage this original action was commenced. The defendant, Harry W. Lushey, claims to be the owner of the undivided one-half of the real estate, under sec. 5961, Rev. Stat., which provides that—

“When a testator, at the time of executing his will, shall have a child absent and reported be dead, or having a child at the time of executing the will, shall afterward have a child who is not provided for in

* For decision of the court of common pleas, see 10 Dec., 24.

the will, the absent child, or the child born after the execution of the will, shall take the same share of the estate, both real and personal, that he would have been entitled to if the testator had died intestate * * *."

The will contained the following provision:

"Should any child or children, we now have only one, George Gabriel, be born to me hereafter it shall in no wise alter or revoke this will and testament."

We do not consider this a provision for the after-born child within the meaning of the section, although it discloses the intention of the testator to disinherit him. This statute has not been construed by our Supreme Court; but we are not without decisions under similar statutes in other states.

In Willard's Estate, 68 Pa. St., 327, it is said:

"We hold then that a reversionary interest, whether vested or contingent, is not a provision for an after-born child within the words or spirit of the statute."

In Hollingsworth's Appeal, 51 Pa. St., 518, a testator gave all his estate to his wife, and if he should have any children living at his death, he appointed his wife guardian of such children during their minority, committing entirely "to her affection, judgment and discretion, their maintenance, education and future provision; and which guardianship I intend and consider as a suitable and proper provision for such child or children (he had no children at the date of the will, but two were born afterward). *Held*: That he died intestate as to the children."

"This is clearly no provision for his children, such as is contemplated by our wills act and the policy of the law."

In Waterman v. Hawkins, 63 Maine, 166, it is said that "a child of a testator, born after his death, can not, in any proper sense of the term, be deemed provided for in his will by a general devise of a reversion to the heirs of the testator."

These cases are cited with approval in *Rhodes v. Weldy*, 46 Ohio St., 234, where the construction of sec. 5959, Rev. Stat., was involved, and seem to require that the provision for an after-born child should be not only substantial, but for his direct and immediate benefit. There are cases such as *Block v. Block*, 3 Mo., 407, and *Bowen v. Hoxie*, 18 Reporter (Boston), 721, in which it is held that the meaning of the statute is that if the testator unintentionally omits to provide, or omits to make a provision which is intended for such child, etc., the child shall take as if the parent had died intestate, or in other words the intention of the testator when ascertained must control.

It may be said in answer to this proposition that the statute does not profess to state a rule of evidence, but to declare a rule of law. It provides that an after-born child not provided for in the will shall nevertheless receive a share of the estate. In *Chace v. Chace*, 6 R. I., 407, where a like statute was under consideration, the court say:

"Upon the whole we are of the opinion that by the terms of the sixth section the legislature intended to, and did, prescribe a rule of law, that if an after-born child is not provided for in the will, he shall be let into his share of the inheritance, and that without regard, to the will or intent of the parent."

The same general doctrine prevails in this state, to-wit: That the intention of the testator can not control in the construction of a will, when it is in conflict with the law or against public policy. *Carter v. Reddish*, 32 Ohio St., 1.

Hamilton Circuit Court.

That this statute is a positive rule of law, and not to be controlled by the intention of the testator, is in some measure evidence by the fact that in sec. 5959, Rev. Stat., relating to an after-born child, the testator having no child living at the time of the execution of the will, there is a provision that "such will shall be deemed revoked * * * unless such child shall have been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision," and that in sec. 5961, Rev. Stat., there is no proviso or limitation depending on the intention of the testator. It is further claimed that sec. 5961, repeals by implication sec. 5914, Rev. Stat., which permits a testator to give and bequeath his property to any person by last will and testament. It does not repeal the latter section; but only places a limitation upon the general power; just as sec. 5915, relating to charitable bequests, and sec. 5963, relating to dower, restrict that power.

In *Doyle v. Doyle, Jr.*, 50 Ohio St., 330, it is said at page 345:

"The power to make a will is not an incident of the *jus disponendi*. It is conferred by statute; and if the wills act were repealed, all the property of a deceased person would descend and be distributed as provided by law. Hence the extent of the power, what property, and what interest in it may be disposed of by will, and to whom, may be, and is, prescribed by statute."

It may be admitted that no sound reason can be advanced why an after-born child, not provided for in a will, should be made more secure in his inheritance under sec. 5961 than under sec. 5959; yet the wisdom of protecting his interest can not be questioned, and as the legislature has, in express terms, done so in this case, there was no error in rendering a decree in his favor.

Judgment affirmed.

Chris. Von Seggern, and *Rattermann & Ward*, for plaintiff in error.

Renner, Gordon & Renner, contra.

SALES—FREIGHT—EVIDENCE.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

MATHIAS PLANING MILL CO. v. L. P. HAZEN & CO.**1. SALES—PLACE OF DELIVERY—CUSTOM OR USAGE.**

Where goods were purchased by a firm in Cincinnati of a manufacturer in Dayton, to be shipped to Indiana, and the contract of sale is silent as to the place of delivery or as to who is to pay the freight, evidence of a general custom among the trade in Cincinnati is incompetent to vary the rule of law that in the absence of express agreement vendor is not required to carry the goods to vendee, unless it appears that vendor was chargeable with notice of such custom or usage.

2. FAILURE TO CHARGE KNOWLEDGE OF CUSTOM.

The fact that the manufacturer in Dayton maintained an agency in Cincinnati and that one of the officers of the manufacturer made weekly trips to that city for the purpose of selling goods, is not sufficient to charge such manufacturer with knowledge of a usage of the trade prevailing only in Cincinnati.

Planing Mill Co. v. Hazen & Co.

3. EVIDENCE—STUB OF PROMISSORY NOTE BOOK.

The stubs in a book of promissory notes are not competent as book account, or otherwise, to prove the purpose or effect of the notes given.

HEARD ON ERROR.

GIPPEN, J.

This was a suit on an account, the plaintiff claiming a balance due of \$300. The defendants pleaded a counterclaim in the sum of \$290.57, and offered to confess judgment for the difference, to-wit, \$9.43. The jury returned a verdict for plaintiff for \$26.03. Judgment being rendered thereon, plaintiff prosecutes error.

The plaintiff operated a planing mill in Dayton, Ohio, and defendants were contractors doing business in Cincinnati, Ohio. One of the items included in the claim of defendants is the sum of \$174.02 for freight paid by defendants for certain material shipped by plaintiff for defendants to Wabash, Indiana. The proposition to furnish the material was in writing, and as follows:

"DAYTON, O., May 29, 1895.

"MESSRS. L. P. HAZEN & CO.,

"Cincinnati, O.

"SIRS—We will furnish the mill work as per plans for the Big Four shops for \$2,250.

"Yours,

"MATHIAS PLANING MILL CO.,

"Per E. P. M."

It does not appear how or where the proposition was accepted.

The contract being silent as to who was to pay the freight, the court received, over the objection of plaintiff, evidence of a usage, among mill owners in Cincinnati, Ohio, that the seller and not the purchaser paid the freight. It is claimed that this was error, for the reason that evidence of usage can not be received to vary a contract or change the general rule of law; that, in the absence of any express agreement in relation to the place of delivery, the vendor is not required to carry the goods to the vendee.

In *Hatch v. Oil Co.*, 100 U. S., 184, it is said by Clifford, J., at page 134: "In a contract of sale, if no place of delivery is specified in the contract, the articles sold must, in general, be delivered at the place where they are at the time of the sale, unless some other place is required by the nature of the article or by the usage of the trade or the previous course of dealing between the parties, or is to be inferred from the circumstances of the case."

In *Howe v. Hardy*, 106 Mass., 329, it appeared that the plaintiffs were manufacturers of window frames in Lowell, and the defendant a dealer in them in Boston. The suit being for the price of window frames sold and delivered, the defendant, against the plaintiffs' objection, was allowed to offer evidence of a general usage at Lowell, where the frames were made and sold, among manufacturers and dealers, for the manufacturers to pay the freight. The court held that—"The usage as to the payment of freight was competent, for it related to what the vendor was to do in respect to the delivery of the goods in the absence of an express stipulation."

In the latter case the plaintiffs were presumed to have knowledge of the usage of the trade in Lowell, the place where the frames were

made and sold, and hence were bound by it; but in the case at bar the goods were manufactured and offered for sale at Dayton, Ohio, from which place they were consigned to defendants at Wabash. It is true that the plaintiff had an agent in Cincinnati, and that one of its officers made weekly trips to that city for the purpose of selling goods; but we think that this alone was insufficient to charge the plaintiff with knowledge of a usage of the trade prevailing only in Cincinnati.

It is urged also that the court erred in receiving as evidence certain memoranda on the stubs of the note book of defendants. Plaintiff had offered testimony tending to prove that the goods shipped to Wabash had been fully settled for by the execution and delivery by defendants to plaintiff of two promissory notes on November 27, 1895, and that the claim for freight paid was not presented until the following summer. To rebut this testimony the defendants read to the jury the memoranda from the stubs of their note book to the effect that the notes were given on account, and not in full settlement thereof. Such stubs were not competent as a book account or otherwise to prove the purpose or effect of the notes given. *Watts v. Shewell*, 31 Ohio St., 331.

Judge Swing concurs in the judgment of reversal, but places it on the ground that the defendants failed to rebut the testimony of Mr. Mathias that a verbal agreement was made to deliver the material for the Big Four shops free on board cars at Dayton, Ohio.

Judgment reversed and cause remanded.

Kelley & Hauck, for plaintiff in error.

R. de V. Carroll, contra.

MUNICIPAL CORPORATIONS—SALE OF GAS PLANT.

[Lucas Circuit Court, June 16, 1900.]

Haynes, Parker and Hull, JJ.

KERLIN BROTHERS CO. v. TOLEDO.

1. CITY OF TOLEDO HAS POWER TO SELL NATURAL GAS PLANT.

Under paragraph 34 of sec. 1692, Rev. Stat., which confers upon municipal corporations the power "to acquire by purchase or otherwise and to hold real estate or any interest therein, and other property, for the use of the corporation, and to sell or lease the same," the city of Toledo has power to sell its natural gas plant.

2. POWER TO SELL SUCH PROPERTY VESTED IN COUNCIL.

By the provision in paragraph 34 of sec. 1692 Rev. Stat., that "in addition to the powers specifically granted in this title and subject to the exceptions and limitations in other parts of it, cities and villages shall have the general powers enumerated in this section and the council may provide by ordinance for the execution * * * of the same," the power to sell is vested in the council alone and the concurrence of natural gas trustees is unnecessary.

3. SALE MUST BE UNDER SECS. 1692 AND 2673a, REV. STAT.

The sale of such property must be effected under paragraph 34 of sec. 1692, Rev. Stat., and in accordance, so far as real estate is involved, with the limitation placed upon that section by sec. 2673a, Rev. Stat., requiring two weeks publication and a three-fifths vote of the council, in "any city or village which has not a board of improvements or board of public works," which includes Toledo.

Kerlin Brothers Co. v. Toledo.

4. LEGISLATION SUFFICIENT FOR THE PURPOSE.

To accomplish a sale in pursuance of Secs. 1692 and 2673a, Rev. Stat., an ordinance must be passed and published, but legislation, though denominated a resolution, accepting a bid for the property, made in pursuance of an advertisement therefor, and directing that the price bid shall be received and that proper conveyance shall be made, amounts to an ordinance and is sufficient for the purpose. (Hull, J., dissents—opinion.)

5. FORM OF MUNICIPAL LEGISLATION IMMATERIAL.

The form adopted in municipal legislation is not a matter of consequence. If a legislative act should be and in substance is an ordinance, and all the rules prescribed for the adoption or passage and publication of ordinances have been observed, the legislation takes effect as an ordinance and *vice versa* as to a resolution.

6. RULE AS TO RESOLUTIONS OF PERMANENT NATURE.

A resolution, although of a general or permanent nature, to come within the purview of sec. 1694, Rev. Stat., requiring a reading on three different days, or a suspension of the rules, must be a necessary resolution. It must not only be or provide for a necessary step toward the ultimate object, but it must be a step which cannot be otherwise taken.

7. RULE APPLIED TO PRELIMINARY RESOLUTION.

A preliminary resolution directing the city clerk to advertise for bids for the sale of part of a natural gas plant, the city reserving in the notice the right to reject any or all bids, amounts to a mere order or direction to the clerk, and is not a resolution of a general or permanent nature within the meaning of sec. 1694, Rev. Stat., requiring three readings or a suspension of rules. (Hull J., dissents—opinion.)

8. NOT REQUIRED TO PURSUE UNNECESSARY FORMALITIES.

Where the object to be attained could be accomplished by a mere motion or order and the city council adopts the form of a resolution, it is not thereby required to pursue further unnecessary formalities in subsequent proceedings.

9. CONSTRUCTION OF BID CONTAINING THREE PROPOSITIONS.

A bid, in response to an advertisement for the sale of a natural gas plant, setting forth that the bidder will pay a certain sum for the property outside the city, and another offer to pay a certain sum for the property inside the city, and still another distinct offer to pay a certain sum for the property inside and outside the city, although in one sense submitted as a single bid, in reality amounts to three separate bids, and particularly where a condition attached to the last bid relates to the operation of the whole plant. Therefore a sale of the outside property based on the first proposition is not invalidated by a condition attached to the last proposition.

10. EFFECT OF ACCEPTING CONDITIONAL BID.

The acceptance by a city council of a bid for the purchase of its natural gas plant, which bid was conditioned that the purchaser should have the right to operate the plant and to fix the price of gas in the city, did not give that right to the bidder, but amounted simply to an acceptance upon the condition that if the city and the bidder failed to come to an agreement upon a contract fixing the bidder's right to operate and the rates to be charged, the bid on the one hand and the acceptance on the other would fail.

11. CONDITIONS CANNOT BE WAIVED BY ANOTHER COUNCIL.

In view of sec. 1691, Rev. Stat., providing that a city council "shall not enter into any contract which is not to go into full operation during the term for which all members of such council are elected," a condition contained in an accepted bid for the purchase of a natural gas plant, providing that the bidder shall have the right to operate the plant and to fix the price of gas, cannot be waived by the bidder, so as to validate a sale, after the expiration of the terms of office of some of the members of the council which accepted the bid.

12. INSUFFICIENCY OF PRICE—RULE AS TO INTERFERENCE.

To justify a court in interfering with the action of a city council in a sale of the property of the city on the ground of insufficiency of the price, when the council has proceeded within the statutes, the price received must be so much less than would probably be obtained by again offering the property, as to establish clearly that the acceptance of the bid amounted to a reckless and improvident act. (Hull, J., dissents from holding sale valid under facts in this case—opinion.)

APPEAL.

PARKER, J.

Both this case and that entitled *Toledo v. Toledo*, come into this court by appeal from the court of common pleas, where they were begun. The evidence was submitted to this court in both cases at the same time, to be considered in either case or both cases, so far as competent and applicable to the issues; both were argued together, and therefore they will both be considered and decided at the same time.

These cases involve the general question of the validity of an alleged sale by the city to The Kerlin Brothers Company of a natural gas plant, the property of the city, consisting of a main pipe line, about forty-four and one-half miles long, extending from the city into and through Wood county and into Hancock county; about seven and one-half miles of lines of pipe connecting said main line with gas wells in said counties—all of said main and connecting lines being buried beneath the surface—certain gas leases in said counties, covering about two thousand acres; forty-seven gas wells and the equipment thereof; three pumping stations, located on small parcels of land owned by the city and consisting of buildings equipped with boilers, engines and pumps to force gas from said wells through said lines to the city; and a telephone line about forty-four miles in length; all of the property above mentioned lying outside of the city; and consisting also of the following described property within the city; something over ninety miles of pipe extending along and buried beneath the streets of the city and submerged beneath the river within the city, used in conveying gas to the inhabitants thereof for heat and light; also pipe and other supplies on hand not in use, and tools and office furniture.

The first case is an action of replevin brought by the Kerlin Brothers Company, a corporation, against the city of Toledo alone, to recover possession of all the pipe in the lines outside of the city and in the wells outside of the city, and some other property, the plaintiff claiming that it is entitled to possession as owner thereof. The city, through its attorney, who appears to be the city solicitor—and I make that remark for the reason that the answer does not disclose that the attorney is the city solicitor—files an answer and cross-petition reciting all the steps taken by the Kerlin Brothers Company and the city in the matter of the alleged sale, pointing out certain alleged irregularities which it contends vitiated the proceedings, and also alleging that said attempted sale was for a price so far below the real value of said property, and was so ill-advised, in view of the losses likely to result to the city, that the transaction amounted to abuse of corporate power on the part of the council acting in the premises for the city, within the purview of sec. 1777, Rev. Stat., and that therefore the alleged sale was null and void.

This pleading closes with a prayer that the plaintiff may be enjoined from taking possession of the property and from taking any farther steps in the premises in pursuance of the transactions respecting said pipe line

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theretofore carried on and yet pending between plaintiff and the city council. The question whether the city solicitor prosecutes this cross-petition under sec. 1777, Rev. Stat., has been discussed by counsel, but we do not deem it necessary to pass upon the question, and therefore shall not do so. We hold that the answer presents an issue as to the ownership and right of possession of this property, and that the issues made by this cross-petition and the reply thereto are brought into this court by the appeal.

The other case is a suit brought by the city solicitor in the name of the city, under sec. 1777, Rev. Stat., against the city, all the members of the council and the mayor and clerk thereof and The Kerlin Brothers Company; and in the petition—which was filed on the same day that the cross-petition in the other case was filed—is set forth substantially the same facts as are averred in said cross-petition, and the same conclusions as to the illegality, irregularity and invalidity of the action taken by the city council on the one hand and The Kerlin Brothers Company on the other, to affect the alleged sale of the gas plant; and the prayer thereof is for an injunction against any farther action by the mayor or clerk of the city or said The Kerlin Brothers Company toward the accomplishment of the attempted sale of said property within the city and the real estate outside of the city, or the giving or taking of possession of any of said property within the city, or said real estate outside of the city, in pursuance thereof.

Issues were joined by answer and reply. It will be seen that the two cases cover all the property, each covering a part thereof. Though the pleadings are voluminous, covering fully the history of these transactions, the only controverted fact is that respecting the value of the property in question. I will state briefly the history of the transactions respecting this alleged sale.

Some time in July or August, 1899, a resolution was adopted by the common council authorizing the city clerk to advertise the property for sale, and invite bids. Some time in August bids were received; the bid of one Bick for all of the property inside and outside the city was \$256,000; the bid of the Northwestern Ohio Natural Gas Company for the same property was \$228,000. The Kerlin Brothers company for the property outside of the city bid \$86,000. While the question of the closing of the contract to the highest bidder was under consideration before the council, Samuel M. Jones, the mayor of the city, made an offer to the city of \$300,000 for the property, including franchises similar to those involved in the so-called franchise ordinance in this case which the council undertook to pass for the Kerlin Brothers Company. These bids, as well as the offer of Mr. Jones, were rejected, and on November 13, 1899, a resolution was adopted directing the clerk to again advertise for bids. The resolution was offered on October 9, but after some vicissitudes, including its being vetoed by the mayor, was finally adopted November 13. It reads as follows:

"Resolved by the common council of Toledo, that the city clerk be instructed to advertise for bids for the sale of that part of the city of Toledo natural gas plant lying outside the city of Toledo. Bids will be received separately on that part lying within the city and that part outside the city."

This resolution was read on but one day by the board of aldermen, and was passed without suspension of the rule requiring a reading of certain ordinances and resolutions on three different days; and the same

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course was pursued when it was afterwards passed by the board of councilmen, by a vote of twenty-four ayes to two noes, over the veto of the mayor. In pursuance of that resolution the city clerk published in The Toledo Daily Commercial, a newspaper of general circulation in the city of Toledo, for two weeks, the following notice:

"NOTICE.

"PROPOSALS FOR THE SALE OF THE CITY GAS PLANT.

"Sealed proposals will be received at the office of the city clerk of the city of Toledo, by the undersigned up to twelve o'clock (standard time) **m.** of Monday the fourth day of December, 1899, for the purchase of the separate parts of the city natural gas plant, as hereinafter mentioned, together with all its appurtenances, including all pipes, and connections laid in the city of Toledo, Ohio, pipe lines and connections elsewhere, together with all wells, rights in wells, tubing, and machinery, appliances, tools, materials, lands, leases, and leasehold interests now owned and held by said city in connection with its natural gas plant, with the right to lay down, maintain and operate in the streets, alleys and public places of said city, gas pipes and their connections, for the purpose of supplying natural and manufactured gas to consumers in said city. The purchaser to assume all obligations pertaining to such property and leases from and including the day of purchase.

"Separate bids will be received for the part of the natural gas plant, lying within the city limits, and for that part of the natural gas plant lying outside the city.

"Intending bidders can obtain a description of all said property owned or controlled by the city of Toledo, by calling upon the undersigned.

"Each bidder must deposit with his bid a certified check drawn on some Toledo bank, in the sum of \$15,000, payable to the order of said city, and which sum shall become forfeited to said city in the event that said bidder refuses to enter into a contract in accordance with his bid within ten days after the same has been accepted, and the proper resolution passed by the city council conveying said property to said bidder. The city reserves the right to reject all bids, which may be offered.

"By order of the common council.

"WILLIAM O. HOLST, City Clerk."

"In pursuance to said notice, two bids were filed before noon of December 4, 1899, as follows:

"TOLEDO, OHIO, December 4, 1899.

"To the Honorable Common Council of the City of Toledo.

"GENTLEMEN: In response to your published invitation for bids, a copy of which is hereto attached, the undersigned will pay for all that part of the property of said city of Toledo, (as advertised) owned, used or connected with the city natural gas plant, as described in said advertisement and lying outside of the city, the sum of one hundred and two thousand and 00-100 (\$102,000.00) dollars, and will pay for that property of the said city of Toledo, owned, (as advertised) used or connected with the city natural gas plant, as described in said advertisement, and lying within the city, the sum of one hundred and twenty-six thousand and 00-100 (\$126,000.00) dollars.

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"Or will pay for the whole of the said city natural gas plant and all parts and parcels thereof, whether lying within or outside said city, and as described in said advertisement, and shown by the description in said advertisement, the sum of two hundred and twenty-eight thousand and 00-100 (\$228,000.00) dollars.

"This bid is made upon the following express conditions:

"That the city of Toledo, Ohio, if the undersigned so elect, will grant them by ordinance satisfactory to them, the right to continue to operate said city natural gas plant, and to take up the same. And to lay down and maintain gas pipes and their connections, and all necessary appliances to enable them to continue the supplying of gas to consumers in said city, in the same manner as is now done and proposed to be done by the present operation of said plant. Also fixing, satisfactory to them, the price they may charge to consumers for gas.

"The undersigned to assume only such obligations as arise from and after the date of purchase, but not to be liable for any obligations that have or may accrue or arise before said date.

"The amounts bid, to be paid in case of the acceptance of this bid, or any part thereof, within twenty days after the passage and legal publication of the necessary ordinances and resolutions conveying said property to the undersigned, and granting to them the right to furnish gas, fixing prices, etc., above referred to.

"A certified check on the National Bank of Commerce of Toledo, Ohio, in the sum of fifteen thousand (\$15,000.00) dollars, payable to the order of said city deposited herewith.

"Respectfully submitted,

"THE KERLIN BROS. CO.

"By E. M. KERLIN,

Secretary."

There was also another bid, which I will not take time to read, by Charles D. Hauk, of \$115,000, for the property inside the city, and of \$90,000 for the property outside the city, and for the entire property, \$205,000.00; and that was also accompanied by a certified check for \$15,000.00.

On December 11, 1899, a resolution was introduced in the board of councilmen reading as follows:

"Resolution accepting the bid of The Kerlin Bros. Company for gas plant lying outside of city of Toledo.

"Resolved by the common council of the city of Toledo, Ohio, that the proposal of The Kerlin Bros. Company, for the purchase of all that part of the property (as advertised) owned, used or connected with the city natural gas plant, lying outside the city of Toledo, with its appurtenances including all mains, pipes, gas and oil wells, gas and oil leases, meters, materials, machinery, lands and appliances, appertaining or belonging to said plant or used in connection therewith at the price of \$102,000.00, be, and the same is hereby accepted and upon the payment of the purchase money, the mayor and city clerk are hereby authorized and directed to execute and deliver to the said The Kerlin Bros. Company, proper deeds and conveyances of all of said property."

That resolution was duly passed, and, after being vetoed by the mayor, was again passed by a two-thirds vote of the council, as provided by law, and was duly published as required by statute in the case of ordinances, on February 15 and 16, 1900.

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At the same date that this resolution was introduced, another, identical in form, with respect to the inside property, was introduced, and that was passed in the same way, but I think perhaps a few days later; at all events, it was duly passed and published.

On February 26, 1900, there were introduced in the board of aldermen of said city, two ordinances: one, which has been called in argument the "franchise ordinance," providing that The Kerlin Bros. Company or assigns should have the right to operate this gas plant under certain restrictions and according to certain regulations provided in the ordinance. That ordinance was passed March 5, 1900. The other ordinance was one fixing the maximum rate at which the company might sell gas, if they should operate the plant; and that has been described in the arguments as the "Rate ordinance." That was also passed March 5, 1900. Upon being presented to the mayor for his approval, both of these ordinances were vetoed. Therafter, and during the life of this council, the rate ordinance was again brought up for passage and defeated; that is to say, it failed to receive the necessary votes to pass it over the veto of the mayor. The franchise ordinance was passed by the necessary vote, but not in time to permit of its being published and taking effect within the life of that council, the terms of certain members expiring before there could be due publication of the ordinance. No ordinance has ever been adopted by the common council of the city of Toledo fixing the price that said The Kerlin Bros. Company might charge in the said city of Toledo for gas. After the final passage of the above resolution purporting to accept the bid of The Kerlin Bros. Company for the outside plant, and before the introduction or passage of the ordinances above referred to—that is, the rate and franchise ordinances—The Kerlin Bros. Company filed with the common council of Toledo, Ohio, a written acceptance of the same as to the part of the plant lying outside of the city of Toledo, and therein signified its willingness and readiness to pay, and tendered to said city the amount called for in said resolution, namely, the sum of \$102,000.00. Most of these facts I have stated from the agreed statement of facts submitted to us by counsel.

A written acceptance of the resolutions, both as to the parts of the plant lying within and those lying outside of the city, signifying its readiness and willingness to pay to the city the amount called for in said resolutions, was filed by the Kerlin Bros. Company with the council, and paying in orders were demanded, which were refused by the city auditor. This was before either the rate ordinance or the franchise ordinance had been introduced.

On March 9, which was after both these ordinances had passed both the boards of council and were in the hands of the mayor, the Kerlin Bros. Company laid a written communication before the common council, to-wit :

" TOLEDO, OHIO, March 9, 1900.

" To the Honorable Common Council of the City of Toledo, Ohio.

" GENTLEMEN: The undersigned, The Kerlin Bros. Company, of Toledo, Ohio, hereby give you notice that they have accepted and do hereby accept the terms and conditions of certain legislation, passed by your honorable body on the 15th day of January, 1900, selling to them all that part of the property of the city of Toledo, owned, used or connected with the city natural gas plant, lying outside of the

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city of Toledo, with its appurtenances, including all mains, pipes, gas and oil wells, gas and oil leases, meters, materials, machinery, lands and appliances appertaining or belonging to said plant or used in connection therewith as described in said legislation.

"We hereby waiving any conditions in our bid, expressed or implied, as to the sale of the property above described, which may require the granting to us of a franchise to sell gas in the city of Toledo, and fixing the price thereof.

"Very respectfully,

"THE KERLIN BROS. COMPANY,

"By R. G. KERLIN, President."

And on the next day, March 10, the company paid into the city treasury the sum of \$102,000.00, and took from the treasurer the following receipt:

"City Treasurer's Office,

"TOLEDO OHIO, March 10, 1900.

"Received from The Kerlin Bros. Company to be placed to the credit of the sinking fund, one hundred and two thousand and 00-100 dollars (\$102,000.00) for purchase of gas plant (outside).

"JOS I. YOST, Treasurer.

"F. S. HODGMAN, Deputv."

On April 5, the common council passed this resolution:

"Resolved by the common council of Toledo, that the common council of Toledo, having by proper legislation, sold to The Kerlin Bros. Company, all that part of the natural gas plant of said city outside of said city, described in said legislation at and for the sum of one hundred and two thousand dollars. And said The Kerlin Bros. Company having paid into the treasury of said city, said sum of \$102,000, and the same having been accepted by said city, and said The Kerlin Bros. Company being now the owner of said described property and the said city is incurring great damages, therefore, the natural gas trustees of the city of Toledo are hereby authorized and directed to surrender and deliver possession of all of said property, including all real estate included therein, to said The Kerlin Bros. Company.

"And the city clerk is directed to send a copy of this resolution to said natural gas trustees at once upon its passage.

"Adopted April 5, 1900.

Attest:

"WILLIAM O. HOLST, City Clerk."

Said money is still in the possession of said city.

On March 10, 1900, The Kerlin Bros. Company addressed and sent to the mayor, the Hon. S. M. Jones, a letter upon the subject, reciting what had been done in the matter of paying in the money, etc., and demanded of him that he execute and deliver to the company a deed of conveyance of said property, as provided in said legislation.

On April 18, 1900, which was after the expiration of the terms of many of the members of the council under which this effort to sell was inaugurated, the Kerlin Bros. Company filed with the city clerk the same waiver of all conditions with respect to franchise or rate ordinances, in so far as the same might pertain to the inside property, and agreed to pay \$126,000 therefor without regard to such legislation. The exact facts as to the expiration of the terms of certain members of the council

and certain other pertinent facts are set forth in this agreed statement as follows:

"The term of office of eight members of the board of aldermen, who were in office on March 28, 1900, expired on April 9, 1900, on which said last mentioned date their successors in office duly qualified and a new board of alderman of the common council of the city of Toledo, was then duly organized by the election of a president and vice president. That the term of office to which they had been elected of fifteen members of the board of councilmen of the common council of the city of Toledo, who were in office on April 11, 1900, expired on said last mentioned date and their respective successors in office then duly qualified as members of the board of councilmen, of said city of Toledo, and thereafter and on April 11, 1900, the new board of councilmen, of said city organized by the election of a president and vice president.

"No proceedings have been taken or attempted to be taken by the common council, or any board of officers of the city of Toledo, in relation to the sale or disposal of any part of the natural gas plant or of any of the property in question in these cases, except as herein-above set forth.

"Neither the mayor nor the city clerk, of Toledo, has executed and delivered to the said company, any deed or other conveyances of any of said gas plant property, or of any of the property in question as aforesaid. That the natural gas trustees, of the city of Toledo, have never consented to or taken any steps towards the sale of any of said property.

"The common council of the city of Toledo, has never adopted any general ordinance providing for the exercise of the power conferred on the said city of Toledo, by sec. 1692, Rev. Stat., for the sale of the property in question, or any other property of the city of Toledo. No vote of the electors of Toledo has ever been had authorizing the sale of the property, or any part thereof."

Then follows in the agreed statement of facts a schedule of the property which I have described in general terms.

I will proceed to discuss briefly certain of the questions in the case which affect the validity of this alleged sale, taking up the objections urged on behalf of the city, and, (if the taxpayers are represented here,) on behalf of the taxpayers of the city.

1. First, it is insisted that the city has no power to sell this property at all. The statute providing for the establishment, erection and operation of this plant, is found in 86 O. L., 7, and there have been some subsequent amendments, I believe.

In *Thompson v. Nemeyer*, mayor, 59 Ohio St., 486, where the Supreme Court had under consideration a similar statute affecting the city of Findlay, and in which case was presented for determination the question whether the city of Findlay had power to sell its natural gas plant, it was held and decided by that court that under sec. 1692, subdivision 34, Rev. Stat., a city or village has power to sell its gas plant. As I shall have occasion to refer to this section several times in the course of this opinion, I will now read the part referred to.

"In addition to the powers specifically granted in this title, and subject to the exceptions and limitations and in other parts of it, cities and villages shall have the general powers enumerated in this section, and the council may provide by ordinance for the exercise and enforcement of the same."

Then follow paragraphs which are numbered from one up to forty, in which are set forth the subjects respecting which the council may provide for the exercise of this power; and among them paragraph 34, the one referred to by the Supreme Court in the case I have cited, and reading:

"To acquire by purchase, or otherwise, and to hold real estate, or any interest therein, and other property for the use of the corporation, and to sell or lease the same."

Without stopping to point out the difference between the act then under consideration by the Supreme Court respecting the gas plant of the city of Findlay and the law respecting the natural gas plant of the city of Toledo, we simply say that we find no material difference between the two acts touching the authority to sell. Something more may be said upon that subject farther along.

2. The second question raised is as to what officers or body may make the sale; it being contended on behalf of The Kerlin Brothers Company that the power is lodged with the common council; and it being contended on behalf of the city—or at least on behalf of the gas trustees, who are represented here by counsel though they are not parties to either action—that if the city has power to sell at all, the sale must be made by the gas trustees, or by the concurrent action of the gas trustees and the common council.

By sec. 1692, paragraph 34, Rev. Stat., authority is conferred upon cities to sell, and authority is conferred upon the common council to provide for the exercise of this power. The making of a sale of any kind involves a contract of sale. The power to contract is, by section 1693, Rev. Stat., placed in the council, and it is therein provided that this power shall be exercised through the medium of an ordinance or resolution; and therefore we conclude that sec. 1692, paragraph 34, Rev. Stat., wherein it is provided that the council may provide for the exercise of said power, fairly construed or paraphrased, means that the council may exercise this power of sale through the medium or instrumentality of an ordinance; and we hold that the trustees need not concur in this action. No provision is found limiting the authority of the council in the premises or providing that the concurrence of the trustees shall be required. It is provided in sec. 2675, Rev. Stat., with respect to the sale of school property, or waterworks, or hospitals, infirmaries, etc., that the trustees having charge of those different properties and works shall concur; that is to say, that their concurrence in the action of the council shall be required in order to effectuate a sale of such properties; but we find no such provision with respect to natural gas trustees; and we think that the fact that this provision is found with respect to these other properties and boards and not with respect to the natural gas trustees, affords a very potent argument in support of the contention that the concurrence of the gas trustees is not required.

Much has been said about the inexpediency and injustice of the provision which permits the council to take this particular property in charge and sell it and thereby deprive the city thereof,—taking it away from the trustees to whom the property and its management have been entrusted, and by the same act in effect depriving the trustees of their offices and the emoluments thereof, without their being consulted in the matter at all; but with that question we apprehend we have no business; that is a question of legislative policy, and the legislature having so provided,—whether

wisely or unwisely we will not pretend to say—to the law as we find it we must give effect.

Section 2491d, Rev. Stat., passed subsequently to the original statute on the subject, has been called to our attention in this connection. That section provides, "That in any city of the third grade of the first class "which described Toledo" in this state is, or hereafter may be lawfully engaged in the production and sale of natural gas, and whilst so engaged produces or procures any petroleum or rock oil, or lands or leases containing such oil, the natural gas trustees of such city are hereby authorized to operate or sell such wells, lands or leases as they may deem best."

And it further provides as to the disposition to be made of the funds arising from such sale. This is perhaps worthy of some consideration as indicating at least the legislature's opinion of the power of the trustees in the premises. If the legislature had thought that the trustees had general power to sell of course this section would not have been adopted. This action on the part of the legislature amounts to a legislative construction of the laws in force to the effect that they conferred upon the trustees no power to sell. *Thompson v. Mayor, etc., supra*, in our judgment fairly decides that in that case at least—and we conclude that if it is so in that case it is so in this—the power is vested in the council alone, because the decision is to the effect that the power of sale is found under sec. 1692, subdivision 34; and these powers cannot be delegated, but must be exercised by the council through the medium or instrumentality of ordinances or resolutions.

3. The third question arises, as to how and under what statutes this authority to sell must be exercised.

We have already indicated that this must be done under sec. 1692, paragraph 34; but, with respect to real estate, the authority of the council under that section is limited by sec. 2673a.

As to what is "real estate" within the meaning of the municipal code, some light is given by sec. 1536, Rev. Stat., and I read the part thereof defining real estate, to-wit:

"In the interpretation of this title, unless the context shows that another sense was intended * * * property includes real, personal and mixed estates and interests; and "land" and "real estate" include rights and easements of an incorporeal nature, but this enumeration shall not be construed to require a strict construction of any other words in this title."

So that perhaps, under that definition, within the municipal code, "real estate" covers rather more than it would under the general definition of the law. We have held that gas and oil leases, for certain purposes and in certain aspects, including the right of the sheriff to sell upon execution, are to be treated as personalty. It is very doubtful whether within the purview of this section such leases could be regarded as personal property, since they involve rights and easements, (as this court has held), of an incorporeal nature.

Now coming to sec. 2673a, Rev. Stat., which, as I have said, in our opinion limits sec. 1692, paragraph 34, in so far as "real estate" is concerned, that provides "That the council of any city or village, which has not a board of improvements, or board of public works"—(and that includes this city) "shall have power, three-fifths of all the members elected thereto voting therefor, to offer for sale or lease any real estate and appurtenances belonging to such city or village, and place the pro-

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ceeds arising therefrom to the credit of such fund or funds as to said council may seem proper; provided that invitation of written bids for such sale or lease shall be first published for two weeks in some newspaper of general circulation in such city or village, and the sale or lease shall be awarded to the highest and best bidder, but all bids may be rejected and said council may at any time within twenty days after opening such bids award the sale or lease privately to any person at a price not less than the highest bid received; or such lease or sale after similar notice may be made by public auction; and provided further, that said council may until such invitation and award or auction, lease any of said property from month to month upon such terms as they choose, without advertisement so as to produce revenue."

So it will be seen that in order to sell real estate a three-fifths vote of the members of the council and an advertisement for two weeks are required.

With respect to a part of this property at least, it is clear that the proceedings must be under sec. 2673a, Rev. Stat.

4. A question is raised as to the validity of the preliminary legislation which was adopted by the council directing the clerk to advertise for bids. As I have stated, this resolution was passed without a suspension of the rules requiring a reading on three different days, as provided by sec. 1694, Rev. Stat., with respect to resolutions and ordinances of a general or permanent nature.

It is contended on behalf of the city that this is a resolution of that nature, and that, therefore, such reading or suspension of the rules was required.

On behalf of The Kerlin Brothers Company, it is insisted that it is not a resolution of that character. This is an important question in the case. We are of the opinion that if it is a resolution of a general or permanent nature, and is a resolution required to be adopted as one of the necessary preliminary steps for the sale of this plant, the subsequent proceedings lack the necessary foundation or basis to make them legal and to make the sale valid. But the majority of the court are of the opinion that this is not such a resolution as is required by section 1694, to be read on three different days.

It will be observed that this resolution is simply an order or direction to the city clerk to advertise for bids; in other words, to put an advertisement in a paper, as required by sec. 2673a, Rev. Stat., to advise all persons interested in a sale of this property that bids will be received by the common council. In the advertisement based upon this resolution it is provided that all bids may be rejected by the council, so that the highest bidder under this advertisement or invitation does not acquire any right as against the city to have the property awarded to him upon his paying the amount of his bid. The statute contains the same provision. Therefore this resolution or action is not binding upon the city.

We do not undertake to say that the subject-matter to which this legislation pertains is not of a general or permanent nature; we think it is, notwithstanding the transitory and elusive and somewhat disappointing character of natural gas, but we do not regard that as decisive of the question. Manifestly the value or importance of the property or interests involved can have no influence upon the legal question now under consideration. The statute makes no distinction based on value or quantity of property involved. If such a resolution respecting the sale of a pipe line or other property worth a million or more dollars must be passed

with the formalities required by sec. 1694, Rev. Stat., it follows that if the property to be sold were worth but a trifling amount the same formality must be observed, so that no force can be added to the argument that such formality was required in this case by the statement that the property involved is very valuable. And if the proposition that the resolution is of a permanent nature is based upon the fact that the ultimate object, i. e., a sale and permanent transference of title, has in it the element of performance, the same can be said, with equal truth and force of a sale of a worn-out shovel or pick, or other article of small value, solely on the ground that this property is of a permanent character, without respect to its value as we hold that the subject matter of the legislation was of a permanent nature.

It is said by the Supreme Court in *Campbell v. Cincinnati*, 49 Ohio St., 469, with respect to the ordinances there under consideration: "The subject-matter of the ordinances was of a permanent nature—the same test we would apply in making the character of a law as general or local, to depend on the character of its subject-matter." But it will be seen that in that case, as well as in every other case, so far as our search has informed us, in which it has been held that an ordinance or resolution under consideration was governed by sec. 1694, Rev. Stat., as to the mode of passage, such ordinance or resolution was required as a step, as a prerequisite, as a condition precedent in the carrying out of the object in view, and it was also required that such step should be taken by resolution or ordinance and not otherwise.

Another case which has been cited is *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St., 374. In that case it was held that a resolution providing for the taking of a vote of the citizens to determine whether or not bonds should be issued, was a resolution of a general and permanent nature within the meaning of sec. 1694, Rev. Stat., and the court puts the decision upon the ground that the adoption of such resolution is a step to be taken in the accomplishment of the ultimate purpose. But it will be observed that in that case also, the statute expressly requires that such a step shall not only be taken, but shall be by resolution; section 2837 providing that: "Whenever the trustees of any township or hamlet, or the council of any municipal corporation shall by resolution declare it necessary to issue and sell the bonds of such township, hamlet or municipal corporation," etc., then they may proceed to the other steps pointed out.

In *Uppington v. Oviatt*, 24 Ohio St., 232, the resolution was required. That was a proceeding to condemn property, and a resolution setting forth the necessity of condemning the property was required by the statute. It was held that the resolution was not required to be read or passed by the formalities required by sec. 1694, Rev. Stat., because it was a resolution declaratory of the existence of a fact, and declaratory of a purpose, and was not of the nature of legislation providing for future action.

Ordinarily, all that is required to effect a sale of property is an offer by the purchaser and acceptance by the seller, or an offer by the seller and acceptance by the purchaser, followed by payment or delivery. Those are the essential things to accomplish a sale. Where the sale is to be made by a municipality, certain formalities are required—it must be done in a certain way, and these rules which are prescribed, and these formalities which are required we think must be strictly and carefully observed in order to insure the validity of the transaction; but we do

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not understand that it is the province of a court to undertake to prescribe any new or additional formalities—to require any other steps or formalities than those required by the statutes, even though the court may be of the opinion that other requirements and other steps would be advisable.

The majority or the court are of the opinion that a resolution, although of a general or permanent nature, to come within the purview of sec. 1694, Rev. Stat., must be a necessary resolution—a resolution required. If the same thing can be accomplished by a mere motion, and the council without necessity therefor adopts the form of a resolution—an unnecessary formality—it does not follow that the council thereby commits itself to a course which would require of it still farther formalities appropriate to resolution but not required in the case of motion; we are of the opinion that this direction or order to the clerk is not of the character of legislation. But, assuming that it is legislation, the statute provides, in section 1665, that the legislative acts of the council may be accomplished by ordinance, resolution or order. Now, suppose this order, on direction to the city clerk to advertise for bids, should be regarded as arising to the dignity of legislation, why may it not be accomplished by an order? And if by an order, what law is there requiring that such order shall be passed with the formalities required in section 1694? None that we know of. As we have already said, the observance of unnecessary formalities does not require of the council that it shall thereafter proceed consistently and therefore that it must follow to the end the path unnecessarily entered upon. Suppose the council had adopted an ordinance directing the clerk to advertise for bids—a thing which we conceive to be altogether unnecessary—would it follow that that ordinance involving merely an order or direction to the clerk to advertise for bids, could not take effect until it had been published, as required of ordinances of a general or permanent nature? We think not. We think that whether it is called an order, resolution or ordinance, it amounts simply to a direction to the clerk which might as well be accomplished by a mere motion.

Our conclusion upon this matter then is, that the resolution, to come within the purview of sec. 1694, Rev. Stat., must not only be or provide for a necessary step toward the accomplishment of the ultimate object, but it must be a step that cannot be taken otherwise than by resolution.

5. The next question that we encounter is whether a precedent ordinance is required by sec. 1692-34, Rev. Stat., in order to make a valid sale of property—that section reading that the council may provide by ordinance for the exercise of powers. Must the council in some way provide for the exercise of the power before the power exercised? We hold that a fair reading of that provision is that the council may exercise the power through the instrumentality of an ordinance.

6. We are of the opinion that to accomplish a sale in pursuance of secs. 1693-34 and 2673a, Rev. Stat., an ordinance must be passed and published. The question, therefore, meets us, whether this legislation which is denominated a "resolution" accepting the bid of The Kerlin Brothers Company for the gas plant and directing that the price shall be received and that the proper conveyances shall be made, etc., is an ordinance and sufficient for the purpose. And upon this question the court is not unanimous, but a majority of the court is of the opinion that that is to all intents an purposes, and "ordinance."

In *Blanchard v. Bissell*, 11 Ohio St., 99, something is said by Judge Scott in the way of undertaking to distinguish between an "ordinance" and a "resolution." It was held in that case that the signature of a presiding officer—the mayor, I believe—was not necessary to the validity of the ordinance; and at page 108, this is said:

"Beside, we are not aware of any provision of the statute which requires a town council to levy taxes solely by ordinance. Such an act, by whatever name it may be called, is properly in the nature of a resolution. It is of a temporary character, and prescribes no permanent rule of government. And though clothed in the forms of an ordinance, it may well have the effect of a resolution without the signature of the presiding officer."

In other words, it was not to be condemned because it was called an ordinance instead of a resolution. And we think the same rule applies where the instrument is in effect an ordinance, but is denominated a resolution. I have referred to this for the purpose of calling attention to the attempt of the learned judge to distinguish between an ordinance and a resolution. While the features indicated may, in a general way, be regarded as forming a very good basis for a general rule—yet when you attempt to apply such rule to ordinances and resolutions provided for by our statutes, it does not cover the subject. You cannot say that every legislative act that is denominated an ordinance, under our statutes, prescribes a permanent rule of government.

The statute expressly provides that a contract may be entered into by ordinance. Now, would any one pretend to say that such an ordinance which is a contract after it is passed—prescribes any rule of conduct or any permanent rule of government? It simply accomplishes the object in view—the making of the contract. In a contract of sale or purchase, for instance, the whole transaction is closed up by the ordinance. It is, in that sense, of a temporary character, although the results may be permanent, but it does not prescribe any rule of conduct for the people. And so with an assessment ordinance. It is required by the statute that upon certain improvements an assessment against the property shall be made by ordinance, which shall describe the property and shall set out the amount that shall be laid as an assessment upon each part. Of course it cannot be said with respect to such an ordinance that it prescribes a permanent rule of conduct for anybody. In that respect it is in the nature of a resolution, according to the general rule laid down by Judge Scott. Taxes must be levied by ordinance, and it cannot be said that an ordinance levying taxes—prescribing the rate for the year—is an ordinance prescribing a permanent rule of government; it also comes within Judge Scott's definition of a "resolution," since it is legislation of a temporary character. This confusion or uncertainty exists not only in Ohio, but elsewhere. There may be, and I believe there are, states in which it is prescribed by statute that an ordinance shall have certain formalities which shall distinguish it as an ordinance, as "Be it Ordained" etc., and that a resolution shall have certain formal parts, as "Be it Resolved," etc., but we have no such distinctions. The constitution of the state provides for the formal parts of a statute; so that we may determine whether certain legislation may be regarded as statutory, perhaps, by the presence or absence of the words, "Be it enacted," etc., but we have no law prescribing the forms of resolutions or ordinances. I think the general weight of authority is to the effect that the form adopted in municipal legislation is a matter of no consequence, but that

if a legislative act should be and in substance is an ordinance, and all the rules prescribed for the adoption or passage and publication of ordinances in order to have them take effect have been observed and complied with, it shall take effect as an ordinance, and *vice versa* as to a resolution. I want to call attention to a few cases on the subject:

35 Penn. St., 231. I read a paragraph from page 236:

"The next objection, that the order for opening was by joint resolution, and not by ordinance, seems to be disposed of by uniform legislative usage in the city government and by a fair analogy to the constitutional practice of the state legislature. Both joint resolutions and ordinances are passed by both councils, and approved by the mayor; and by the 17th and 18th sections of the act of 11th March, 1789, the laws, ordinances, regulations and constitutions of the city must be published and recorded; and by the 44th section of the consolidation act, the laws and ordinances of the city must be published for the information of the citizens. It is a legislative act, a law, and it matters not whether it be called a joint resolution or an ordinance."

I call attention to *Kepner v. Commonwealth*, 40, Penn. St., 130, but will not take time to go into the case farther than to read some short paragraphs, indicating the opinion of the court upon the general subject. Chief Justice Lowrie, in announcing the opinion, undertakes to distinguish between resolutions, ordinances, regulations, by-laws, etc., and says, at page 129, 130:

"Certainly there is some distinction between these words in ordinary usage. Regulation is the most general of them, meaning any rule for the ordering of affairs, public or private; and it thus becomes the generic term from which all the others are defined, specified or differentiated. Ordinance is the next most general term, including all forms of regulation by civil authority, even acts of parliament. With us its meaning is usually confined to corporation regulations. Ordinances are all sorts of rules and by-laws of municipal corporations. Ordinary usage shows this, and it may be found illustrated in *Willcock on Corporations*, 73.

"Resolution is only a less solemn or less usual form of an ordinance. It is an ordinance still, if it is anything intended to regulate any of the affairs of the corporation. If the word "Ordinances" in the act of assembly, does not include such resolutions, the law that requires ordinances to be submitted to the mayor for his approval, is of no force at all, because it allows its substantial purpose to be defeated, by giving to ordinances the form of resolutions.

"What we have said cannot, of course, apply to rules of council properly so called, for these are mere rules of practice of the council itself in its deliberations, passed by virtue of an authority inherent in all associated functionaries, and implied when not expressly granted; and establishing the forms under which they act in the process of passing ordinances. They are not ordinances, but rules for passing ordinances.

"Ordinance, then, is the generic term for acts of council affecting the affairs of the corporation; and we can make no distinction between them founded on the difference of degree in which they affect those affairs. Such a distinction would necessarily be so indefinite as to give rise to great difficulties in practice, and involve the danger of frequent resorts to the courts to settle disputed questions, and of frequent legal controversies upon the validity of acts of councils, even after they may have been carried into effect."

First Municipality v. Cutting, 4 La., 335.

"It is no objection to the validity of an ordinance of one of the municipalities of New Orleans, containing a prohibition and attaching a penalty to its violation, that it purports by its terms to be a resolution."

Authorities to the same effect may be found in 1 Dillon on Municipal Corporations, 388; 45 N. J. 279, and 40 Wis. 204, are to the same effect, and we find no authority holding a contrary doctrine. There are cases where it is held that matters to be accomplished by ordinance cannot be accomplished by resolution, but in all such cases, so far as we observe, the resolutions in question were not passed and published with the formalities required of an ordinance, and that fact is emphasized by the court.

In the Case at bar each resolution accepting a bid contains every essential provision of contract of sale: *i. e.*, the provisions that the offer is accepted; that the purchase money shall be received and converted into certain funds, and that a certain conveyance shall be made.

Whether this is real or personal property, though much debated, it is not necessary to decide, since we hold that the requirements as to real estate have been complied with, and that is sufficient to cover personalty as well as real property.

7. Another question is whether the conditions in this bid invalidated the sale? It will be observed that the notice of sale sets forth that in addition to accepting bids for the property, bids will be received that will cover the "right to lay down, maintain and operate in the streets, alleys and public places of said city, gas pipes and their connections, for the purpose of supplying natural and manufactured gas to consumers in said city," etc. The bid of The Kerlin Brothers Company contains an offer to pay \$102,000 for the property outside the city and another offer to pay \$126,000 for the property inside the city, and still another distinct offer to pay \$228,000 for the property inside and outside the city; and following that, it reads "this bid is made upon the following express conditions," and then follows what I have read therefrom as to the right to continue to operate the plant, the fixing of a satisfactory rate for gas, etc. Although in one sense this proposal submitted by the Kerlin Brothers Company is a single bid, yet when we come to distinguish between the different parts, there are in fact three bids submitted. We are of the opinion that a fair construction of the proposal is that the provision as to conditions applies to the last bid only, the bid for both the inside and outside parts; that it does not apply to the bid for the inside part alone nor to the bid for the outside part alone and we think that is made more clear by the provision that they shall have "the right to continue to operate said city natural gas plant, and to take up the same." Said natural gas plant was composed of property inside the city as well as outside the city. No *part* of it could be fairly described as "said natural gas plant," but these words describe the whole.

Again, they are to have the right to "maintain gas pipes and their connections, and all necessary appliances to enable them to continue the supplying of gas" (and the only gas they can *continue* to supply is natural gas) "to consumers in said city, in the same manner as is now done and proposed to be done by the present operation of said plant." They are to have the right to *continue* to supply gas *in the same manner as is now done*;" and that was done through the old pipe line in the field

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and through Hancock and Wood counties and to and within the city of Toledo. So we are agreed that these conditions do not apply to and do not invalidate the bid as to the outside property alone.

That is the construction that we would put upon this contract, that is to say, upon this offer and its acceptance; but it evidently is not the construction that has been put upon it by the council and by The Kerlin Brothers Company with respect to the inside part. It may not have been the construction that they put upon it with respect to the outside plant, but that is not material because during the life of the council in which the proceedings were inaugurated, all of the conditions with respect to the outside plant were waived. The money was paid in, was accepted, and the council directed that the property should be delivered. With respect to the inside property, however, the case is different. The Kerlin Brothers Company and the council treated the conditions as applying to the inside part of the property until after the life of the council had expired. It is a familiar rule of construction of contracts that the court will be aided by and in many instances will follow the construction adopted by the parties themselves as indicated by their conduct. In view of the construction put upon this proposal by The Kerlin Brothers Company and by the city—in view of the fact that Kerlin Brothers & Company did not until after the legal death of this council, undertake to waive any of the conditions as to the inside plant, but were undertaking to have the franchise and the rate ordinances passed as a part of that which they had no right to insist upon, we hold that the bid and the acceptance thereof should as between said parties receive that construction, and that therefore the acceptance, so far as the inside plant is concerned, must be considered as a conditional acceptance. By accepting this bid the council did not abdicate its power in the premises or undertake to confer upon The Kerlin Brothers Company a right to fix the price of gas in the city, but it was simply an acceptance upon the condition that if they failed to come to an agreement upon a contract fixing their right to operate and the rates that they might charge, then the bids on the one hand and the acceptance on the other would fail and would not consummate the agreement. Now since that condition was not waived nor complied with during the life of that council, we hold that by virtue of the provisions of sec. 1691, Rev. Stat., that "The council shall not enter into any contract which is not to go into full operation during the term for which all the members of such council are elected," the transaction as to the inside property was not completed so as to go into full operation as a sale during the life of the council, and could not be completed subsequently by waiver of conditions or otherwise so as to validate the sales thereof.

8. We come now to the consideration of the last important question in the case, and that is as to the value of this outside property. We have spent several days in the hearing of testimony of witnesses and receiving other evidence as to the value of this property. It has taken a very wide range, and everything offered which was likely to reflect any light upon the subject was received and has been given consideration. The conclusions reached and already announced make it unnecessary for us to declare any finding as to the value of the property within the city, a problem into which enters the question of the value of the franchise and rate ordinances mentioned, and with respect to which witnesses have expressed the widest divergence of opinion, the estimated values of the privileges thereby to be conferred ranging from

some millions of dollars to absolutely nothing. As to the outside property this question does not enter into the problem, because (as before stated) we hold that the conditions expressed in the bid do not apply to this property alone. But even as to this the estimates of value are widely apart. In view of the nature of the property we cannot regard much of the testimony as to value as more than estimates, since it is impossible to exactly determine the value as the property lies, a large part of it being beneath the ground. Consequently we do not find it possible to be precise or definite in stating our finding as to the value. We can only say that we find from the evidence—and here I only speak for a majority of the court—that it is probably of a certain value, and this is based on what the purchaser or the city could probably have obtained for it in the market as soon after the bid and acceptance as it was practicable to put it on the market, and we put this probable value at not more than \$200,000.00. Mr. Philipps, an expert witness called on behalf of the city, puts the whole value of the property outside the city at \$227,000. On the other hand, Mr. Kerlin—who appears to be an expert also on the matter of second-hand pipe and the cost of taking it up and laying it down and what may be done with it on the market, and what deterioration may be expected, puts the value of the whole property at about \$122,000. Now these two estimates are about \$100,000 apart, and they are perhaps the nearest together of those given by any of the witnesses produced by both parties. In point of information and ability to speak intelligently with respect to the value of this property, we believe they are the best witnesses produced. Mr. Kerlin, of course, is interested in the matter, and his interest must be taken into consideration in the weighing of his evidence. Mr. Kerlin took into consideration certain alleged proper discounts and freight charges and other losses and percentages, that are, to say the least, very liberal, reducing the value. On the other hand, we are of the opinion that Mr. Philipps omitted certain elements and considerations which should reduce his estimate. I will not undertake to discuss this in detail. He makes no allowance whatever for freight, in which he is perhaps correct. He makes no allowance for the removal of the pipe from the place where it would lie after taken from the ground, but he gave the value of it where it would lie after taken up, and he allowed but three cents a foot for taking it up, which we think is too low. We think he does not make a sufficiently large allowance for the cost of cutting off this shoulder of the pipe, which, according to the testimony of all the witnesses, must be done in order to make the pipe marketable and useful as pipe is now used; nor for the joint which is required in order to make this a complete pipe, and other matters not mentioned in our judgment should modify his estimates, so that we think that the true and actual value of this pipe lies somewhere between the amount stated by Mr. Philipps on the one hand and that stated Mr. Kerlin upon the other. Now it is said by Mr. T. P. Brown, a witness for the city, that the purchaser of this pipe is "buying a pig in a poke," and Mr. Philipps testifies that after pipe has been in the ground for ten years, as this has, it is likely to be so much deteriorated that it is not safe to buy it at all until it has been uncovered, and that he would not undertake to bid on it on account of the uncertain condition of the pipe, until it had been taken up. No objection was made to his making this statement, but it was taken with other testimony of a like character perhaps not strictly admissible, but not objected to. Mr. Philipps testified that the life of pipe of this

character, buried as this is about fifteen years. If that is true, then two-thirds of the life of this pipe is gone. But he afterwards modified that by saying he thought he should have stated it at perhaps twenty-five years instead of fifteen; and if that is correct then two-fifths of the life of this pipe is gone, and that will certainly reduce the value of it very materially. But it is agreed upon all hands that you cannot tell much about the value of any certain line of pipe that is in the ground, as it depends upon various conditions. It may be said that the council should not have proceeded to sell this pipe in this way, as Mr. Brown puts it, "Like a pig in a poke." It has been suggested in argument that it would have been better for the council to have taken up this pipe and to have found out what condition it was in before selling it. That may be true, and yet it may be that if they had dug it up they would have found that they had something much less valuable than they supposed, and something that they could not obtain as good a price for as they have obtained for this.

The value of this pipe forms the most considerable part of the value of the outside property, but we have taken it all into consideration in our estimate. The leases are of but slight value. The pressure of gas, which affects in a somewhat corresponding ratio its volume, has fallen off in the fields from which the city has been drawing the most of its supply, from 375 pounds ten years ago to two pounds at the present time. In one part of the field—up about Dunbridge, the pressure was about 400 pounds and had been reduced to 35 pounds; but very little gas is brought from that section, the larger field is below, where the pressure has been reduced as I have stated. This shows the slight value of the gas leases. As a result of this falling off of gas the supply to the city has been reduced steadily and it has finally fallen so low that for the past year, as shown by undisputed testimony, the plant was run and at a loss of about \$10,000; Mr. Heston, the manager, so testified; this is not taking into account the interest on the debt created no the establishment of this plant. The supply of gas, according to the testimony, continues to grow less day by day, and there does not appear to be any way to mend the matter, unless by discontinuing the business or by establishing a plant to manufacture gas for sale to the people of this city. Whether the latter plan would probably prove profitable is a question upon which witnesses differ widely. It is a question of policy to be determined by the proper city authorities, and with which we have no business whatever, except as the testimony of witnesses upon the subject tends to throw light upon the question of the value of the property. What has been said with respect to the recent results of the city's operating the plant in furnishing natural gas is enough to indicate clearly that for that purpose the plant is not valuable to the city, but quite the contrary, and unless it can be made more valuable by being devoted to the conveyance of artificial gas, its value is no more than what it will bring as second-hand material. Since the part beyond the city could not be utilized, as it lies, in connection with the distribution of artificial gas, and since the natural gas supply in the field to which it reaches is practically exhausted, it follows that the value of the outside part as second-hand material is its only value.

The fact that this property has been twice offered to the highest bidder—once in August, 1899, and again in December, 1899—in the methods required by the statute, and at times when the price of iron pipe of all kinds was higher than it has been for many years—the last

time the price being 25 per cent. higher than at the time of this hearing—and that the bids on both occasions by the different bidders were as near in amount to one another and to this last bid of the Kerlin Brothers Company as would be expected where honest competition prevails, helps us in arriving at a conclusion as to the value of this property.

When we give fair consideration to the unprofitable results which have accrued to the city therefrom, and the improbability of the market price of iron maintaining its present high stage, or at least that obtaining at the time at which the bid was submitted, and the chance taken by the purchaser with respect to the present condition of the property, and with respect to the condition of the market when he shall be able to put the pipe upon sale, and the fact that a purchaser has a right to count upon a fair profit in the transaction and will make his bid accordingly, we cannot find from the evidence that the price bid by the Kerlin Brothers Company was so far below the apparent fair market value at the time of the sale as to make the action of the council in selling it at that figure so reckless or improvident as to amount to an abuse of corporate power, or, in other words, an abuse of their discretion in the premises. Indeed, we seriously doubt, after hearing all the evidence, whether if this property were again offered, after the fullest publicity, it would bring a higher price than that for which it has been sold. It may be remarked that during the pendency of these public negotiations, while the subject has been in every citizen's mouth, and not only the publication which was regularly made in one newspaper was given to the world, but the other newspapers of the city have had much in print upon the subject, so that the public has had an opportunity to keep close track of the proceedings, up to the time that this bid was accepted, and up to the present hour, so far as the evidence shows, after this second bid was put in by the Kerlin Brothers Company, no one had appeared to offer to the city one dollar more for the property.

Furthermore, on the first occasion when the bids mentioned were made, the Northwestern Ohio Gas Company, one of the bidders, was desirous of obtaining this pipe to use in extending its lines to Fairfield county, and said company, by purchasing, would not only have obtained the pipe which it desired, but it would have accomplished the closing out of the city as a competitor in the natural gas business, thereby leaving it without a competitor in the city, a result that certain witnesses seem to think would be worth millions of dollars to it, and that the city should receive millions of dollars for permitting, and yet for the plant inside and outside and the other possible advantages, this company bid but \$228,000. One fact like this is worth more to a court intent upon discovering the truth than the mere estimates of a multitude of witnesses who cannot furnish reliable *data* as a basis for their opinions, and who do not risk or offer to invest a dollar in reliance thereon.

Now it cannot be said that it would not be worth while for anybody to appear and offer more, because when this transaction was closed it was within the power of the council under the statute to have sold that ground at a private sale at a price not less than this bid. It is a homely saying, but we think it has been used in this case quite appropriately with respect to the value of this property upon the market when you come to offer it for sale, as indicated by the bids and offers, and the absence of greater offers, that "The proof of the pudding is in the eating thereof."

There must be a clear abuse of corporate power upon the part of a legislative body to authorize a court to interfere, or to justify it in so doing. The administration of the affairs of the city is by the law entrusted to the council and officers of the city, and the council in matters of this kind is invested with a wide and extensive discretion, and so long as it keeps within its powers its authority is supreme and not subject to the supervision or interference of the courts.

It is not sufficient for us to find that a better price might have been obtained, or that in our judgment a different course should have been pursued. When we find that the course has been pursued that the statute marks out, and that the necessary steps have been taken, that is as far as we are authorized to go in that direction. To authorize us to interfere upon the mere ground that the price is not sufficient, it seems to us it should be so much less than would probably be obtained by again offering the property that it might be said by all men of fair judgment that the acceptance of the bid was a reckless and improvident act, and we do not think that that case is presented here.

I have spoken of the fact that according to the testimony of witnesses it appears that iron at this time had reached a very high figure, yet this was the best price which was offered and the best price which has been offered since; and that the price of pipe was not likely to remain at so high a figure, was a matter to be fairly considered and contemplated by those who were in the market buying and selling. That it was but the exercise of good judgment to assume, as we must suppose they did, that the prices would not remain at that figure, is evidenced by the fact that since that time it has fallen 25 per cent. as witness testify, so that the price is one-fourth less in the market than it was at the time this bid was accepted.

I will not extend the discussion farther. I have taken much time in the discussion of this case because of the importance of the questions and issues involved to the city and the inhabitants thereof as well as to The Kerlin Brothers Company and the interest manifested by the public, all of which have seemed to require or at least justify that course.

The judgment of the court is that there shall be an injunction issued in the equity case, with respect to the inside property only. The cross-petition in the replevin case will be dismissed. That will leave the replevin case still pending in the court below: And we are of the opinion that as the result is partly in favor of one contestant and partly in favor of the other, they prevailing respectively as to practically equal parts of the property, the costs should be equally divided.

HULL, J., dissenting.

I have been unable to agree with my colleagues in all of the conclusions at which they have arrived, and, in view of the importance of the questions involved in these cases, it has seemed to me to be my duty to state my views, orally and briefly, upon the questions concerning which I differ from the majority of the court.

It is my judgment that the same decree should have been rendered in this court that was entered in the court of common pleas, enjoining the sale of this property and plant both outside and inside the city, for the reason that the sale of the part of the plant outside of the city is invalid on account of irregularities in the proceedings of the council; and for the further reason that taking into consideration all of the irregularities in those proceedings, considering the price at which the prop-

erty was sold and the manner in which it was sold, the sale itself was an abuse of corporate power, within the purview of sec. 1777, Rev. Stat.

The application for an injunction in these cases is made by the city solicitor on behalf of the city or on behalf of the taxpayers of the city.

The judge of the court of common pleas found that the preliminary resolution which was introduced in the council looking toward this sale and directing the advertising of this property was a resolution of a permanent and general nature and that a resolution was the proper method of bringing this matter before the council, and that, therefore, it was necessary to proceed according to sec. 1694, Rev. Stat., and to have had that resolution read before the council on three separate days, or to have had such reading suspended by a three-fourths vote of the council. And this is also my judgment, if the council could proceed by resolution alone.

It is urged, however, that it was not necessary for the council to proceed in as formal a manner as by resolution. It is conceded that this sale, or attempted sale, is to be governed by the provisions of sec. 2673a, Rev. Stat. The council attempted to proceed under that section. A portion of the property at least being real estate, and a very large part of it appurtenances to real estate, and all being sold together, it is clear that the provisions of this section must control; and the section provides that before a sale is made certain things must be done by the council. It provides :

"That the council of any city or village, which has not a board of improvements, or board of public works, shall have power, three-fifths of all the members elected thereto voting therefor, to offer for sale or lease any real estate and appurtenances belonging to such city or village, and place the proceeds arising therefrom to the credit of such fund or funds as to said council may seem proper; provided that invitation for written bids for such sale or lease shall be first published for two weeks in some newspaper of general circulation," etc.

The council may offer for sale any real estate belonging to the municipality if they comply with the provisions of that section, and that section was passed after sec. 1692-34; and the purpose of it seems to be to provide in some manner for the sale of real estate and to lay down the steps that the council must follow in order to sell real estate. It provides that three-fifths of the members of the council elected thereto must vote therefore, so that some action of the council was necessary to bring the matter before it.

Section 1692-34, Rev. Stat., provides for the exercise of the power of sale. Section 2673a does not provide how this matter shall be brought before the council, and it has been said the council may act by ordinance, resolution or order, as provided in sec. 1655. They passed a piece of legislation, however, which was called a "resolution." They did not proceed by order, and in my judgment the word "order" in this section does not relate to such a proceeding as this, but is akin, in some respects, to the word "warrant;" and in that I am supported by Dillon on Municipal Corporations. They undertook to pass a resolution in order to bring this before the city council. It was evidently the judgment of the city council—the legislative body—that this was necessary. It was, apparently, the judgment of counsel who, according to the testimony, either prepared or superintended all of the proceedings in regard to this matter, that a resolution was necessary. And that is the way they proceeded. It has been suggested that they might have proceeded by

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motion. But they did not so proceed, and I do not think it was the intention of the legislature that a matter of such importance as this should be brought before the council for its consideration in as informal a manner as a motion. It was not the purpose of the legislature in enacting this statute to provide that all that should be necessary to start proceedings to sell city property would be for a member of the city council to move that they sell the city hall, or sell the gas-plant or any other piece of public property, and that the clerk be directed to advertise for bids. A resolution is as informal a way at least as was intended by the legislature that the council should proceed, under this statute. In any event, they proceeded by resolution in this case, and it seems to me that when their action comes before a court the judgment of the legislative body as to the particular manner in which they should proceed—there being no express provision in the statute—is entitled to some weight.

If the resolution is of a permanent and general character, it must have been passed according to sec. 1694; have been read three times on separate days, unless suspended by a three-fourths vote of the council. Now this provision of sec. 1694 is a provision of great importance. It is not one that should be diminished or weakened by judicial construction. The powers that the council and municipal bodies have are such powers as have been conferred upon them by the legislature, and no others, and those powers, as the Supreme Court of this state has said many times, are to be strictly construed against the corporation, and whenever there is any doubt, as the court have said, and many other courts of last resort, that doubt is to be construed in favor of the taxpayers and against the council who are attempting to act. This provision of sec. 1694, Rev. Stat., is intended to restrict the council in the performance of such acts as are of a general or permanent character, intended to require deliberation and intended to require them to have such a resolution read at three separate and different meetings, to give the council an opportunity for discussing it and thinking about it, and to ascertain, if they see fit, the views of the people, who are their immediate superiors and principals, in regard to the action which they propose.

It seems to me that there can be no question but that this resolution was one of a permanent and general nature. It was a resolution that set on foot proceedings for the sale of property that cost the people of this community a million and a quarter of dollars. It was a resolution to begin proceedings that looked toward the taking from the public the title to this property and forever vesting it in private owners. It was a resolution in which not only every taxpayer but every inhabitant of this municipality was interested. The Supreme Court said in *State v. Toledo*, 48 Ohio St., 112, where the validity of the Toledo natural gas works statute came in question, on page 140 of the opinion:

"The natural gas works for which Toledo has issued its bonds, are owned and controlled by the municipality, and not by individuals. But every citizen, as a member of the community, has an interest in their construction, management and maintenance. The advantage resulting from them is tendered on equal terms to every inhabitant of the city. And the terms and conditions on which the benefits are to be enjoyed by the whole people are dependent largely upon the action of the people themselves. In our judgment, the taxation authorized by the general assembly for the payment of the bonds issued, was in no wise to subserve a private purpose, when used as language of constitutional limita-

tion. The establishment of natural gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy. But, in deciding whether in a given case, the object for which taxes are assessed is a public or private purpose, we cannot leave out of view the progress of society, the change of manners and customs, and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power. And, in deciding whether such taxes shall be levied for the new purposes that have arisen, we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and by long course of legislation levied."

And, on page 137 preceding this, the Supreme Court said, at the inception of this enterprise:

"Heat being an agent or principle indispensable to the health, comfort and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens, as to furnish water."

So that the Supreme Court held that not only every taxpayer but every individual of the municipality had an interest in the natural gas works, and seemingly set its approval so far as it could upon the plan which was then conceived to be for the advantage of the whole people.

It is not necessary for me to read from *Campbell v. Cincinnati and Elyria Gas and Water Co. v. Elyria*, *supra*, which have been cited by my colleague and which hold that any resolution of a permanent or general character must be read three times, on three separate days, unless the rule is suspended, and in default thereof that the action of the council is absolutely null and void. This court at its last term in this county, held that a resolution looking toward the ordering of the construction of a four-foot sidewalk in front of a fifty-foot lot was a resolution of a permanent character and must be passed according to sec. 1694. A resolution which resulted in the sale of property which had cost a million and a quarter dollars and in which every individual in the city was interested, is certainly a resolution of as permanent a character as a sidewalk resolution. The opinion of the judge of the common pleas court in these cases upon this question is full and complete and it seems to me that the argument which he makes supporting the proposition that a preliminary resolution was necessary and should have been passed according to sec. 1694, is unanswerable.

It is urged further, by the city solicitors and other counsel for the taxpayers, that before any steps were taken looking toward this sale or the beginning of the sale, an ordinance should have been passed, providing for the exercise of the power of sale of municipal property, and I am inclined to that view. No such ordinance was ever passed by the common council of the city of Toledo. Section 1692-34 provides for the exercise of the power of sale of public property by municipal corporations. It reads:

"In addition to the power specifically granted in this title, and subject to the exceptions and limitations in other parts of it, cities and villages shall have the general powers enumerated in this section, and the council may provide by ordinance for the exercise and enforcement of the same."

And subdivision 34 reads:

To acquire by purchase or otherwise, and to hold real estate, or any interest therein, and other property, for the use of the corporation, and to sell and lease the same.

In my judgment, under that section, before any steps can legally be taken by the council to sell the property of the municipality, the council must provide by ordinance for the exercise of that power. This is the language of the section, if we are to construe the word "may" as "must" or "shall," and it should be so construed. In the 14 Am. & Eng. Ency. Law, 979, the general rule is laid down thus:

"The word 'may' in a statute is sometimes used in a mandatory and sometimes in a directory and permissive sense. It has always been construed as 'must' or 'shall' whenever it can be seen that the legislative intent was to impose a duty and not merely a privilege or discretionary power, and where the public is interested and the public or third parties have any claim *de jure* to have the power exercised."

And in 50 U. S. (9 How.), a decision of the Supreme Court of the United States, I read a few words from page 259, where the court quote from the language of an English case:

"Where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall';" thus, 23 Hen., 6, says the sheriff *may* take bail; this is construed he *shall*, for he is compellable to do so."

"Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been "to impose a positive and absolute duty."

The question is discussed quite fully in Mechem on Public Officers, sec. 593. The last paragraph of the section, quoting from Chief Justice Nelson, of New York, is as follows:

"The inference deducible from the various cases on this subject seems to be that where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty though the phraseology of the statute be permissive merely and not peremptory."

This statute, therefore, should be read that municipalities shall have the power to acquire and dispose of real estate and they *must* provide by ordinance for the exercise of the same. Now, *when* must they provide by ordinance for the exercise of this power? After the sale is made? After the advertisements have been published? After bids have been made? After proposals have been accepted? After everything is done but the transfer of the purchase money into the city treasury and the order to the mayor to make a deed? The time to provide for the exercise of this power is before the municipality begins to exercise the power.

Section 2673a provides that before this property can be sold they must advertise it. That they undertook to do. It seems that after the advertising of the property for sale, and the offering of it for sale to The Kerlin Brothers Company and others, under this section, it might have been sold either at public auction or upon written bids as was done in this case, and the offering of it for sale was as much a part of the sale as the acceptance of the proposal of Kerlin Brothers. The offer to sell

and the advertising for bids are necessary parts of the sale under this section. After the property had been offered for sale and the bids had been received and opened a resolution accepting the Kerlin bid was passed, and it is urged that that is an "ordinance" providing for the exercise of the power of sale, and that therefore this statute has been complied with. This has been read. It reads, including the title, as follows:-

"Resolution accepting the bid of the Kerlin Brothers Company for gas plant lying outside of city of Toledo.

"Resolved by the Common Council of the City of Toledo, Ohio, that the proposal of the Kerlin Brothers Company, for the purchase of all that part of the property (as advertised) owned, used or connected with the City Natural Gas Plant lying outside the city of Toledo," etc. (And then it describes it) "at the price of \$102,000, be and the same is hereby accepted and upon the payment of the purchase money, the mayor and city clerk are hereby authorized and directed to execute and deliver to the said The Kerlin Bros. Company, proper deeds and conveyances of all of said property."

I am unable to reach the conclusion that that is an ordinance. Evidently the council did not regard it as an ordinance when they were passing it, because they denominated it a "Resolution," and whoever drew it did not regard it as an ordinance. It does not contain the formal parts of an ordinance, nor is it within any of the definitions of an ordinance. An ordinance is a law of some kind. It is so defined by Dillon. It is a by-law of the corporation for the government of the people or for the government of the council. It has been defined by our Supreme Court, as has been read, as a piece of legislation that lays down a permanent rule of conduct, as distinguished from a resolution, which is only temporary in its character. I am unable to see anything in this resolution which simply accepted the bid which had been made by the Kerlin Brothers Company and directed that the property should be turned over to them, anything that savors of an ordinance or of a permanent rule of conduct. The publishing of it did not change its character and make it an ordinance. It is exactly what it appears to be upon its face—a resolution of acceptance of this bid, and cannot be construed to be an ordinance providing for the exercise of the important power of sale of property belonging to the municipality. It rather falls within sec. 1698, following 1692, which provides that: "No contract, agreement or obligation shall be entered into except by an ordinance or resolution of the council." The sale had been made, so far as it could be made, and everything done except the acceptance of the bid, which consummated the sale, and the receipt of the money, the making of the deed and the turning over of the property.

Upon this question of what constitutes an ordinance, I cite Dillon on Municipal Corporations, sec. 307; *Blanchard v. Bissell*, 11 Ohio St., 96-103; 32 Kan., 456, 467, 468. The Supreme Court of Kansas there held that if an ordinance was required, a ratification by ordinance was not sufficient; the court say:

"A majority of the court hold that the mayor and council are themselves only agents, and in providing for street improvements to be paid for by abutting lot owners, can only act in strict accordance with the powers delegated to them; and if they act in some other mode than that provided for by statute, as by resolution, where they should act by ordi-

nance, their acts are utterly null and void, and cannot be subsequently ratified or confirmed by ordinance or otherwise."

If there is any doubt whether this was an ordinance or not; if there is a doubt as to whether an ordinance is required, under the authorities, that doubt should be resolved in favor of the taxpayers and against the exercise of the power, 1 Dillon on Municipal Corporations, sec. 89, and the language here used has been practically adopted by our Supreme Court in *Ravenna v. Penn. Co.*, 45 Ohio St., 121. Dillon says:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied."

I am of opinion that before this power of sale could be exercised in any respect it was necessary that the council should pass an ordinance providing for the same, and I am unable to arrive at the conclusion that this paper which was denominated a resolution—the acceptance of The Kerlin Brothers Company bid—was an ordinance providing for the exercise of such power of sale, and for that reason the proceedings for the sale and the attempted sale, in my judgment, were null and void, both as to the outside and the inside property.

It is also charged that the council was guilty in this transaction of an abuse of corporate power. Section 1777, Rev. Stat., provides: He (the city solicitor) shall apply in the name of the corporation to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the corporation or the abuse of its corporate powers * * *. This question was not presented in the common pleas court, as no evidence was offered in that court except upon the alleged irregularities in the proceedings of the council. The proceedings looking towards the sale of this plant covered some time, evidently; for the evidence shows that in July, 1899, the council took steps to have this property advertised for sale, and in considering whether the council has been guilty of an abuse of corporate power, it is necessary to speak briefly of what was done with reference to the whole transaction.

As has been said by my colleague, whether it was good policy or not to dispose of this plant, is a matter which is undoubtedly committed by the law to the judgment and discretion of the council. All of the court agree, under the law as it stands, that the council, if it proceeds according to law, may sell the property without the concurrence of the gas trustees. A section of the statute provides that waterworks can not be sold without the concurrence of the waterworks trustees, and that school property cannot be sold without the concurrence of the board of education, and that infirmaries cannot be sold but with the concurrence of the board; but, for some reason, or from oversight the legislature did not provide that this property could not be sold without the concurrence and approval of the gas trustees. It would have been a very wise provision had the statute provided, as it does in the case of waterworks, that the gasworks should not be sold without the concurrence of the trustees who had been elected by the people for the purpose of managing this property, some of whom had

been members of the board for many years, and the entire plant being an institution established by a vote of the people—for, upon examination of the statute, we find that it required a vote of sixty per cent. of the voters voting thereon to authorize the issuance of the bonds. It might be presumed that these trustees, among whom, were some of the most prominent citizens of the community and who had given these questions much consideration, they might be presumed to have more knowledge of what would be best to do with this plant than men who had recently been elected to the council and who had had no experience in such matters, and it would have been a very proper act of the council to have sought the advice of the gas trustees in regard to selling the property and plant, but the statute does not require that. In July of last year this property was first offered for sale. The highest bid then was \$256,000. After the bids were opened, the mayor of the city, as he testified, in order to save the property from sale to private owners and being sacrificed at what he regarded as a disproportionate price, filed, within ten days, a cash bid for these two properties, of \$300,000, and was ready and willing to take the property at his bid of \$300,000, and further offered to agree that the city might have the property back whenever it desired to purchase it from him, at what it had cost him. The council might have accepted this bid, under the law, as the statute gives the right to accept any bid within twenty days as high as the highest bid filed. But the council rejected the bid of \$300,000 and rejected all bids, and in October again advertised the property for sale.

By section 2673a, as has been said, it is only required that advertisement be made for two weeks, in some local newspaper, and there was no statute providing that the council should advertise for bidders for this immense plant in different parts of the country, as a private owner would have done or as a receiver would have been ordered to do, to secure bids from men interested in such enterprises all over the United States. But it was advertised for two weeks again, in a local paper only, and bids were again made, two only, one of them being the bid now under consideration in this case, and which contained a condition, among others, that the council should pass a rate ordinance fixing the price of gas to the satisfaction of the Kerlin Brothers Company, a condition wholly unlawful and void, and the council might have entirely disregarded the bid for that reason—for it certainly had no power or authority under the law to agree with The Kerlin Brothers Company that the council would pass an ordinance fixing the rate for the price of gas satisfactorily to them. This bid was afterwards accepted and the council thereafter did pass an ordinance giving them a perpetual franchise in the streets of the city of Toledo, and passed an ordinance fixing a rate for the price of gas satisfactory to The Kerlin Brothers Company; so that the city council did everything in their power to carry out the unlawful and illegal part of this bid. As has been said by my colleague, the life of the council expired before this ordinance required by The Kerlin Brothers Company could go into effect, and therefore it and the attempted sale of the inside plant became null and void, but it was a part of the power attempted to be exercised by the city council and a part of their conduct in relation to this matter, and they sold, or attempted to sell to The Kerlin Brothers Company the inside property for \$126,000 and the outside property for \$102,000, a total of \$228,000.

As the inside property is held by all the court not to have been legally sold, it is not necessary to discuss its value. Under the undis-

puted evidence in this case, the property had enhanced in value from forty to sixty per cent. during the period from July or August to December, 1899, when the property was sold to the Kerlins, say fifty per cent. Pipe had advanced to a very high price. It was scarce, and new pipe was in great demand, and, as witnesses say, second-hand pipe sold readily—for many who needed pipe could get nothing else. The mayor's offer in July, to save the property from sacrifice, was \$300,000; by December the property had advanced fifty per cent. in value and was then sold for \$72,000 less than the mayor's bid in July.

There was a large amount of testimony offered here as to the value of this plant and property outside of the city bearing upon the question of the abuse of corporate power. There were some seven witnesses called, five on the part of the city and two for the defense. Although the question as to the exact value of this property, as has been said, is somewhat difficult to answer, yet experienced men, who have bought new pipe, who have laid it in the ground and who have seen it after it came out, and who knew the nature of it, are able to tell pretty nearly what it is worth, and the only way that a court can arrive at its value is to take the evidence here and from it reach a conclusion. Upon this question, for the defense, R. G. Kerlin, the president of the defendant company, testified, and one witness from Indiana by the name of Driscoll, who is in Kerlin's employ, or in the employ of a company in which Kerlin is interested. Taking all of the testimony together and averaging it, as is sometimes done would make the value of this property outside of the city \$325,000—in round numbers. Mr. Grossweiler, who had had sixteen years' experience in the business, and who is now connected with the Toledo Gas & Fuel Company, and who was six years purchasing agent for that company and was perfectly familiar with prices, gives his estimate of the value of the pipe at about \$225,000; which was about fifty per cent. of the value of new pipe; and I may say that new pipe at that time had as stable and fixed a selling price and specific value as wheat, and when the value of the other property is added, it makes a total of about \$285,000. The mayor of the city, Mr. Jones, who testified that he had had large experience in the gas business since 1865, and in both new and second-hand pipe, that he had employed many men and carried on a large business, made a careful estimate of the value of this plant outside the city and testified that in his judgment it was worth \$400,000, to dismantle, take up and sell on the market. Mr. T. P. Brown, who was a gas trustee for some years, testified that in his judgment it was worth \$575,000. Mr. Edwin D. Philipps, brought here from Columbus, who appeared wholly disinterested, who was for sixteen years in the natural gas business, estimates the entire value of the plant outside at \$236,000, and in round numbers, the pipe-line alone, about \$225,000. Mr. William P. Heston, who has been the manager of the natural gas plant ever since its inception and who probably had as good an actual knowledge of this pipe as any one who was called, estimated the value of the plant outside the city at \$600,000. These estimates were all of its value to dig up, dismantle and sell. Mr. Driscoll, who came here from Indiana, and who was in the employ of the Kerlins, and Mr. Kerlin himself were the only witnesses called by the defense on the subject, and they testified that in their judgment, when everything was taken out that should be allowed, it would be worth \$122,107. In arriving at these figures they were obliged to take out ten cents per foot for taking the pipe out of the ground, which would make \$42,000, while other witnes-

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ses estimated this expense at three cents per foot; and they also deducted \$10,000 for possible freight that they might be compelled to pay to ship the pipe to different parts of the country. Neither Mr. Kerlin nor Mr. Driscoll, his employee, could be said to be disinterested. Mr. Philipps seemed to be entirely disinterested and a man who was entirely fair and without political interest in the question, and after a careful computation in the presence of the court, gives his estimate at \$236,333. Mr. Grossweiler, who is wholly disinterested and a man of experience, as I have said, gives his estimate of the pipe alone at \$225,556, and when there is added to this the other things that should be taken into consideration, his estimate runs up to about \$235,000, adding to his valuation of the pipe the value Mr. Kerlin himself put upon the telephone line, buildings, boilers, pumps, etc. Now there are two witnesses who are wholly fair and disinterested and entirely removed from any feeling whatever in the matter, and they give it as their judgment that this property is worth from \$235,000 to \$240,000.

Now it should be presumed that the council knew the value of this property before they undertook to sell in this manner; that they informed themselves as to the probable value of the property which they undertook to sell to the Kerlin Brothers Company for \$102,000 which from the evidence was worth at the very least \$225,000. The sale of property for so grossly inadequate a consideration as this, in my judgment constitutes an abuse of corporate power, and that it should be so held by the court. Allowing to the Kerlin Brothers Company what should be considered as a large profit, say \$25,000, there is here over and above any legitimate profit, \$100,000 of property that belongs to the taxpayers of this municipality turned over practically as a gift to the Kerlin Brothers Company.

While it may be said, and it has been said, that this value is to some extent uncertain, yet it has been made as certain to this court as human testimony could make it, by the evidence of men who had had the widest experience and who appear to be frank, honest and truthful. The defendant was given every opportunity to call witnesses, and it called none except Kerlin himself and an employee, while the city called five witnesses, all without any pecuniary interest in the case except as taxpayers. The average value of this property, taking all of the witnesses together, is, as I have stated, over \$300,000 and its very lowest value is certainly \$225,000. Can it be said that the sale of this immense property for less than half its value, and at a loss to the city of \$100,000, is not an abuse of corporate power? If it is not, then that provision had better be stricken out of the statute. It is put there for some purpose. It should be construed, not strictly against the taxpayer, but liberally in his behalf and strictly against his agents who are handling and selling and disposing of his property. The fact that the plant is being run at a loss on account of the decrease of the supply of natural gas, is no reason or excuse for selling the pipe and other property for half their value.

There have been some decisions upon this question, and I will call attention to one of them. I refer to a New York case, found in 5 New York Supplement, a decision of the Supreme Court of New York. The court say, in a case where property was about to be bought at a price one-fourth more than it was worth:

"For a mere error in judgment, involving no greater difference than might exist between persons purchasing property for themselves,

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the court would not be required to interfere and restrain the purchase under the statute, but for so large a difference as appears here the case requires to be otherwise considered. It involves an appropriation of a large sum of money belonging to the public, for which no equivalent is to be received by the city, and it is accordingly, in all substantial respects the gift or donation of so much money to the person from whom the property is proposed to be purchased. This the law will not permit. It requires the same fidelity, care and caution on the part of the individual representing the public interests as would be expected to be used by an individual purchasing the like property for himself and paying for it with his own money. In all public positions the law not only expects, but it exacts, this degree of care and fidelity from those representing public interests, and it is because these expectations have not always been realized, and the obligation has not been observed, that the statutes have been passed, allowing the taxpayers to institute suits in their own names to prevent the misappropriation of public moneys or public property. It has been found necessary, in addition to the obligations imposed upon public officials, to subject them to this restraint and oversight on the part of the taxpayers, not only to keep down their own expenditures and burden, but to exact from the officials a complete and careful discharge of the duties imposed upon them by the laws."

The court held that it was an abuse of corporate power calling for the interference of the court when property was to be purchased for one-fourth more than its value; and what shall be said when property is sold for less than one-half its value, at a loss to the city of more than \$100,000?

I am unable to avoid the conclusion that under sec. 1777, taking all these things into consideration, here was an abuse of corporate power which calls for the action and intervention of the court. In my judgment the city solicitor was fully warranted and justified and simply did his duty in applying to the court in the name of the taxpayers and people, to protect them from their agents who were thus disposing of their property.

E. W. Tolerton and Hamilton & Kirby, for plaintiffs.

M. R. Brailey, city solicitor, for defendant.

MASTER AND SERVANT.

[Lucas Circuit Court, July 7, 1900.]

Haynes, Parker and Hull, JJ.

FRANK STRABLER V. TOLEDO BRIDGE CO. ET AL.**1. SERVANT HAS A RIGHT TO ASSUME PERFORMANCE OF MASTER'S DUTY.**

A servant who proceeds with reasonable care to enter and remain upon a scaffold in the prosecution of his work has a right to assume that the master has performed his duty of providing and maintaining a safe place and is not required to investigate to determine whether such scaffold is safe; such servant is not chargeable with negligence unless the defect and danger is obvious or unless he has been advised of the failure of the master to perform his duty or of such facts as would cause a reasonably prudent man to investigate the scaffold himself before going upon it.

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2. IS NOT REQUIRED TO INVESTIGATE SUBSEQUENT CHANGES.

Where a scaffold was firmly constructed in the first instance, but, through use or removal of certain boards, by direction of the foreman, it had become racked, insecure and unsafe, a servant without knowledge of such defective condition cannot be charged with negligence in not investigating, even though he had an equal opportunity with the master to make an investigation and discover the defect and danger.

3. KNOWING DANGER AND ASSUMING MASTER WOULD REPAIR.

And if the servant knew that the removal of the boards was likely to render the scaffold insecure, he had a right to assume that the master had performed his duty in again securing it and in the absence of knowledge on the part of the servant that the foreman had not done so, the servant's right to recover is not defeated.

4. NEGLIGENCE WORK OF CONTRACTOR IN BUILDING.

A person who agrees to put floor in a building for another, and fails to do so, whereby another is injured, is liable only to the person with whom he contracted. Therefore, a servant of the master for whom the structure was built, not being a party to the contract, acquires no right of action against the contractor. This rule is not affected by the act of February 23, 1893, 90 O. L., 52.

5. RULE AS TO JOINT LIABILITY AND RELEASE.

Where the failure to perform a duty which was devolved upon one of several defendants, in an action for personal injuries, was not the proximate cause of the accident, as a failure to have a floor provided in a building, from which simply resulted a more severe injury, such defendant is not jointly liable with the defendant whose negligence was the proximate cause of the injury, and a settlement with the former would not release the latter from liability.

HEARD ON ERROR.**PARKER, J.**

Frank Strabler was in the employ of Stephen J. Pickett, engaged in the work of laying brick and other like service upon the Valentine building, in this city, Pickett being the contractor for and having charge of the laying of the walls of the building. The scaffolding upon which Strabler was while at work fell and he was thrown to the cellar of the building and was injured. He brought his action to recover damages against the Toledo Bridge Company, as well as against Stephen J. Pickett, alleging that the negligence of the bridge company consisted in failing to construct floors beneath where he was at work upon this scaffolding, as required by an act entitled "An act to provide for the safety of mechanics and others engaged in the work of constructing buildings." passed February 23, 1893, 90 O. L., 52.

Plaintiff charged that Pickett also was guilty of negligence in this respect; that the duty devolved upon him as well as upon the bridge company to floor the story of the building immediately beneath where plaintiff was at work. And plaintiff further avers that the Toledo Bridge Company were under contract with the proprietor of the building—Ketcham—to construct such a floor; also that Pickett furnished a weak and unsafe scaffold which fell, and that therein he was guilty of negligence.

Upon the trial, after the evidence was all in, the judge of the court below directed a verdict for the Toledo Bridge Company, which was returned accordingly; and then the case went to the jury upon the proofs to determine the rights of Strabler against Pickett, and the jury returned a verdict in favor of Pickett.

Now Strabler prosecutes error, alleging as against the bridge company that "The court erred in directing the jury to return a verdict for

the defendant, The Toledo Bridge Company;" and that, as against Pickett, the court erred in its charge to the jury; and there are other errors assigned, but these are the chief grounds alleged.

On the trial below evidence was introduced tending to prove that the plaintiff, a brick mason's apprentice, while engaged in the service of his master, Stephen J. Pickett, one of the defendants, assisting in the erection of one of the brick walls of a building and while proceeding under the direction of a foreman, went upon a scaffold provided and erected by the master to be used by those doing the kind of work which plaintiff was directed to do, and while plaintiff was engaged in such work the scaffold fell, precipitating plaintiff to the cellar of the building, whereby he received the injuries on account of which this action was brought.

Evidence also tended to show that the scaffold was firmly constructed in the first instance, but that through use or the removal of certain boards therefrom, by direction of the foreman, it had become racked, insecure and unsafe, and that such racked, insecure and unsafe condition was not known to the plaintiff and was not obvious to one working thereon, though it might have been readily discovered by either the plaintiff or said foreman by reasonably careful investigation directed to the end of ascertaining whether it was in a secure and safe condition, but that neither plaintiff nor said foreman, nor any person on behalf of the master inspected or investigated said scaffold after said boards had been removed therefrom. Also that both plaintiff and said foreman knew that said boards had been removed from said scaffold, and that the removal thereof was likely to rack the scaffold and render it insecure and unsafe; but plaintiff did not know that it had not been subsequently inspected by the foreman, and supposing that it was the duty of the foreman to see that the scaffold was kept in a secure and safe condition, and that the foreman had performed that duty, and relying upon that assumption, he went upon said scaffold and proceeded with his work without investigation to determine whether the scaffold was secure and safe.

After evidence had been introduced tending to establish this state of facts, the plaintiff requested the court to charge the jury, amongst other propositions, as follows:

"An employe in going to work for his employer has a right to assume his employer has furnished him a safe place to work, and safe appliances to do his work. He can only be chargeable with negligence when he continues at his work when he knows, or in the exercise of ordinary care is bound to know, the place or appliance is unsafe."

This the court refused to give, and the court did not embody in its charge the principle involved in the proposition requested, but did charge the jury that "If the plaintiff knew or had equal means with the defendant of knowing the danger of the falling of the scaffold while he was at work upon it, he cannot recover."

In refusing to charge as requested and in charging as stated, the court erred. If the plaintiff proceeded with reasonable care to enter and remain upon the scaffold in the prosecution of his work, without investigating to determine whether it was secure and safe, because of his reliance upon the assumption that the master had performed his duty of providing and maintaining a safe place (that is, in this case, a safe scaffold), he would not be chargeable with negligence in so doing unless the defect and danger were obvious, or unless he had been advised of the

failure of the master to perform his duty, or of such facts as would have caused a reasonably prudent man to investigate the scaffold himself before going upon it.

Under the circumstances that the evidence tended to prove as above set forth, reasonable care on the part of the plaintiff would not require him to make such investigation on his own account, and he would not be chargeable with negligence or his right to recover would not be defeated on the ground of negligence because of his failure to do so, even though he had an equal opportunity with the master to make such investigation and to thereby discover the defect and danger.

Plaintiff was entitled to have the law as to his right to proceed upon the assumption that the master had performed his duty in providing and maintaining a safe place, stated to the jury in the charge of the court.

In support of this we cite *Clow & Sons v. Boltz*, 92 Fed. Rep., 572; *Illinois Steel Co. v. Schymanswiski*, 162 Ills., 147; *Vandusen G. & G. E. Co. v. Schelies*, 61 Ohio St., 298.

It was contended upon the hearing, and it was one of the defenses pleaded, that there had been a settlement made by the plaintiff with Mr. Ketcham, the proprietor of the building, on account of this accident, and that Mr. Ketcham had been relieved from liability or responsibility, and that appeared to be true; but we are of the opinion that the absence of the floor from the floor beneath the scaffold where the plaintiff was working was not a proximate cause of his injury; that it was not one of the concurrent causes, that it was simply a condition from which resulted a more severe injury, perhaps, than he would have received if it had been there, and that since no other duty devolved upon Mr. Ketcham in the premises than to have the floor provided, (we do not undertake to say that there was devolved upon him, but no other or greater duty devolved upon him), there was no joint liability, and therefore a settlement with Mr. Ketcham would not have the effect of discharging others who may have been wrongdoers. And since we find that the absence of a floor from the floor beneath the scaffold was not a proximate cause of the injury, and no other or further duty than to provide such floor is claimed to have rested upon the Toledo Bridge Company, we conclude that there was no error on the part of the court in directing a verdict for the Toledo Bridge Company.

It is contended that the Toledo Bridge Company was bound to the plaintiff to provide the floor because it had entered into a contract with Ketcham to provide such floors; but the fact that the absence of the floor was not the proximate cause of the injury, would be an answer to that claim. The fact that it had entered into a contract with Mr. Ketcham to provide the floors is of no consequence so long as the absence of the floor was not a proximate cause of this injury.

There is still another answer to that proposition, and that is, that the plaintiff was not a party to this contract to provide the floors and had no interest whatever therein and could claim nothing thereunder, as held in *Bailey v. Natural Gas Co.*, 2 Circ. Dec., 656, a case decided by this court in which that principle is discussed, and authorities are cited.

For the reasons stated, the judgment of the court below in favor of the bridge company, will be affirmed, and the judgment in favor of Pickett will be reversed and the cause remanded.

Hurd, Brumback & Thatcher, for plaintiff in error.

E. W. Tolerton, for defendant in error, The Toledo Bridge Co.

Rathburn Fuller, for defendant in error, Stephen J. Pickett.

OFFICE AND OFFICER—ELECTION.

[Lucas Circuit Court, July 7, 1900.]

Haynes, Parker and Hull, JJ.:

STATE EX REL. RIGGS V. ELIJAH LEE JAQUIS.**1. FAILURE TO FILE STATEMENT OF EXPENSES—RIGHT TO OFFICE.**

Section 3981, Rev. Stat., 43 O. L., 48, providing, in effect, that if a person elected or appointed to the board of education shall fail to qualify for the office within the period of ten days after the annual organization of the board or after his appointment, a vacancy occurs, involves and implies the converse. Therefore a person elected to such office has ten days after the annual organization in which to qualify, which includes the filing of his certificate of election with the clerk of the board. Thus a person elected on April 2 who qualifies and files such certificate within ten days after the annual organization of the board on the third Monday in April, is entitled to hold the office; and his right thereto is not affected by a failure to file statements of expenses within ten days after nomination and election respectively.

2. SUCH FAILURE NOT WITHIN SEC. 7 OF SAID ACT.

A failure to file the statements of expenses of nomination and election, required by the Garfield law, sec. 3022-5, Rev. Stat., though a penalty is attached, is not within the provisions of sec. 7 of said act, which provides, among other things, that when it shall be made to appear in an action instituted against an officer to deprive him of his office that he has committed one of certain specified offenses, "or that any other acts declared unlawful or made punishable by law of this state, were committed by such officer, his agent or agents, or with his or their consent or connivance * * * to secure or promote his nomination or election" such person may be deprived of his office: The act complained of must not only be unlawful but it must be done with intent to secure or promote his nomination or election, and a failure to file the certificate referred to is not within that class of offenses.

3. COURTS CANNOT ADD TO STATUTORY PENALTIES.

The statute having pointed out the specified offenses on account of which one may forfeit his office, a court is not authorized to add other causes and declare that for such acts or omissions one may forfeit or be deprived of his office. Therefore, the Garfield law requiring statements of nomination and election expenses to be filed within ten days, contains no express provision that one who fails to comply therewith shall forfeit his office, a court has no power to so declare.

QUO WARRANTO.**PARKER, J.**

The relator avers in his petition that at the annual election held in Lucas county, Ohio, on April 2, 1900, for the election among other officers, of a member of the board of education for district No. 2, village of Maumee, in Waynesfield township, Lucas county, Ohio, he was duly elected for the term of three years, beginning with the third Monday in April, 1900, and that he was duly qualified and is lawfully entitled to exercise the powers and duties of the office for that term, but that the defendant, Elijah Lee Jaquis, has usurped and unlawfully holds and exercises said office and excludes the relator therefrom. Wherefore he prays that Jaquis may be ousted and he may be adjudged entitled to said office.

It stands unquestioned upon the evidence that Riggs was elected, having received a majority of votes cast for said office at said election. Some question is made as to whether the election was held upon the right day; whether it is not a special village district in which the election was not required to be held on another day; but we have concluded,—as announced

upon the hearing—that in this controversy between these parties respectively claiming the office, we will not consider that question, it appearing that this has been regarded as a village school district for a great many years, and that all the present membership of the board have been elected under the law providing for the election of members of boards of education of village school districts. What we might do, if a proceeding were instituted on behalf of the public by the proper public authorities, to question on that ground the right of any of these members of the board of education to exercise their office, we need not say, but, as between these individuals, we do not feel that we would be justified in giving that question consideration.

The defendant claims a right to the office because he was elected thereto some three years ago, and is the member of the board that Riggs was elected to succeed; he claims the right to occupy the office and hold over until his successor is duly elected and qualified, and says that Riggs has not been duly elected and qualified and is not entitled to the office because he has failed to file certain statements of expenses in procuring his nomination and election to the office.

What is known as the Garfield law, or the corrupt practices act, requires, among other things, that a person nominated to any office created by the constitution or laws of this state to be filled by popular election (and this we find is an office under the laws of the state to be filled by popular election), shall, within ten days after his nomination, file certain statements, under oath, of all his expenses which he has sustained in procuring the nomination, and such statement shall set forth in detail each and all sums of money and other things of value, contributed, disbursed, expended or promised by him, and (to the best of his knowledge and belief) by any other person or persons with his procurement in his behalf wholly or in part endeavoring to secure or in any way in connection with his nomination to such office or place; in the statute the form which is to be observed in making this statement is given. And there is also a like provision with respect to the expenses incident to the election.

These statements are to be made out in writing and filed with the clerk of the county in which the candidate resides, and a duplicate thereof with the board, officer or officers if any, empowered by law to issue the certificate of election to such office or place. The provisions with respect to the nomination and election are substantially alike. Section 5 of this act (sec. 3022-5, Rev. Stat., provides that any person failing to comply with the provisions of the third section (which is in regard to the nomination expenses), or with the provisions of the fourth section (which is in regard to the election expenses) of this act, shall be liable to a fine not exceeding one thousand dollars, to be recovered with costs, in an action brought in the name of the state by the attorney general or by the prosecuting attorney of the county of the candidate's residence, the amount of said fine to be fixed within such limits by the jury, and to be paid into the school fund of said county.

It appears that Riggs made out such statements and filed them, but it is said that he did not file them within ten days after the nomination and election respectively, and that therefore he has forfeited his right to the office. The nomination was made upon March 15. The ten days within which he should have filed his expense account with respect to such nomination expired on March 25. The relator testifies, and about this he is not contradicted, that he made out statements of his nomina-

tion expenses some four or five days before the expiration of this ten days, perhaps along about March 20; that he turned the papers over to a notary public, before whom he made the oath required by the statute, and desired and directed such notary to file them where the law required them to be filed. The date appearing upon this account is March 27, two days after the expiration of ten days. The same date appears upon the certificate of the notary public to the affidavit, and Mr. Riggs testifies that these dates were not placed there by himself, and that he has no knowledge of their being placed there, the papers having no dates upon them when he made oath thereto, and that they were not certified to or dated by the notary public in his presence. As to when the papers were actually filed he had no knowledge.

Whether such paper is required to be filed with the clerk of the board of education we do not find it necessary to inquire. The statement which was filed with the county clerk has upon it a very indistinct mark made by the filing stamp. One witness testified that that mark indicates March 25; but the court, upon careful inspection, is unable to determine the date when that was filed, but from the circumstances, including the date appearing upon the account itself and the date affixed to the certificate of the notary public, we conclude it was not filed before March 27. It appears that the nomination paper filed with the clerk of the board of education was filed March 27, 1900. The certificate of filing upon its back shows that.

The election was held on April 2, so that the statements of election expenses were due to be filed upon April 12. It is unquestioned that such statement was filed with the county clerk upon April 12. A copy of such statement was mailed at the city of Toledo in an envelope addressed to Walter Richardson, village clerk, at Maumee, Ohio. From the marks upon the envelope, it appears that it was mailed on April 12, at 7 o'clock P. M.; that it reached the village of Maumee at 8 o'clock A. M. on the 13th, and Mr. Richardson endorsed upon the back of the envelope: "Received 4—13, 1900," which he says means April 13, 1900; and on the afternoon of that day he caused the paper to be handed, or in some way put into the custody of the clerk of the board of education, who testifies that that was the first time he had it in his possession. It thus appears that a statement of the expenses incident to his nomination was not filed within ten days of the time of the nomination, with either officer, and that a statement with respect to the expenses incident to the election was not filed with the clerk of the village board of education until after the expiration of ten days succeeding the election.

Now the question arises whether the failure to file such statement within ten days of the nomination and election respectively defeats the relator's right to the office? As I have before pointed out, sec. 5 of this act authorizes the imposition of a penalty by way of a fine upon one who does not file the statement within the time required; but there is no express provision in the statute that one who fails to file such statement shall forfeit his office. It was said in argument that since it is provided in sec. 7 that one becomes subject to removal from office if he fails to file these statements at the time provided, the court will not confirm his title to an office that by another proceeding he could be deprived of. But counsel are mistaken in their view of the effect of the provisions of sec. 7 (sec. 322-7, Rev. Stat.). That section does not provide that a failure to file such statements shall work a forfeiture or defeat

Lucas Circuit Court.

the right to the office or afford a ground for a proceeding to oust one who has been duly elected. It provides, among other things, that when it shall be made to appear in an action instituted against an officer to deprive him of his office that he has committed one of certain specified offenses "or that any other act or acts declared unlawful or made punishable by any law of this state were committed by such officer, or by his agent or agents, or with his or their consent or connivance by some committee or organization, or political party of which party he was the nominee, or the agent or agents of any such committee, organization or party, with intent to secure or promote his nomination or election," he may be removed from his office.

Now the provision that it shall be done with intent to secure or promote his nomination or election applies to and qualifies the whole clause providing that when he violates some penal law of the state he shall be liable to removal from office. If, for instance, he were guilty of an assault and battery, or of some offense that has no relation whatever to the duties of his office, or to the means by which he procured his office, he would not forfeit his office because of such offense. The act must not only be unlawful but it must be done with intent to secure or promote his nomination or election.

It cannot be said that the failure to file either of these statements within ten days as provided by law, was the commission of an act with intent to forward or promote his nomination or election. It is hardly the commission of an act, it is rather the omission of an act; but if it be the commission of an act, it cannot be said to be an act to procure his nomination or election, because the nomination and election had been previously accomplished. So we hold that the provision that proceedings may be instituted against a party charged with violation of this law for the purpose of having him ousted from office has no application to a case like this.

But it is said that since sec. 6 (3022-6, Rev. Stat.,) provides that "No board, officer or officers authorized by law to issue commissions or certificates of election, shall issue a commission or certificate of election to any person required by the third or fourth section * * * hereof to file a statement or statements until such statement or statements shall have been so made, verified and filed by such person with such board, officer or officers," and that since the candidate is required to file such statements within ten days and cannot lawfully file them after the expiration of ten days, therefore he cannot perfect his title to and has forfeited the office. But forfeitures of rights are not favored by the law. This statute points out the specific offenses on account of the commission of which one may forfeit his office, and we think the court is not authorized to add other causes, and declare that for such acts or omissions one may forfeit or be deprived of his office. The statute with respect to the organization of the board of education, sec. 3980, provides that the board shall be organized by choosing one of its members president, and by choosing a clerk, etc., on the third Monday of April of each year, except as otherwise provided by statute. Now it appears that upon the third Monday of April the old members of the board met at the usual place, and those who claimed that they had been elected on the first Monday in April were also present, Mr. Riggs among the number, and that he there asked that he might be sworn in as a member of the board of education and then and there claimed his office and the right to exercise its functions; but he was not recognized as a member of the board and was refused the privi-

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leges and rights of a member. On April 21, he appeared before a notary public and took an oath of office, which was written, and was signed by him, and this he filed with the clerk of the board of education on April 23. Section 3981, Rev. Stat., (43 O. L., 48), provides that "Vacancies in any board of education, or vacancies in the office of subdirector of any subdistrict arising from death, non-residence, resignation, expulsion for gross neglect of duty, failure of a person elected or appointed to qualify within ten days after the annual organization or after his appointment, or from any other cause * * *" may be filled in a certain way. Now that statute provides, in effect, that if one shall fail to qualify for the office within that period, a vacancy occurs; and it implies and involves the converse, i. e. that he shall have that period within which to qualify for the place, and a vacancy shall not occur in the meantime. Therefore we hold that one does not relinquish or forfeit his office if he qualifies within this period of ten days succeeding the time provided for the organization of the board of education, and that if the filing of these statements may be held to be a part of his qualification for the office (and that we believe is the correct view of it) he may file his statements at any time within ten days after the time fixed by law for the annual organization of the board. And Riggs having qualified by filing his statement under the Garfield act and by taking the oath of office before a notary and having appeared before the board and asked that he might be recognized as a member, and having signified that he was ready and willing to enter upon the performance of his duties as an officer, all before the expiration of this time, we hold that he has not relinquished or forfeited his office.

It is unnecessary to enquire into the title of the defendant to the office. As he claims and has no greater right here than the right to hold over until his successor shall have been duly elected and qualified, and as his successor has been duly elected and qualified, it follows that defendant has no right to hold the office. Therefore the judgment of the court will be that the defendant shall be ousted, and the plaintiff will be confirmed in his right to the office, and judgment will be entered against the defendant for costs.

*J. M. Ormund, A. W. Eckert and L. M. Murphy, for the plaintiff.
O'Donnell O'Brien, for the defendant.*

HIGHWAYS—CHANGE OF GRADE.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

CINCINNATI V. MARIA A. ROTH ET AL.

HIGHWAYS—GRADE OF TRAVELED PORTION ESTABLISHES WHOLE GRADE.

Where the traveled portion of a street has been used for such a length of time as to constitute a grade by user, the grade of such traveled portion determines the grade for the whole width of the street; and whenever the whole road is found necessary for the public travel, the public has the right to improve it, to correspond with the traveled portion, without being responsible to the abutting property owners for any change in the surface of the ground where their property abuts the road.

HEARD ON ERROR.

SWING, J.

This was an action under the statute to assess compensation for damages to property owners by reason of the improvement of Observatory avenue in said city. The defendants filed answers claiming damages in the sum of \$3,000. A trial was had in the court of common pleas, and a verdict was returned for \$1,350. The city prosecutes error in this court, alleging numerous grounds of error.

The following facts appear to be undisputed. Observatory avenue is a street sixty feet wide, one-half of which lies within the city of Cincinnati, and the other half within the village of Hyde Park. Long before it was a street it was a traveled public road. In the year 1891, it being some time after the defendants had improved the property in question, the city of Cincinnati passed an ordinance establishing the grade of the portion of the avenue within the city in front of defendants' property. The village of Hyde Park, in the year 1897, improved the portion of the avenue within said village to conform to the grade established by said city and the improvement now sought to be made is in accordance with said grade. No grade had ever been established for said avenue prior to November, 1891. At this time, and at the time the defendants improved their property and for a long time prior thereto, and up to the time the village of Hyde Park improved its half of the avenue, the portion of the avenue within the city in front of defendants' property was in its natural condition, and was not used by the public for the purpose of travel; the traveled portion of the roadway was north of the city's thirty feet, and was in that portion of the roadway now in the village of Hyde Park. The portion of the avenue within the city was used as a part of defendants' lawn in front of their property. The improvement contemplated requires a cut of 6.6 feet at one side and 8.2 feet at the other side of their property. The grade as established and the improvement as contemplated is about three feet lower than the traveled grade of the old road.

If the avenue had been improved in front of defendants' property in accordance with the grade of the traveled portion of the road, it would have required a cut at the line of plaintiff's property, but not to the extent as now contemplated by nearly three feet, 280.6 being the exact amount. The city admitted that it was liable for all damages resulting from a change of grade below the grade of the old traveled road, but claimed it was not liable for cutting down in front of defendants' property to a proper level with the old traveled grade, but for the 280.6; which was the distance of the established grade below the old grade, it admitted liability. The court, however, throughout the trial, ruled that the city was liable for damages for the whole cut of 6.6 to 8.2.

In taking this view of the law we think the court erred. There is no claim here that the grade as now established is not a proper and reasonable grade; and if it was not for the fact that the defendants improved their property with a view to an old grade of a public highway established by user for a long number of years, they could not recover for any damages by reason of change in the surface of the soil at the intersection of their property with the street; but their being an established grade to the traveled roadway, under the laws of our state they were protected in making their improvements in accordance with it; but this protection would not include the whole part of the ground included within the limits of the roadway in its natural condition, but only that portion of the roadway which was used for travel. Whenever

the whole of the road was found necessary for the public travel the public had the right to improve it to correspond with the old traveled portion, without being responsible to the abutting property owner for any change in the surface of the ground where his property abutted on the road. If this could be done without any right in damages accruing to the property holder, it would seem to follow that damages could only be allowed where a change of grade is made for the difference between what the public had the right to take and that which it had not.

All the evidence admitted to be placed before the jury was upon the theory that the defendants could recover for the whole amount of the injury caused by cutting the line down to 6.6 and 8.2 at the two sides of defendants' property, and the verdict must have been rendered on this evidence. The question was raised upon the application of the city to introduce evidence upon the claim of the city, but this was refused by the court. But without passing on the numerous questions raised in the record, it is probably best to say that we think the judgment should be reversed and the cause remanded for a new trial on the ground that the judgment is not sustained by the evidence.

H. K. Rogers and F. H. Kunkel, for the city.

L. W. Goss, Johnson & Levy and Walter DeCamp, contra.

WILLS—QUIETING TITLE—PLEADING.

[Adams Circuit Court, April Term, 1900.]

Russell, Cherington and Sibley, JJ.

SARAH M. DARLINGTON V. JULIA COMPTON ET AL.

1. WILLS—CONSTRUCTION.

A devise of lands to testator's daughter, providing that in the event of her death, "leaving no legal heirs," the property so willed "is to descend to her brothers and sisters," passes to the daughter the entire estate in the lands devised.

2. BROTHERS AND SISTERS HAVE ONLY FUTURE CONTINGENT INTEREST.

Under such will, during the daughter's life, the brothers and sisters, or their heirs, can have only a future, contingent interest in such lands, without present right or title thereto.

3. ACTION TO REMOVE CLOUD ON TITLE.

Where such devisee is in possession of the lands devised, she may maintain an action to remove a cloud upon the title thereto, though it consists of claims asserted which involve a construction of the provision in the will giving the property to her.

4. SAME—SUFFICIENCY OF PETITION.

Where the item in the will under which the claim asserted is set out, as against a general demurrer, the petition sufficiently shows a cloud upon the plaintiff's title by stating that the defendants claim an interest in the lands devised adverse to her right under that item of the will.

HEARD ON ERROR.

SIBLEY, J.

This was an action in the common pleas court for Adams county, to remove a cloud from the title to certain lands described in the peti-

tion, that the plaintiff avers ownership of, in fee simple, and of which she holds possession. Other allegations are, that this title was derived from her father, G. D. Darlington, deceased, by virtue of item four of his last will, which is stated to have been duly proved, said item being fully set out as follows:

"I will and bequeath to my daughter Sarah Margaret Darlington, the one-half of the farm I now live on in Ashmore's survey 1947, adjoining West Union, the line of division to be run so as to include the little field across the road between the pikes, or include it in half the farm. Also, my present residence, with the yard and garden as now inclosed, including my dwelling house and outhouses, with all the household furniture, beds, bedsteads and bedding, cupboard and cupboard furniture, stoves and kitchen furniture, bureaus, book-case and all books, all property in the cellar and smoke-house, and all other household furniture. Also one-half of the farming utensils. Also the tract of land east and north of the county road leading from West Union by Layman Spohn's bounded by the county road and the lands of Layman Spohn, Sam. Wright, and F. Seaman. Also fifteen hundred dollars in cash. Also lots Nos. 9 and 10 in Darlington's Addition to the town of West Union—a cow and the poultry.

"In the event of Sarah Margaret's death, she leaving no legal heirs, then and in that case the property above willed is to descend to her brothers and sisters."

It also is alleged that the defendants named include all those who now would take under said item of said will, in the contingency provided for by its last clause. Then follows the averment that "said defendants claim an interest in said premises adverse to plaintiff's right under and by virtue of the 4th item of said G. D. Darlington's last will, a copy of which is above set out. But said plaintiff denies that said defendants, or either of them, have any valid interest therein, yet defendant's claim thereto creates and is a cloud upon plaintiff's title to said property." The petition concludes with a proper prayer for relief.

A general demurrer was interposed, sustained, and exception to the ruling thereon made. The plaintiff not wishing further to plead, judgment on the demurrer was entered in favor of the defendants. To reverse that, error is prosecuted to this court.

Two questions are presented by the record before us. One relates to the rights of the parties under the will, and the other to the sufficiency of the petition in alleging the "claim" of the defendants. These I will consider in the order stated.

I. A true reading of the item, from the will of G. D. Darlington, seems to be quite clear. In argument, the contention for the defendants was, that by the devise to her the plaintiff took only a life estate in the lands, while the remainder in fee is vested in them. But this we think is wholly untenable. The deviser says—"I will and bequeath to my daughter," naming her, this property. That was sufficient to pass an estate of inheritance, and standing alone would be given such effect, without reference to our statute. *Smith v. Berry*, 8 Ohio, 366; *Thompson v. Hoop*, 6 Ohio St., 481. This is emphasized evidently by sec. 5970, Rev. Stat., which requires that every devise of lands "be construed to convey all the estate of the testator therein which he could lawfully devise, unless it shall clearly appear by the will" that he "intended to convey a less estate."

There is no suggestion here that the plaintiff was not to take the fee, unless found in the last clause of item four, providing to whom the lands shall go, in case she dies "leaving no legal heirs." That, therefore, furnishes the sole basis for the defendants' claim. But it cannot be given the effect for which they contend. The law is settled in Ohio, on that proposition. The principle established is, that the "limitation over does not refer at all to the quantity of the estate before devised," but "simply designates the contingency on the happening of which, that estate, whatever was its *quantum*," shall pass over to others—in this instance to the brothers and sisters. The will is to be read, therefore, exactly as it would be if the devise had been to the plaintiff, her heirs and assigns forever. Consequently the defendants can have no present right in or title to these lands. Their only interest in them is future, contingent, and by way of executory devise. *Niles v. Gray*, 12 Ohio St., 320; *Durfee v. MacNeal*, 58 Ohio St., 238; *Thompson v. Hoop*, 6 Ohio St., 481.

II. The view taken of the will, makes it necessary to determine whether or not, as against a general demurrer, the petition so alleges the "claim" of the defendants as to show a cloud upon the plaintiff's title.

Our two greatest writers upon equity jurisprudence very fully consider chancery powers in cases of bills of *quia timet*, bills of peace, and suits to remove a cloud from title. 2 Story's Eq., Chap's 21, 22; 1 Ibid, secs. 700, 711a, 12th ed.; 1 Pomeroy's Eq., 243; 3 Ibid, 429, 485.

This action is of the latter class, respecting which jurisdiction is held to be "inherent in courts of equity." *Holland v. Challen*, 110 U. S., 16. Speaking generally, the right to relief may be said to depend upon title and possession in the plaintiff, and some claim by the defendant adverse to that title. The precise matter now to be considered is, whether, beyond the allegations that such claims are made, a party must go in order to show a right to relief.

How this would be on a motion to make the petition more definite and certain, is not before us, and we therefore forbear to decide. But that it is sufficient as against a general demurrer, appears to be reasonably certain. An early case is clearly in point. As the report states "it was a bill in chancery asserting that the claimant held the legal title to certain lands, and was in possession, and that the respondents pretended a claim to the same lands." According to the opinion by Lane, J., the court held that "he who is in possession of land, and having a legal title, may call upon any pretending a claim to come forward and assert it;" and on this ground they granted the relief sought. *Douglass v. Scott*, 5 Ohio, 195-196.

Taking that as law, the petition here is manifestly good. This conclusion is supported also by a late case. It was an action in foreclosure, and involved a construction of sec. 5006, Rev. Stat., which provides that "any person may be made a defendant," in an action, "who has or claims an interest in the controversy adverse to the plaintiff." Under this provision, it was held that a plaintiff is not required to set forth either the nature of or the facts constituting the claim of another lienholder whom he has brought in, in order to a decree barring the latter, if he fails to answer. It is enough to make him a party, and allege that he had or claimed some interest in or lien upon the premises in controversy. *Widemiller v. Laughlin*, 51 Ohio St., 421.

Obviously, on principle, the interpretation given section 5006, should apply to 5779, under which this suit is brought. It gives a right of

action to one in possession of "real property, against any person who claims an estate or interest therein, adverse to him." Now, if in the one case it is not necessary to set out the nature of, or facts constituting the alleged "claim," in order to put a defendant in default, and so entitle the plaintiff to a decree against him, *pro confesso*, how can it be in the other? On the point in discussion, we are unable to perceive any valid ground of distinction between them. By fair analogy, therefore, this holding of the Supreme Court becomes decisive here.

The defendants relied in argument on *Collins v. Collins*, 19 Ohio St., 568. But as we conceive it wholly fails them. On a demurrer to the petition in that case, two propositions were decided. One was, that as it affirmatively appeared that the defendants had no present or certain interest in the lands involved in the controversy, an action to quiet title would not lie. The other that aside from this, the only question left related to the construction of a will, upon which no trust arose, and so was not within the jurisdiction of the court. By force of an amendment, however, since made, to section 5779, Rev. Stat., the first point decided has ceased to be law; as the decision now is that it is not a requisite to relief of the nature here sought, that the adverse claim, "should relate to or affect the right of present possession." *Rhea v. Dick*, 34 Ohio St., 420.

The second point falls with the other, in cases under the new statute, and the effect to be given to the decision in *Niles v. Gray*, *supra*, approved in *Rhea v. Dick*, *supra*. The fact, therefore, that in order to obtain relief of the character prayed for in this suit, a will creating no trust must be construed, can neither affect the jurisdiction nor debar the party relying upon the testament from a judicial determination of his rights. Section 5779, as it now stands, is to be regarded, say the Supreme Court, as designed to promote a beneficial and enlightened policy, which is to be received with favor. It also is declared to be highly desirable that land should be freed from suspicion, even, of unsubstantial claims, because however ill founded, they affect the value of property, when on sale. Hence, where a right to open a road had terminated, and the proceeding therefor become null, it was nevertheless held that the landowner might maintain an action to vacate it, as a cloud upon his title. *Lowmiller v. Fouser*, 52 Ohio St., 123. It is difficult to see how a "claim" shown to be void by the facts alleged, is sufficient, if the averments made in this case are not. But however that may be, the exact point as to the pleading has been adjudicated under a statute which, like ours, gives the owner of lands an action "against another who claims title or interest * * * adverse to him." The decision upon this act was that it is "sufficient to aver that the defendant claims some interest or title, or pretended interest or title, adverse to complainant, without stating what the title is." *Reynolds v. Craw. Bank*, 112 U. S., 405; *Jeffersonville & C. R. R. Co. v. Oyler*, 60 Ind., 383.

The conclusions stated determine the questions in the case, and compel us to hold that the learned court below erred in sustaining the demurrer to the petition. Consequently the judgment must be reversed, and the cause remanded.

H. Scott and F. D. Bayliss, for plaintiff.

W. C. Coryell and Blair & Mayhaffey, for defendants.

PLEADING—VERDICTS.

[Hamilton Circuit Court, 1900]

Smith, Swing and Giffen, JJ.

JOS. V. L. IRWIN V. PETER CHRISTMAN.*STATUTE OF LIMITATIONS SPECIALLY PLEADED—VERDICT.**

Where the statute of limitations is specially pleaded as a defense, and the jury, being instructed thereon, returns a verdict which includes a finding of that fact in favor of the defendant, such verdict should be treated as a special verdict and judgment rendered thereon.

HEARD ON ERROR.**GIFFEN, J.**

Upon a former hearing of this cause we found that the court erred in receiving the McDonald deed in evidence and in leaving its construction to the jury, but that only one issue was affected thereby; and the jury having found upon both issues in favor of the defendant, the judgment should be affirmed.

It now appears that the transcript, which showed that the jury "upon the issues joined find for the defendant," was not true and correct, and that the original verdict was upon a single issue only, but one which, of the two issues tendered, can not now be determined. Hence the judgment must be reversed.

It is urged that the defense of the statute of limitations, in an action under the code for the recovery of real property, tenders no issue, but is only another mode of denying plaintiff's title. *Powers v. Armstrong*, 36 Ohio St., 357. We are of the opinion that where the statute is specially pleaded as a defense, and the jury, being instructed thereon, afterwards returns a verdict which includes a finding of that fact in favor of the defendant, the same should be treated as a special verdict, and judgment rendered thereon.

There being no plea of estoppel, the court erred in instructing the jury as it did on that question.

Judgment reversed and cause remanded.

W. A. Hicks, for plaintiff in error.

H. J. Harrop, contra.

* For previous decision, see *Irwin v. Scheuer*, 10 Circ. Dec., 827.

CORPORATIONS—DIRECTORS—CONTRACTS.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

BROWNE AND STEWART V. UNITED STATES BOARD & PAPER CO.**CONTRACTS BETWEEN CORPORATIONS AND DIRECTORS.**

The mere fact that a contract was made by a corporation with an individual who was at the time a director of the corporation, and who participated as such in the making of the contract, is not sufficient to render the contract invalid. Its unfairness to the corporation must also appear.

HEARD ON ERROR.

SWING. J.

We are of the opinion that the judgment in this case should be reversed and the case remanded for a new trial on the ground that the finding and the judgment is not sustained by the evidence.

The action by the plaintiffs, Browne and Stewart, was for damages by reason of the breach of a contract. The answer of the defendant was, first, a general denial of all allegations not therein admitted, and, second, allegations to the effect that the contract was made with Browne, and Stewart while Browne was acting as a director; that neither Browne, nor Stewart had paid for the stock then held by them, amounting to \$16,600, and that one Bell was a director, holding \$8,200 worth of stock which he had not paid for.

There was no allegation in the answer that the contract was made by Browne while acting as a director, and that it was an unfair contract. We think under the decision of our Supreme Court in *Rolling Stock Co. v. Railroad*, 34 Ohio St., 450, something more must be shown than the mere fact that a contract was made by a corporation with an individual who was at the time a director of the corporation, and who participated as such in the making of the contract, in order to make it invalid. The unfairness of the contract must be shown in addition. This issue should have been made in the pleadings.

It is claimed in this court by the plaintiffs in error that the contract in question, even though unfair, was ratified by the defendant company by reason of its having been acted upon by the parties for a period of four months after full knowledge of its terms, but this issue is not raised by the pleadings, and probably could not have been under the pleadings as they now stand.

The judgment seems to have been rendered upon the theory that the contract was an unfair one, and was made by a director of the corporation with himself as an individual. This issue should have been made, and then the plaintiffs by reply should have pleaded ratification.

We do not deem it out of place to say that it seems to us that there was nothing unfair in the contract itself. If there was any unfair advantage taken of the company it arose from the construction placed upon the contract when taken in connection with by-law 8 of the corporation.

The court found that the contract was the usual one made in the trade. And it seems quite clear that if Browne and Stewart had sold the product of the company to those other than members of the corporation

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there would be nothing to complain of. The court found that Browne and Stewart sold all of the product of the company during the time the contract was in force.

It seems to us that this is the vital question in the case. When the stockholders took the product under by-law 8, were sales made by Browne and Stewart under the contract, or rather were they entitled to commissions on those sales?

As to the question of ratification, we think we had better not express any opinion. It will be time enough when the issue is properly presented and the evidence adduced.

Province M. Pogue (of Pogue & Pogue), C. B. Mathews and Cleveland & Bowler, for plaintiffs in error.

Gorman & Thompson, contra.

PLEDGES—PARTNERSHIP—INSOLVENCY.

[Hamilton Circuit Court, 1900.]

Smith, Swing, and Giffen, JJ.

IN RE ASSIGNMENT OF HENRY F. STOTHFANG.

1. SUFFICIENT POSSESSION TO VEST TITLE ON PLEDGE.

A note, given to secure a surety, reciting that promisor has "deposited or pledged as collateral security for the payment of this note the same warehouse receipts for whiskey now in possession of the Atlas National Bank and pledged with said bank as collateral security for loans or their renewals of loans, and after payment of said loans or their renewals to the Atlas National Bank, then the balance of said warehouse receipts are to be held as collateral security to this note," the possession being as full and complete as the nature of the case would permit, is sufficient to vest title in the second pledgee.

2. CONTRACT NOT INVALIDATED BY INSOLVENCY OF PARTNER.

Where it appears that such pledge was made by a partnership without other liabilities at the time, it is not within sec. 6343, Rev. Stat., as amended 93 O. L., 290, relating to conveyances by debtors in contemplation of insolvency, or invalidated by the insolvency of one of the partners who subsequently, upon dissolution, succeeded the firm.

HEARD ON ERROR.

GIFFEN, J.

From the agreed statement of facts it appears that on April 16, 1898, Ferdinand Dibowski accepted in satisfaction and payment of a note given to him by H. F. Stothfang another note as follows:

"\$1,000.

CINCINNATI, O.

"April 16, 1898.

"One year after date we promise to pay to the order of Ferdinand Dibowski one thousand dollars. Payable at Cincinnati, Ohio, with six per cent. interest per annum. Value received.

"(Signed)

"H. F. STOTHFANG,

"F. H. STOTHFANG,

"LOUISA STOTHFANG."

On the back of which Henry Dieckmann signed his name before delivery to Dibowski. The same was not paid when due. Payment was demanded and suit was about to be commenced for the same, when

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Dieckmann executed and delivered to Dibowski his individual note for \$1,000, secured by mortgage upon his real estate.

To secure Dieckmann, H. F. Stothfang and F. H. Stothfang executed, and delivered to Henry Dieckmann their promissory note, dated May 12, 1899, for \$1,000, payable to his order "having deposited or pledged as collateral security for the payment of this note the same warehouse receipts for whiskey now in the possession of the Atlas National Bank and pledged with said bank as collateral security for loans or their renewals of said loans, and after the payment of said loans or their renewals to the Atlas National Bank, then the balance of said warehouse receipts are to be held by the said Henry Dieckmann as collateral security to this note."

H. F. Stothfang for a year or more prior to this transaction was in partnership with his brother, F. H. Stothfang, and they did business under the firm name of H. F. Stothfang & Brother.

Said partnership was dissolved and H. F. Stothfang continued the business, assuming its liabilities and taking its assets. H. F. Stothfang at the time was insolvent, and on August 7, 1899, made a general assignment for the benefit of creditors.

Dieckmann claims to be entitled to payment in full of his note and interest out of the proceeds of sale of the warehouse receipts now in the hands of the assignee. This is resisted by the general creditors on the grounds:

First. That there was no delivery of possession of the warehouse receipts to Dieckmann.

Second. That the transfer was fraudulent and void as to creditors under sec. 6343, Rev. Stat., as amended 93 O. L., 290.

By the terms of the collateral note Dieckmann was to have actual possession of the balance of the warehouse receipts after payment to the Atlas National Bank. The bank was at once notified of the pledge to Dieckmann and requested to deliver to him the warehouse receipts remaining after payment of its claim.

In Jones on Pledges, sec. 34, it is said: "But possession may be held by a third person for a pledgee, when such person will be considered as the pledgee's agent." We think that the possession of Dieckmann as pledgee was as full and complete as the nature of the case would admit.

It is further claimed that the pledge of the warehouse receipts was a preference within the inhibition of sec. 6343, Rev. Stat., as amended, which provides that every conveyance, transfer, etc., made by a debtor in contemplation of insolvency, or with a design to prefer one creditor to the exclusion of others, shall be declared void, and shall inure to the benefit of all creditors. And every such conveyance or transfer made, in the event of a deed of assignment being filed within ninety days after the giving or doing of such thing or act, shall be conclusively deemed fraudulent and void as to the assignee of such debtor, where, upon proof shown, such debtor was insolvent at the time of giving or doing such act.

It will be observed that the collateral note was a joint obligation of H. F. Stothfang and F. H. Stothfang, and a joint pledge of the warehouse receipts, and that the statement of facts as to partnership and its dissolution warrants the inference that at the time the note was executed the partnership was still in existence and the owners of the property pledged, and that the dissolution occurred subsequently. It does not

In re Assignment of Henry F. Stothfang.

appear that as partners they had any other liabilities, and hence it could not be a preference of one creditor to the exclusion of others.

Judge Smith and Judge Swing concur in the judgment of affirmance, but for the reason that H. F. Stothfang was alone the owner of the warehouse receipts at the time they were pledged, and that as surety he was not a creditor of his principal, within the meaning of sec. 6343, Rev. Stat., until he paid the debt.

Judgment affirmed.

Renner, Gordon & Renner, for Dieckmann.

Charles F. Williams, for the general creditors.

A. H. Bode, for the assignee.

APPEAL—BONDS.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

OSCAR W. KUHN, ASSIGNEE, V. MARGUERITE HALEY ET AL.

BOND OF TRUSTEE IN BANKRUPTCY NOT SUFFICIENT FOR APPEAL.

A party desiring to appeal must give a bond according to the statute and subject to the control of state courts. Therefore the bond of a trustee in bankruptcy is not sufficient to exempt such trustee, under sec. 5228, Rev. Stat., relating to appeals by parties in a trust capacity, from giving the bond required by sec. 5227, Rev. Stat.

APPEAL.

GIFFEN, J.

This case is submitted upon a motion to dismiss the appeal.

Soon after the action was commenced Oscar W. Kuhn, trustee in bankruptcy, was substituted as plaintiff, and as appellant gave no appeal bond.

Does sec. 5228, Rev. Stat., dispense with the same? This section provides that "a party in any trust capacity, who has given bond in this state with sureties according to law, shall not be required to give bond and security to perfect an appeal."

The purpose of this provision manifestly is to relieve an appellant from giving an appeal bond where he has already given a bond as trustee that will afford at least equal protection to the appellee.

Under sec. 5227, Rev. Stat., a party desiring to appeal must give an undertaking, with surety to be approved by the clerk of the court or a judge thereof.

Section 4953, Rev. Stat., provides the qualifications of sureties.

The bond of a trustee in bankruptcy is not approved by the clerk of a court of this state or a judge thereof, nor are the qualifications of his sureties prescribed by our statute. He is not under the control of our courts, and cannot be required by them to give additional security.

We are of the opinion, therefore, that a party under sec. 5228, Rev. Stat., must have first given bond according to the statute, and be subject to the control of the courts of this state, in order to claim exemption from giving an appeal bond.

Motion sustained.

Dan T. Wright, for the motion.

Smith & Kuhn, contra.

Jackson Circuit Court.

PROBATE COURTS—HIGHWAYS—APPROPRIATION.

[Jackson Circuit Court May Term, 1900]

Russell, Cherrington and Sibley, JJ.

JACKSON CO. (COMRS.) V. ISAAC MCGHEE ET AL.

1. PROBATE JURISDICTION—STATUTORY.

Probate courts can take jurisdiction of no matter or proceeding unless authorized by provision of constitution or statute.

2. CHAPTER 8, REV. STAT.—NOT APPLICABLE TO COUNTY ROADS.

By its own terms, chapter eight, Rev. Stat. (Secs. 6414, 6453), does not apply in proceedings by county or township authorities to appropriate private property for roads.

3. COMPENSATION FOR LAND TAKEN.

Where land in fact is taken for a turnpike, in case the owner and county commissioners fail to agree as to the compensation and damages to be paid, the same may be adjusted by proceedings had in the "name" of the "commissioners" in the probate court. Sec. 4761, Rev. Stat.

4. PROCEEDINGS CORAM NON JUDICE.

The fact of such disagreement, however, does not authorize an action by the owner in his own name against the board of commissioners, in that court, to recover compensation and damages. Such a proceeding is *coram non jure*. And this also is true of a claim for damages consequent upon a change of grade in a public highway, or for obstructing access thereto.

HEARD ON ERROR.

SIBLEY, J.

On April 25, 1898, Isaac McGhee filed his petition in the probate court of Jackson county, by which he sought to recover (1) compensation and damages for land alleged to have been taken in the construction of a turnpike over a county road which passed through his premises, and (2) damages growing out of a change in the grade of the old highway, injury of access thereto, etc.

To this a demurrer was interposed, upon two grounds; (1) that the court had "no jurisdiction of the defendant or the subject of the action;" and (2) that the petition did "not state facts sufficient to constitute a cause of action." This was overruled, the defendant duly excepting.

Afterward, slight amendments were made to the petition, but not in any particular affecting the question of jurisdiction. Later, new parties plaintiff were made. An answer was filed which put in issue the averments of the petition as to taking any land of the plaintiffs, or in other respects injuring their property or rights by the construction of the turnpike. To this a reply was filed. Upon the issues thus made, the case was three times tried in the probate court, with verdicts for the defendant. On the last one judgment was entered.

The case was then taken to the common pleas by proceedings in error. There the judgment was reversed, and the cause set down for trial,—to all of which the defendant objected and excepted. Later, the action was tried, with a verdict for plaintiffs of \$76. Motions for a new trial and in arrest of judgment were filed, on the ground of want of jurisdiction, which were overruled, defendant duly excepting. Judgment was thereupon entered against the defendant for the amount of the verdict, and costs; the latter being from eight to nine hundred dollars.

Error is prosecuted to this court to reverse the action in the common pleas. The record shows a bill of exceptions setting out all the evidence on the trial of the case.

But the one question we consider is,—whether or not the probate court was invested with jurisdiction; for, if that was lacking, all the proceedings in the action are manifestly erroneous and void.

The defendants in error, of course, maintain that it had jurisdiction, while the other side strenuously controverts this proposition.

1. All agree that the case does not fall within the jurisdiction conferred on the probate court by the constitution, or in express terms by any statute. It further is conceded, that it cannot be inherent to that court, and so if not given by the proper effect of some legislative act it does not exist.

The controversy finally narrows down, therefore, to a comparison and construction of certain sections of the Revised Statutes.

These are found in the chapter which provides for the laying out and making of turnpikes, secs. 4758-4773, and the later one, authorizing the appropriation of property by corporations, secs. 6414-6453.

Upon a true reading of some of their provisions, the question of jurisdiction hinges.

Section 6448, Rev. Stat., relied on in part by the defendants in error, provides: "When a corporation authorized by law to make appropriation of private property * * has taken possession of, and is occupying or using the land of any person * * and the land so occupied or used has not been appropriated and paid for by the corporation, or is not held by any agreement in writing with the owner thereof, * * such owner or owners or either of them, * * may serve notice in writing, upon the corporation in the manner provided for the service of summons against a corporation, to proceed under this chapter to appropriate the lands, and on failure of such corporation for ten days so to proceed, said owner or owners * * may file a petition in the probate court of the proper county setting forth the fact of such use or occupation by the corporation, that the corporation has no legal or equitable right thereto * * that the notice provided in this section has been duly served, that the time of limitation under the notice has elapsed, and such other facts, including a pertinent description of the land so used and occupied, as may be proper to a full understanding of the facts."

On the filing of such petition, the further provision by sec. 6449, Rev. Stat., also cited by them, is that "a summons shall issue and be served upon the corporation, and thereafter the proceedings in said court shall be conducted to final judgment in all respects as provided in this chapter."

The formal averments of the petition herein sufficiently bring the case within sec. 6448, Rev. Stat., if that can be regarded as applicable, on the other facts alleged, and in an action of this nature, against the board of county commissioners.

Here, indeed, is the core of the controversy, for if that section does not apply, and authorize the institution of this suit, then utter lack of jurisdiction is admitted.

That by force of its own terms, it has any application, is not contended. All the provisions in the chapter of which this section is a part, relate to private corporations only.

But, as if to put the matter beyond dispute, it is expressly provided by sec. 6458, Rev. Stat., that they "shall not apply to proceedings by state, county, township, district, or municipal authorities, to appropriate private property for public uses, or for roads or ditches."

Such cases are left under other provisions of law, therefore, so far as this chapter goes.

But the contention for the application of sec. 6448, and so for jurisdiction, is at least made to rest upon sec. 4761, which specifies how compensation and damages for lands taken to build turnpikes shall be determined, in case the commissioners appointed to lay them out, and the owners, cannot agree upon the amount to be paid.

It is as follows: "When said commissioners and the owner or owners fail to agree as to the amount of compensation and damages, then the same shall be ascertained and determined by the board of county commissioners, and if the said board of county commissioners and the owner or owners fail to agree as to the compensation and damages, or when the owner is unknown, non-resident, or incapable of contracting, then the same shall be ascertained and adjusted by proceedings had in the name of the county commissioners, under the law providing for the appropriation of private property by corporations; provided, however, when any owner or owners not unknown, or not non-residents, or not legally incapacitated from entering into a contract, and said commissioners fail to agree as aforesaid, they shall cause to be filed with the proceedings brought in the name of the county commissioners the amount of compensation and damages by them tendered in writing to such owner or owners, and unless said owner or owners shall be allowed by the jury in said proceedings compensation and damages in excess of the amount allowed and tendered by said commissioners, then said owner or owners shall pay all costs made in said proceedings in the name of the board of county commissioners."

Before considering particularly the material parts of this section, it will aid, perhaps, to glance at the scheme and policy of the chapter in which it is found.

This was enacted in 1869, 66 O. L., 62, and is entitled "An act to authorize county commissioners to locate and construct turnpike roads."

A few amendments since made do not affect its general character, or the construction of the provisions in question.

The bill of rights, sec. 19, clearly implies that, as a prerogative of state sovereignty, private property may be taken for the "purpose of making or repairing roads which shall be open to the public without charge," before making compensation therefor.

The right to this however, is secured, but the time and mode of providing for it are left to a reasonable legislative discretion.

The act, a section of which is under consideration, was evidently framed upon that theory.

Provision is made for the appointment of special commissioners who are authorized to lay out, survey and locate turnpike roads, and for this purpose enter upon lands improved as well as unimproved; to receive grants, or propositions for the sale of rights of way from owners of lands over which roads will pass; and also "to take timber and other materials necessary to the construction and repair of the same."

The statute further provides for a fund that is to be created by donations or taxation, or both, out of which the owners shall be compensated for lands taken, and damages suffered by them through the con-

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struction of a road, and from which also shall be paid other costs or expenses incident thereto.

It is at this point that sec. 4761, Rev. Stat., becomes specially important.

It contemplates an effort amicably to settle the compensation and damages for lands taken, and hence the amounts to which the owners will be entitled, from the fund raised, (1) by arrangement with the commissioners appointed to lay out the road; and (2) in case they are unable to agree, by referring the matter to the county commissioners.

Should they also fail, then the compensation and damages "shall be ascertained and adjusted," says this statute, "by proceedings had in the name of the county commissioners."

That is its imperative requirement—the one and only mode of procedure which it authorizes, in the contingency for which it provides.

This is emphasized moreover by the clause as to "costs made in said proceedings in the name of the board of county commissioners."

Manifestly, no right of action against that board was given or intended, so far as the words used import.

Nor is this conclusion altered by the fact that, from this initial point the proceedings are to go forward "under the law providing for the appropriation of private property by corporations."

This still leaves the mandatory declaration that they "shall be * * * in the name of the county commissioners" wholly untouched, for the reason that in the chapter thus referred to, there is nothing which modifies or in the slightest degree is incompatible with it.

Its provisions merely determine the forum, and the procedure which is ulterior to this requirement of sec. 4761, when the proceedings which it authorizes have been instituted.

Otherwise, its own terms exclude its application to any dispute as to compensation and damages given by the turnpike act. Hence it is that sec. 6448 gives the defendants in error no help. By no word or expression does it authorize an action like this, on the subject of action here involved. Only by a supposed analogy with what it provides, in an entirely different class of cases, can the assumed right to maintain it be deduced. But the difficulty with this is that if thus read, it is brought into irreconcilable conflict with sec. 4761. There is abundant room for the operation of each section, according to its fair import. We are therefore debarred from giving one a construction, the effect of which will be to make it inconsistent with the other.

But even if clauses in these sections may be regarded as in some sense opposed, on the question at issue, the provisions of sec. 4761 must control, because they are not only clear and explicit, but also special to the matter in hand; while those of sec. 6448, to say the most, give nothing in aid of the jurisdiction invoked, except by doubtful inference.

In every view, therefore, it results that the board of county commissioners cannot be made a defendant in such proceedings, except by giving a reading to sec. 4761, which is in the teeth of its plain, positive terms, and that no other provision of law requires.

The authority granted, is to proceed in their name; that exercised, was the bringing of a suit against them. One thing was authorized, in other words, and another and wholly different thing done. For the first the jurisdiction is ample; for the second it does not appear.

The evident object of the proceedings authorized by section 4761,

is simply to fix the sum to which, as compensation and damages, one whose land has been taken for a turnpike, will be entitled.

This is primarily a question between the special commissioners appointed, and the land owner. When they disagree, the statute refers it to the county board. And if they cannot settle it,—what? An action against them for that purpose? The law answers “no,” by saying it “shall” be ascertained by “proceedings” in their “name.”

Could language be more explicit?

While sec. 4761, Rev. Stat., is not perfectly clear on the point, apparently if any adverse parties were made in such proceedings, they would be the turnpike commissioners.

The original difference is with them, and it seems to be contemplated that they will make a tender in writing to the land owner of what, in their judgment, is a just compensation and damages, the amount of which shall be “filed with the proceedings,” for the purpose of charging the costs upon the party instituting them, unless the jury allows him a larger sum.

In the event of his recovering more, the costs, as part of the expenses incident to making the road, would not be chargeable against the county commissioners, in the absence of provision to that effect, but payable from the fund they are to raise.

Properly regarded, however, the proceedings authorized by this section are not adversary—rather, they seem to be in the nature of an action *in rem*—to determine how much a party is entitled to out of a certain fund.

And obviously no authority is given to bring suit in the probate court, and there, or elsewhere, take judgment against the board of commissioners. As respects property appropriated, none such was needed. Complete relief was open to the owner, by following the directions of the statute, with proceedings in the name of the county commissioners, instead of beginning an action against them. Consequently, there is no call for a strained construction of secs. 4761, and 6448, Rev. Stat., in order to uphold the jurisdiction.

The other branch of the action relates to damages growing out of an alleged change of grade in the old road, occupied by this turnpike, and for making it more difficult of access—less valuable in use.

While it is not separately numbered as such, this, nevertheless, is a distinct cause of action, and one which it may be doubted if sec. 4761 was designed to cover, by the proceedings it authorizes.

The claim relates to injury to an easement, the extent of which scarcely could be ascertained till the road was completed.

But whether it would be within the scope of that section or not, is immaterial, as, to say the least, if it so be held, it cannot sustain the jurisdiction asserted in this action, if otherwise it is not shown.

11. That, however, is not all. The turnpike act, of which sec. 4761 is a part, was passed, as before stated, in 1869. The slight amendments since made, are not material to the point in view. Then, as now, in case of disagreement respecting compensation and damages for land taken, it was provided that the “same shall be ascertained and adjusted by proceedings had in the name” of the “county commissioners.”

This, also, was to be “under the laws in force at the time for the appropriation of private property for public use.”

Considered with the existing form of the section, enacted in 1892, 92 O. L., 103, this shows its original and settled policy, as to the procedure, if the land owner went into the probate court for relief.

But if his lands have been taken, and rights in a public highway injured by change of grade and obstructed access thereto, he is not without remedy in another forum, where beyond question, complete relief may be given.

The owner in that case can go into the court of common pleas, and recover compensation, and damages in all forms, arising out of the taking of his lands and the making of the road.

This was held in 1876, in an action against a municipality, and we see no reason why the principles thus established will not apply here.

The statutory proceeding authorized, is to be regarded as cumulative to the right to remedy in such cases growing out of the constitutional title to compensation. *Youngstown v. Moore*, 30 Ohio St., 133; *Feuchter v. Keyl*, 48 Ohio St., 357; *Smith v. Commissioners*, 50 Ohio St., 628.

This furnishes an additional reason why a forced reading of secs. 4761 and 6448, Rev. Stat., should not be given, in order to uphold the jurisdiction of the probate court in the present case.

A proceeding in the mode provided in sec. 4761 could have been instituted if that was the forum chosen, or an action might have been brought in the common pleas.

We are therefore constrained to say that sec. 6448, Rev. Stat., confers no authority to prosecute this suit in the probate court; that sec. 4761, Rev. Stat., in effect forbids it; and consequently that there was no jurisdiction there to entertain the action, either as to the subject thereof, or the party defendant.

On that ground, therefore, the judgment of the common pleas must be, and is, reversed, and the cause dismissed.

A. E. Jacobs, Prosecuting Attorney, and *S. F. White*, attorneys for plaintiff in error.

John T. Moore and *John W. Higgins*, attorneys for defendants in error.

JUSTICE OF THE PEACE—ATTACHMENT—JURISDICTION.

[Lucas Circuit Court, March 3, 1900.]

Haynes, Parker and Hull, JJ.

PATRICK KELLY V. ANN FLANAGAN.

ATTACHMENT—JURISDICTION TO PROCEED WITHOUT SEIZURE.

Where in a civil action before a justice of the peace, brought in the county but not in the township of the defendant's residence, the summons is accompanied by an order of attachment sued out and issued in good faith upon any ground authorizing an attachment against a resident of the county, and the summons is duly served, such justice thereby obtains jurisdiction over the person of the defendant, and may proceed to personal judgment against him, though no property is seized or held under the attachment.

HEARD ON ERROR.

PARKER, J.

On July 24, 1899, Ann Flanagan filed a bill of particulars before a justice of the peace for Washington township, in this county, against Patrick

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Kelly, in which she claimed \$39.50, on an account for board, and also filed an affidavit for attachment and garnishment, and thereupon a summons and a writ of attachment and garnishment were issued. It appears from the return of the constable on the summons that it was served by leaving a true copy at the place of residence of Patrick Kelly, and it also appears that the garnishee was duly served. It further appears that on July 29, 1899, both parties appeared before the justice and a motion was made on behalf of Patrick Kelly to discharge the attachment, on certain grounds set forth therein, which motion was heard and overruled, and from this order Kelly took an appeal to the court of common pleas. Thereupon the case pending before the justice was adjourned until August 9, 1899, at 9 A. M., presumably to await the action of the court of common pleas upon this appeal.

The docket then states, under the date of August 2, 1899, that the motion to dismiss the attachment was heard in the common pleas and was granted, and that the fact that such action had been taken in that court had been certified to the justice.

Then the docket states that on August 9, 1899, the case came on for hearing on its merits. That the plaintiff, with her attorney was in court, but for one hour thereafter the defendant did not appear: That certain witnesses were sworn on behalf of the plaintiff, and that on consideration of the evidence the justice found for the plaintiff and entered judgment against the defendant.

Plaintiff in error (Kelly) contends that after the attachment had been thus discharged the justice had no jurisdiction to proceed farther in the case for the reason that the plaintiff in error was a resident of another township than Washington township, to-wit, Port Lawrence township, Lucas county, and that he was not answerable to a summons, in a civil action for debt, before a justice of the peace in any other township than that of which he was a resident, unless the summons were accompanied by an order of attachment and the order of attachment was made effective by the taking and holding of property, in which event the suit became substantially a proceeding *in rem*.

That he was not a resident of Washington township and was a resident of Port Lawrence township does not appear in this transcript; but in his petition in error he sets that forth as a matter of fact. It is urged that this averment of fact may be considered because it is something not contradicting the record, but supplementary to it. We do not pass upon that question, but decide the case upon the assumption that the plaintiff in error was a resident of Port Lawrence township.

Subsequently the plaintiff below (Ann Flanagan) instituted a proceeding in aid of execution, under the act passed April 27, 1896, 92 O. L., 375 and 376, authorizing proceedings in aid of execution before a justice. Plaintiff in error was informed of that, and appeared before the justice to oppose such action, and he says that then was the first time he became apprised of the fact that the justice had attempted to exercise jurisdiction in the premises and had proceeded to judgment against him; and he then and there filed an affidavit setting forth the fact that his residence was in another township, and in this way he undertook to attack and procure the setting aside of this original judgment.

That, we think, could not be accomplished in that way, or in such collateral proceeding. The justice held against him. In this proceeding the plaintiff below failed to reach any property to apply to this judgment,

but the justice proceeded to enter up judgment against the plaintiff in error, in form substantially like the original judgment.

Within four months of the time of the original judgment the plaintiff in error prosecuted error to both these judgments and orders to the court of common pleas and there they were affirmed, and now he prosecutes error in this court to reverse the judgment of the court of common pleas and both of the judgments of the justice.

The statute then in force, providing when a person may or may not be sued before a justice of the peace, is secs. 582, 583 584, Rev. Stat., as amended April 19, 1898, 93 O. L., 146, 147, 148. Section 582 provides:

"The jurisdiction of justices of the peace, in civil cases, unless otherwise directed by law, is limited to the township wherein they have been elected, and wherein they reside; but no justice of the peace shall hold court outside of the limits of the township for which he was elected.

Section 583 provides:

"Justices of the peace within and coextensive with their respective counties shall have jurisdiction and authority * * * * *
* * * * * To issue attachments and proceed against the goods and effects of debtors in certain cases, * * * but when said justice has jurisdiction of the defendant because he resides in the township for which said justice was elected or otherwise as provided in section 584 of the Revised Statutes, the jurisdiction of the justice shall be coextensive with the county."

Section 584 provides:

"No householder or freeholder resident of the county shall be held to answer a summons issued against him by a justice in a civil matter in any township of such county other than the one where he resides, except as otherwise provided by section five hundred and eighty-three, and in the cases following:"

Coming to the fourth paragraph, it reads:

"Where the summons is accompanied with an order to attach property the jurisdiction is coextensive with the county," except—in certain counties,—and this county does not come within the exception.

Now the plain provision of the law, as found in sec. 584, is, that the jurisdiction of the justice shall be coextensive with the county and a householder of any township of the county shall be held to answer the summons, if the summons is accompanied with an order for the attachment of property. If the legislature had intended that it should be coextensive with the county only in cases where such attachment is made effective by the seizing and holding of property or only in special cases where the defendant resided in the county, but not in the township of the justice, it would have been just as easy to have stated it in that way and to have specified the cases. There may be reasons why the jurisdiction ought not to be exercised coextensively with the county unless property is reached by the attachment, unless the defendant is a resident of the township as well as the county of the justice, but we cannot find from the reading of this law that it is so provided.

The only case that is directly in point, to which we are cited, is that of *Orr v. Schackel*, 7 Dec. 352, in the Hamilton county common pleas. The opinion is by Judge Spiegel, and he holds as follows:

"Section 584, paragraph 4, must be construed together with sec. 583, paragraph 7 and sec. 582, and thus construing it, a justice can only ob-

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tain jurisdiction over a non-resident of his township in a civil action, where the order to attach property accompanying the summons is made effective by the attachment of the property; otherwise, not."

And he cites certain cases, but they do not directly bear upon the proposition, and we find ourselves obliged to adopt a different conclusion as to the proper construction of this law. We think the proper reading of the statute is that where in a civil action before a justice of the peace brought in the county but not in the township of the defendant's residence, the summons is accompanied by an order of attachment sued out and issued in good faith upon any ground authorizing an attachment against a resident of the county, and the summons is duly served, such justice thereby obtains jurisdiction over the person of defendant, and may proceed to personal judgment against him though no property is seized or held under the attachment. What might be done in a case where one procures an attachment to be issued fraudulently, for the purpose of giving a justice jurisdiction where he ought not to exercise it or in a case where the affidavit should be insufficient, or the like, we do not undertake to say. In this case it does not appear but that the attachment was sued out and issued regularly and in entire good faith; and that a part of the object of plaintiff's proceeding failed through his misfortune but not through his fault; we therefore hold that the justice might rightfully proceed to judgment against the plaintiff in error, as he did. This disposes of the case and makes it unnecessary for us to consider or discuss various other questions that enter into the matter; but, if we had got beyond this point and held with the plaintiff in error upon it, there would have remained a serious question as to whether plaintiff in error had not entered his appearance by his motion to discharge the attachment; and also as to whether, where the record shows that he was duly served and knew that the action was pending against him, he can turn his back upon the proceeding and allow judgment to go against him and then prosecute error on the ground that he was a resident of another township—a fact that does not seem to have been brought to the knowledge of the justice of the peace, although the plaintiff in error was present at the time the case was called and adjourned over.

The judgment of the court of common pleas affirming the first judgment of the justice will be affirmed. The second judgment of the justice was unauthorized and does not either strengthen or weaken the first judgment, so we need not notice it farther.

W. J. Gill, for plaintiff in error.

J. A. Chase, for defendant in error.

SEWERS---ASSESSMENTS.

[Lucas Circuit Court, July 14, 1900.]

Haynes, Parker and Hull, JJ.

TOLEDO, FOR THE USE OF MACGAHAN, V. SAMUEL A. FORD ET AL.**TRUNK SEWERS—FINDING OF ASSESSING COMMITTEE CONCLUSIVE.**

All the land within a sewer district in the city of Toledo may be assessed for a general or trunk sewer constructed within such district, and the finding of the assessing committee with reference to the special benefits which will accrue to the several parcels of land within the sewer district is conclusive, in the absence of fraud or great oppression.

APPEAL.**HAYNES, J.**

This case comes into this court on appeal, and is an action brought for the purpose of enforcing certain sewer assessments within the city of Toledo.

The petition sets up that there is a sewer district within the city of Toledo, called and denominated sewer district number 26. That sewer district lies in the westerly portion of the city—perhaps abuts on the westerly line of the city—and lies between Central avenue and Auburn avenue and other streets named, being east of the wagon works, reaching over to Woodlawn Cemetery and extending in an easterly direction over to Bancroft street and then following along another street therein named, comprising a very large sewer district.

Proceedings were had in the common council whereby it was ordered that there should be a main sewer constructed within the district, commencing in the neighborhood of the Milburn Wagon Works and extending through certain streets and emptying into Ottawa river or Ten Mile creek. The country around about this section is table-land, but as it approaches Ten Mile creek it descends, by rather an abrupt bank to the low grounds abutting upon the river. This sewer was ordered to be constructed and contracts were let in due form according to law, the work was performed and a final estimate was made. That estimate was made upon the whole of this district, as we understand, at least it was ordered to be made upon the whole sewer district, and it is not shown that it did not cover the whole sewer district, it included, however, in this district the lands about which the controversy has arisen. These lands lie, a part of them, upon this high table-land, a part of them being—as is testified here—treated as acre-land, and a portion is the low ground adjoining the river or creek, and there is descending from these table-lands, at one point, a ravine running down to and into the low lands.

The contention of counsel for the defendants in this case is, that this property is not benefited by this main sewer, they claiming that it furnishes no drainage for the low lands and practically no drainage for the high lands, or perhaps I should say that the high land, by virtue of its elevation, and the ravine has already sufficient drainage.

The case was heard upon evidence. It was claimed that this sewer was simply a sewer for surface drainage; that the parties who owned the land and sold the lots in question had no right to drain into it or to use

the sewer for house drainage; but we find upon examination of the testimony that this is not true. Under the statutes of the state when the city desires to make drainage in a city, the matter is to be submitted to the board of health, and the board of health at first decided against allowing this main sewer to empty into Ten Mile creek, but afterwards, upon a hearing, they allowed it to be so used until such time as they should order another outlet to be built; so that so far as appears at present, the sewer is used for all of the purposes of a sewer—for surface drainage and for house drainage also.

It is claimed that it is impossible to drain many of the lands and lots into this sewer, and the statute is invoked which provides that where lots and lands cannot be drained, or where they have sewerage already provided, no assessment can be made. But, without discussing this matter to any length, we think counsel for defendant have, as we understand their arguments, at least, taken an erroneous view of these assessments. It is not an assessment for local drainage and is not attempted to be. The ordinance does not provide for anything of that kind; it is an assessment in a sewer district for the building of a trunk sewer through that district, an assessment which is ordered by the common council and is an assessment upon all the lands within the district which are benefited for the purpose of building this sewer. We have been cited to 45 Ohio State and to the decision of the court in that respect, with regard to charging for local sewerage where there is a district sewer. That question does not arise here, for there is no attempt here to make or assess for local sewerage.

The statute referred to is sec. 2380: "The assessment shall not exceed the sum that would, in the opinion of the council, be required to construct an ordinary street sewer, or drain, of sufficient capacity to drain or sewer such lots or lands; nor shall any lots or lands be assessed that do not need local drainage, or which are then provided therewith; and the excess of the costs, over the assessment herein authorized, shall be paid out of the sewer fund of the corporation."

Now that was the general statute. That is the statute under which the decision in *Newell v. Cincinnati*, 45 Ohio St., 407, proceeded and which was construed. In that case there had been a sewer district made and the council had attempted to assess for local drainage \$2.00 per front foot, which it said was to be used for building the sewer. The sewer was located on the heights above Cincinnati; and forty years ago there was a creek passed by there, called Deer creek, and the parties to the suit had built upon these heights and at their own expense had built sewers into Deer creek and their property had all the sewerage needed. That case decided that these lots could not be charged for local sewerage, that it must be paid out of the general sewerage fund. In all cities but the city of Toledo, of which I know, a sewerage fund is provided under this general statute by taxation—either by taxation upon the property in the respective sewer districts or upon the whole of the property within the city—that is to say, the money to make the trunk sewers and lay sewers and the general sewerage, is raised either by general taxation upon such districts or upon the whole city, the same as money is raised to sustain the fire or the water departments of the city. But Toledo seems in municipal legislation to be always blessed with something peculiar to herself. She had this law amended, and in its terms it applies, of course, to cities of the third grade of the first class, but, as that only covers Toledo, it is a local statute. Now it proceeds to say: "or in cities

of the third grade of the first class, if the council so determine, may be assessed in addition to other taxes now authorized by law, on all the real property in the sewer district in which said sewer is or may be constructed according to benefits," and it then proceeds to tell how to borrow money—for the purpose of raising money with which to build the sewer. It was under this statute that the council proceeded to order this assessment made upon the property within this sewer district.

Now, while it is said that it should be made according to benefits and being called an assessment, it is treated as proceeding upon the same general principles as all assessments proceed, to-wit, because of the benefits which accrue to the property—nevertheless, it is in substance a method of raising money for the purpose of building a general trunk sewer in the sewer district, the same as is raised by a sewer fund in other cities, under the general statutes of the state. It is a tax upon the property in that district for the general purposes of a sewer, and it is to be sustained upon the same principles that we sustain a tax for a fire department or a tax for a water department or a tax for a police department, the money is raised for sanitary purposes, for the protection of the health of the inhabitants of the city of Toledo, and every man who owns a foot of property in the city is interested in having sewerage of that kind—a general system, for the protection of the health of the city.

When they came to make this assessment, the parties who were appointed proceed to make this general assessment, and they assessed upon this property which abuts upon the creek and through which this trunk sewer passes, a small sum of money. Now that trunk sewer, when it comes down out of this table-land crosses this low land to the creek, and the bottom of the sewer there is not over eight or nine inches below the surface of the ground, and as it is a fifty-four inch sewer inside substantially the whole of the sewer lies above ground, there is no question about that; but there is no attempt to drain into it locally, it is not designed for local drainage. It is not expected that it will be drained into. The tax is made under that general provision that taxes the whole district for the general good of the property within the district.

Of course it is difficult to say just how much any of these lots or lands are benefited, but the assessors did proceed to make discriminations and assess some lands more than others, discriminating on account of the locality of the property and its relation to the sewer and the probable benefits of the sewer to the property assessed.

In regard to these assessments the law of Ohio has not been changed. This assessment was made by the city authorities and made with reference to the special benefits which will accrue to the property. The finding of the assessing committee upon that point is conclusive upon this court, unless there is shown to be fraud or great oppression. That is decided in perhaps 84 O. S. Upon examination of the facts of this case we think the assessments are very fairly and justly made; that this court could not make any better if it should try. We think the plaintiff entitled to a judgment against these lands for the amounts respectively assessed, which are recited in the petition, and judgment will be entered accordingly.

P. A. MacGahan, for the plaintiff.

S. A. Ford and C. F. Watts, for the defendants.

CURTESY—STATUTES.

[Hamilton Circuit Court 1900.]

Smith, Swing and Giffen, JJ.

EVA D. CAMERON ET AL. v. GOEBEL & BETTINGER ET AL.**1. ESTATE BY CURTESY—RESTRICTIONS—RETROACTIVE LAWS.**

Where by the law in force at the death of the wife, the husband acquired an estate as tenant by curtesy, but without any right to convey or encumber the same during the life of any of the children, and with an express provision of the statute in force that his interest therein should not be taken by any process of law for the payment of his debts, the legislature cannot, without infringing upon the vested rights of children, remove such restrictions and authorize the husband to convey or encumber his interest or allow it to be sold for his debts during the life of any of the children. The act of April 14, 1884, amending sec. 3108 Rev. Stat., by new secs. 3108 and 3109 Rev. Stat., repealing the limitation imposed upon a tenant by curtesy is, therefore, retroactive and invalid as to vested rights of children.

2. PROVISIONS REFERRED TO MAY BE WAIVED.

The provisions of the statutes above referred to, preventing a sale or encumbrance by the husband or preventing the property being taken for the debts of the husband, during the life of any of the children, being intended for the protection of the children or remaindermen, may be waived.

APPEAL.**SMITH, J.**

[This is an action by the plaintiffs seeking to sell the interest of defendant. Simpkinson, in a certain tract of real estate to pay a judgment rendered against him,] which judgment is now owned by them, and to have a claim asserted by defendants, Goebel & Bettinger, as a lien on the same land prior to theirs held to be invalid as against them.

It is admitted that the real estate in question was owned in fee simple, at the time of her death, by Martha Simpkinson, who died intestate December 29, 1869, leaving surviving her the defendant, Henry H. Simpkinson, and three children, her only children and heirs at law—the two plaintiffs and their brother, John H. Simpkinson.] Whether John H. Simpkinson is now living does not appear, but it is admitted that before the commencement of this suit he had sold and conveyed all of his interest in this real estate to Mrs. Ford, his sister, and that the two plaintiffs are the owners of the land in fee simple, subject only to the interest of their father (or of those claiming under him) therein, as the surviving husband of Mrs. Martha Simpkinson, their mother.]

John Kelly, the grandfather of the plaintiffs, held a claim against Henry H. Simpkinson, on which he brought a suit in Miami county common pleas court, which he assigned to his two grand-daughters, the plaintiffs, while the suit was pending, and a judgment was recovered in said suit against defendant, Simpkinson, for the sum of \$5,580.53, on which an execution was issued to the sheriff of Hamilton county, Ohio and levied on the interest of Simpkinson in the land described in the petition in this case. Prior to this, however, the defendants, Goebel & Bettinger, had, by confession, recovered a judgment against said Henry H. Simpkinson, in Miami county common pleas court, for \$1,757.85 and costs, and an execution issued thereon had also been levied by the sheriff of Hamilton county on his interest in said land.

¶The claim of the plaintiffs is that they are entitled to have the interest of their father in this land sold for the payment of their said judgment) and that under the law the defendants, Goebel & Bettinger, have no claim or lien thereon, and that it be so held and adjudged by the court, and that the said interest of Henry H. Simpkinson in this land be sold under the order of the court, and the proceeds be applied to the payment of their claim, and for such other relief as in equity they are entitled to.

The claim of Goebel & Bettinger as set up in their answer is that the execution issued on their said judgment was levied on the interest of H. H. Simpkinson, in this land on December 30, 1897, and that the execution in the Kelly case was not levied until April, 1898, and that by virtue of the levy of their execution they have a good lien on the interest of Simpkinson therein, and one prior to that of the plaintiffs, and they, by cross-petition, ask for the sale thereof, and that this claim be first paid from the proceeds.

The court of common pleas by its decree ordered the interest of Simpkinson in the land to be sold, and that from the proceeds of sale, the costs be first paid, and that the residue be applied, first, to the payment of the claim of Goebel & Bettinger, and the balance to the claim of the plaintiffs. From this decree the plaintiffs appealed to this court. In this court Simpkinson filed an answer consenting to the sale of this interest in the property to pay the claim of Goebel & Bettinger.

On this state of fact what are the rights of these several parties in this case?

Mrs. Simpkinson, the wife of Henry H. Simpkinson, and the mother of the two plaintiffs, and their brother, having died intestate December 29, 1869, the real estate in question descended to her said three children subject to the interest of Henry H. Simpkinson therein, as by the provisions of either Sec. 1 or Sec. 2 of the statute of descents, passed March 4, 1865 (S. & S., 304), amending Sec. 1 and 8 of the act of March 14, 1853 (S. & C., 501), and by virtue of the provisions of Sec. 17 of the last cited act which provided that "nothing in this act should be so construed as to affect the right which any person may have to any estate by the curtesy or in dower in any estate of any deceased persons. And surviving husbands, whether there has been issue born during the coverture or not, should be entitled to the estates of their deceased wives by the curtesy."

These provisions of the statute being in force at the time of the death of Mrs. Simpkinson, if there were then no other provisions of law modifying or changing the same, it seems clear that the surviving husband would have taken a life estate in this land, and would have had all the rights of a life tenant therein, including the right absolutely to convey the same to a third person, or to mortgage or encumber it for his debts, or to confess a judgment against himself, and that on proceedings to foreclose the mortgage, or enforce the judgment by execution or otherwise, his life estate therein might be sold under the order of the court, and the purchaser obtain a good title thereto.

But these were not the only statutes to be taken into consideration. On May 1, 1866, an act was passed and took effect (S. & S. 389), making real estate owned by a married woman, and acquired by her in any one of the ways therein specified, her separate property, and giving her certain rights therein, but providing that "this act shall not affect the estate by the curtesy of any husband in the real property of his wife after

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her decease, but during the life of the wife or any heir of her body such estate shall not be taken by any process of law for the payment of his debts, or be conveyed or encumbered by him, unless she shall join therein with him in the manner prescribed by law in regard to her own estate." ^{curt.}

This section was slightly amended March 23, 1866 (S. & S., 391), but in no wise affecting this provision, and in the revision of the statutes in 1880 the law in question was re-enacted as Sec. 3108, Rev. Stat. If, as between these parties, these laws are still in force, it would seem to be clear that during the lifetime of the plaintiffs, two of the heirs of the body of Mrs. Simpkinson, this interest of the husband as life-tenant in this estate could not be taken by any process of law for the payment of his debts, at least without the consent of the three children of Mrs. Simpkinson, or, it may be, the consent of those living, who now have the estate in remainder, that is, of Mrs. Cameron and Mrs. Ford.

But, as we understand it, the claim asserted on behalf of the defendants, Goebel & Bettinger, is this: That on April 14, 1884, this sec. 3108 was so amended by new secs. 3108 and 3108, Rev. Stat., as to repeal the limitation before that time imposed upon him, that during the life of any heir of the body of the wife his interest in her estate as tenant by this curtesy should not be taken by any process of law for the payment of his debts, or be conveyed or encumbered by him unless the wife should have joined therein with him in the manner prescribed by law in regard to her own estate (81 O. L., 209), and that this legislation had the effect immediately to confer upon Mr. Simpkinson the same rights as other life tenants have in real estate, and to mortgage or convey the same, and to encumber it by judgment liens, and from that time forward it was liable to sale on execution or otherwise, even during the lifetime of any heir of the body of Mrs. Simpkinson; and if the statute in question was a valid one as to these parties, as applied to their respective interests and estate in this land, the contention would seem to be right unless the law as affecting them has been changed by subsequent legislation.

There have been substantial changes in the statutes on this subject since that of April 14, 1884. At the very next session of the legislature sec. 3108, Rev. Stat., as amended April 14, 1884, was repealed, and re-enacted with the same limitation upon the rights and powers of a tenant by the curtesy as had existed when the husband had acquired his interest at the death of his wife under the law of 1861, and as amended in 1866, and by sec. 3108, Rev. Stat., as brought into the revision of 1880. This act is found in 82 O. L., 131, and continued in force until March 19, 1887, when an act was passed (84 O. L., 186), sec. 4194-1, Rev. Stat., abolishing the estate by the curtesy, but saving vested rights and in lieu thereof giving to a widower, as dower, one-third of his wives' land for his life.

But manifestly this last statute does not affect the rights of the parties in this case for the reason that it does not purport to do so, as it saves all vested rights, and for the additional reason that the legislature would not have the right to reduce a vested life estate of a tenant by the curtesy in the whole land to a dower interest of one-third thereof. And for the last reason stated, we are of the opinion that if the statute of April 14, 1884, was a valid statute as to these parties, and gave to Simpkinson, the tenant by curtesy, the right to convey, mortgage and encumber this interest in this real estate by repealing the restrictions and limitations on his right to do so imposed by the statute in force

when he acquired his title thereto, that the legislature had not the right by the statutes of 1885 to reimpose such limitations upon him, and upon the right to use his said estate.]

[On this point then the question then seems to be this: The husband and the children, the heirs at law of Mrs. Simpkinson, having acquired their several interests in this land on the death of the wife in 1869, his interest under the law then in force being that of a tenant by the curtesy, having an estate for his life in said lands, but without any right to convey or encumber them during the life of any of her surviving children, and with an express provision of a statute in force that his interest therein should not be taken by any process of law for the payment of his debts, could the legislature, without infringing upon the vested rights of the children, remove all those restrictions and authorize him thereby to convey or encumber his interests therein, and allow it to be sold for his debts during the lifetime of any of those children?]

The question is one not free from doubt. Indeed we are referred by counsel for the defendants to the decision of this court directly holding, in a somewhat similar case, that this statute of 1884 was not open to the objection named. It is *Hulick v. Higdon*, 1 Circ. Dec., 184. It there appears that the court deciding it was composed of Judges Cox, Smith and Swing. This is an error as Judge Bradbury took the place of Judge Swing, who had been of counsel in the case. Personally I have but an indistinct recollection of the case or of the arguments of counsel, but on reconsideration of the question I am of the opinion that that case was not correctly decided; that the rights of the parties were fixed by the laws in force when their interests were acquired, and were, therefore, vested rights, and could not be interfered with by the legislature. There can be no question, I think, but that on the death of the mother the three children took the whole title to the estate which had been held by her, subject only to the right given by the existing law to their father, and that certainly was not an absolute life estate therein, but, on the contrary, by the statutes referred to, was shorn of many of the attributes and privileges of a tenant of the curtesy as it existed at common law, on the death of the wife, and as it existed in this state by statute prior to the passage of the law of 1861. At the death of the wife in 1869, the husband and the children together owned the whole estate—the husband an estate for his life therein, as fixed and limited by the statute, and the children the residue of the estate, subject only to his rights.

On what principle, then, the legislature could afterwards provide that his rights therein could be greatly extended, and the interest of the children correspondingly lessened, and this be effective as against them, I can not understand, in view of the provisions of sec. 28, art. 2, of the constitution of the state, which provides that "the general assembly shall have no power to pass retroactive laws." And as held by Judge Brinkerhoff in deciding *Raridan v. Burnett* 15 Ohio St., 207, "the words 'retrospective' and 'retroactive' as applied to law, seem to be synonymous," and he quotes approvingly Judge Story's definition of a retrospective law: "[Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already passed must be deemed retrospective," and therefore, under the clear doctrine of the law that statutes

affecting substantial interests and rights of property have a prospective operation only, unless the contrary intention is already expressed. Kelley v. Kelso & Loomis, 5 Ohio St., 199.

Such should be the holding as to this statute of 1884, for it certainly seems to come within the meaning of retroactive law, as defined by Judge Story. The statute in force at the time he acquired his title, simply gave to the husband during the time that any one of the heirs of the body of the wife was living the right to use and occupy the estate during his life (by himself or his agent we suppose), and expressly deprived him of any right to convey or encumber it during the life of the wife, unless she joined in the deed, and expressly exempted his interest therein from sale on execution or otherwise for his debts, either before or after the death of the wife, while any of said heirs were living unless the wife had so joined in the mortgage or other encumbrance. It is expressly held in Robert v. Sliffe, 41 Ohio St., 225, that the living children after the death of the wife, have the right to prevent the enforcement of a mortgage made by the father after the death of the wife, which shows, we think, that they had substantial rights which would be protected by the courts, and which were so vested that they could not be divested by the legislature.]

[If these views be correct, and the claim of the defendants, Goebel & Bettinger, could not be asserted and enforced in an action brought by them directly to do so, against the wishes of the children, can it be done where, as in this case, an action is brought by the two children now owning the remainder, and where they seek the sale on a debt of the father now owned by them?] And under the circumstances of this case, have the plaintiffs, the sole owners of the remainder, the right to have the father's interest sold to pay the judgment lien thereon? As to the last question, we have had doubt whether it can be done without the consent of John H. Simpkinson, one of the children of Mrs. Simpkinson, if he is now living. But as this provision as to sale or encumbrance by the husband, or preventing the property being taken for the debts of the husband, during the life of any child was probably for the protection of the remainder of the estate, it may be that the consent of one who has parted with his interest in the estate is not essential, but we think it would be the safer plan to have such consent. If given, we see no reason why (as this provision of the law is one for the protection of the children or remainder man) they could not waive it.] Nor do we see any good reason for holding that they may, and do, waive it as to their own claim, and ask for a sale of their father's interest in the land to pay it; that this also would operate as a waiver of their right to object to the sale thereof to pay the claim of Gobel & Bettinger.

But it is clear, we think, that the court ought not to take any action that would be prejudicial to the rights of the latter. Their lien, by the levy of their execution before the levy of that of the plaintiffs, in some sense gave them a lien on the freehold estate of Simpkinson. It attached at the date of the levy, and gave them the right to sell the life estate if he survived his children. This is a substantial right and should not be taken away. The only way in which the rights of all the parties can be protected, as it seems to us, would be to have the interest of Mr. Simpkinson sold on the claim of the plaintiffs, and the proceeds of the sale, less the costs of the case, placed in the hands of a trustee for investment during the life time of Simpkinson, the net pro-

Cameron v. Goebel & Bettinger.

ceeds of the income thereof to be paid to the plaintiffs during the lifetime of the father and of the plaintiffs, or either of them, and if the father should survive the children then the defendants, Goebel & Bettinger, would be entitled to the amount of the purchase money, less the costs as aforesaid.

J. J. Glidden and C. & M. Swing, for plaintiffs.

Jacob Shroder, for defendants.

APPEAL BONDS—SURETIES.

[Hamilton Circuit Court. 1900.]

Smith, Swing and Giffen, JJ.

PHILIP WINKLER V. STATE EX REL. BACK.

1. APPEAL BOND—PROPERTY QUALIFICATION FOR SURETY.

An execution may be levied upon a family homestead notwithstanding the exemption and the right of dower, but can only be enforced subject to such rights. If, therefore, the exemption and dower will, together, if claimed, consume the entire property, the person has not "property liable to execution" within the meaning of sec. 4953, Rev. Stat., and may be rejected as surety on an appeal bond.

2. EVIDENCE FAILING TO ESTABLISH QUALIFICATION.

Where the evidence showed that the person offered as surety on an appeal bond was the owner of a house and lot valued at \$2,300, upon which there was a mortgage of \$1,160, that he was forty years of age and his wife thirty-four years of age, and that they resided on the premises, without evidence indicating whether the wife executed the mortgage or evidence as to the state of the husband's health, it cannot be determined whether the husband had property liable to execution or not.

HEARD ON ERROR.

GIFFEN, J.

The court below issued a writ of mandamus to compel the justice, plaintiff in error, to accept a surety offered on an appeal bond for the sum of \$70.

It appears from the testimony that the surety was the owner of a house and lot valued at \$2,300, upon which there was a mortgage amounting at that time to \$1,160. He was forty years of age, his wife thirty-four years, and together with their four children resided on the premises. It is claimed by plaintiff in error that by reason of the homestead exemption and the wife's right of dower, the surety offered had no property liable to execution.

Section 4953, Rev. Stat., provides—

"Sureties must be residents of this state, and worth, in the aggregate, double the sum to be secured, beyond the amount of their debts, and have property liable to execution in this state equal to the sum to be secured."

An execution may be levied upon a family homestead, notwithstanding the exemption and the right of dower, but can only be enforced subject to such rights. If, therefore, the exemption and dower will, together, if claimed, consume the entire property, then the surety has not property liable to execution within the meaning of sec. 4953, Rev. Stat., and the justice would be justified in refusing to accept him.

In this case the value of the property in excess of the mortgage lien was \$1,140. If the wife joined her husband in the execution of the

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mortgage, the lien would preclude the allowance of a homestead to either of them, while a levy of execution upon a judgment recovered on the appeal bond would not; and upon sale of the premises after payment of the mortgage, the head of the family or the wife would be awarded five hundred dollars in lieu of homestead. The same result would follow if the husband executed the mortgage before marriage (sec. 5440, Rev. Stat.). Again, if we confine our estimate to the tables of mortality alone, the value of her contingent right of dower is \$103.77.

In *Mandel v. McClave*, 46 Ohio St., 407, the first proposition of the syllabus is as follows:

"The contingent right of a wife, during her husband's life, to be endowed of his real estate at his death, is property having a substantial value that may be ascertained with reasonable certainty from established tables of mortality, aided by evidence respecting the state of health and constitutional vigor of the husband and wife respectively."

If the husband was in ill-health and with a weak constitution, the wife's contingent right of dower would be increased in value. The bill of exceptions discloses no evidence as to the state of health of the husband or wife, or as to whether the latter executed the mortgage, and without which facts it can not be determined whether the surety had any property liable to execution, or from which the amount of the judgment could be realized. Had the testimony shown that the husband and wife were entitled to \$500 only in lieu of homestead, and that the contingent dower was valued only at \$103.77, then clearly there could be no reason for rejecting the security offered and the writ should issue.

Judgment reversed and cause remanded.

Renner, Gordon & Renner, for plaintiff in error.

Charles M. Hepburn, contra.

PARENT AND CHILD.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

IN RE EDWIN MURNCH, EX PARTE.

PARENT AND CHILD—ILL TREATMENT BY STEPMOTHER.

A father cannot be deprived of the custody of his child on account of cruel and unlawful punishment inflicted by a step-mother in his absence, unless it appears that the father countenanced or encouraged such ill-treatment.

HEARD ON ERROR.

GIFFEN, J.

While the court below found that the child had been cruelly treated by his stepmother, it does not appear that it was done with the knowledge or approval of the father; but the custody of the child was taken from the father and given to the grandmother until September 1, 1900, when the father was to be reinvested with it. This order seems to have been made with a view of punishing the father for permitting the stepmother to mistreat the child, for if the father was an unfit person to have the custody and control of his child, it does not appear that he will be better qualified on September 1. We doubt if such interference in the government of the family by writ of *habeas corpus* should be encouraged and upheld; but, on the other hand, believe that it would be pro-

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ductive of much mischief. If the stepmother, in the absence of the father, cruelly and unlawfully punishes the child, she in turn may be punished under the statutes of this state, and unless the father countenances or encourages such ill treatment he ought not to be deprived of the custody of the child in favor of one who has no legal claim thereto.

We think the evidence fails to show that the welfare of the child required that he be removed from the care and control of his father; yet we are satisfied that kind and patient treatment, rather than corporal punishment, would better teach him to respect and obey his parents.

The judgment will be reversed.

Ed. M. Spangenberg, for the petitioner.

August H. Bode, contra.

WILLS—RECEIVERS—ERROR.

[Richland Circuit Court, July, 1900.]

Voorhees, J., at Chambers.

EVA M. SANKER ET AL. V. ETHEL M. MATTISON ET AL.

1. RECEIVER—ACTIONS TO DETERMINE VALIDITY OF WILL.

Where an action is brought in common pleas court under sec. 5881, Rev. Stat., to determine the validity of a will, the issue is confined to the question whether the writing produced is or is not the last will of the testator, and the subject of the action is the validity of the will.

2. SAME—NOT A CASE FOR A RECEIVER UNDER SEC. 5587, REV. STAT.

The circuit court, or judge thereof in his circuit, has no power under sec. 5587, Rev. Stat., to appoint a receiver in such an action, after final judgment, to sell or take charge of the personal or real property of the decedent, during the pendency of proceedings in error, where an executor or administrator with the will annexed had been previously appointed by the probate court.

3. SAME—APPOINTMENT OF A RECEIVER IN SUCH ACTION—WHEN.

A court of equity possesses the power independent of statute, to appoint a receiver to preserve property *pendente lite*; but such power can be exercised only in cases where the property is the direct subject of the action, and the judgment will act upon the specific property, and when there is no person who is at the time competent to hold and manage it during the judicial proceeding.

4. SAME—EFFECT OF JUDGMENT IN SUCH AN ACTION.

While the judgment in such an action is conclusive as to the title of real and personal property of the testator, it does not deal with or relate to the possession of any specific property of which the decedent died seized; and the plaintiff cannot, under any process that can be issued to enforce the judgment, obtain possession of the property, regardless of the rights of the executor or administrator to duly and legally administer and distribute the estate, according to the provisions of the will or the law.

5. SAME—JUDGMENT SETTING WILL ASIDE DOES NOT REMOVE ADMINISTRATOR

A judgment setting aside the will leaves the parties in the situation which they would have occupied had the testator died intestate; but it does not vacate or annul the order of appointment by the probate court of an administrator of the estate.

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6. SAME—EFFECT OF PROCEEDINGS IN ERROR.

The judgment setting aside the will, and the filing of a petition in error to reverse this judgment, does not vacate the order appointing an administrator on the estate, or release the administrator from the preservation of the property, or the protection of the interest of parties during the pendency of the litigation; and the jurisdiction to make such orders or further orders for that purpose, during the pendency of proceedings in error, remains in the probate court. The petition in error does not bring the whole property and the administration thereof, before the appellate court, but only the order adjudging the will to be void; and leaves in the probate court all jurisdiction in the cause not inconsistent with the power to reverse, vacate or modify the final order or judgment in which error is alleged.

APPLICATION for receiver in action pending in circuit court of Richland county.

VOORHEES, J. (At Chambers.)

This action is pending in the circuit court of Richland county, on petition in error to reverse the judgment of common pleas in favor of the defendants in error, on an issue made up under sec. 5861, Rev. Stat., contesting the last will and testament of William M. Mattison, deceased.

The plaintiff in error, Eva Sanker, is the administratrix with the will annexed of said William M. Mattison, and one of the heirs of said deceased, and a devisee under said will. Since filing the petition in error in the circuit, and for the first time, an application is made to one of the judges of said court at chambers, by the defendants in error, for the appointment of a receiver, to take charge of and sell the real estate of which said William M. Mattison died seized and disposed of by said will.

The said Eva Sanker, as such administratrix and devisee under said will, with others, plaintiffs in error, oppose the appointment of a receiver and contest said application, which presents some important legal questions.

The action being one for the contest of a will, it may be assumed, and it appears from the record, that the will was duly admitted to probate, in the probate court of Richland county; that an administrator with the will annexed was duly appointed and qualified by that court; and afterwards proceedings were commenced to contest the validity of the will by the defendants in error. It is further shown by the record that the cause was tried in the common pleas court to a jury, resulting in a verdict and judgment in favor of the contestants, the defendants in error, and the plaintiffs in error, prosecute error to the circuit court. Since the cause came into this circuit court this application is made for the appointment of receiver. No misconduct, fraud or maladministration of any kind is charged against the administratrix.

The application is made under sec. 6587, Rev. Stat. If the power to appoint a receiver exists under said section in such a case, it is by virtue of the sixth subdivision, which provides that: "In all other cases where receivers have heretofore been appointed by the usages of equity."

The first question then is: Is this a case in which, by the usages of equity, the circuit court or a judge thereof can appoint a receiver *pendente lite*?

The appointment of a receiver in any case is, as a general rule discretionary. The discretion is not arbitrary or absolute; it is a sound and judicious discretion, taking into account all the circumstances of

the case exercised for the purpose of promoting the ends of justice, and of protecting the rights of all the parties interested in the controversy and subject matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding, 3 Pomeroy's Eq. Jur., sec. 1331.

The author divides the cases in which receivers should be appointed into four classes: "The first class contains those cases where there is no person entitled to the property, who is at the time competent to hold and manage it during the judicial proceedings." 3 Pomeroy's Eq. Jur., sec. 1332. This class embraces the estates of infants, lunatics and deceased persons, when it becomes necessary to have them preserved pending litigation. "The second class of cases is based upon the fact that all of the parties are equally entitled to the possession of the property which is the subject matter of the controversy, but it is not just and proper from the nature of the dispute and their relations with each other, that either one of them should be allowed to retain possession and control during the litigation." Id., sec. 1333. Controversies between tenants in common, and similar contentions fall within this class. "The third class embraces those cases in which the person holding title to the property is in a position of trust, or of *quasi* trust, and is violating his fiduciary duties by misusing, misapplying or wasting the property, and is thereby endangering the rights of other persons beneficially interested." Id., sec. 1334. This class takes in the whole field of trusts and fiduciary holdings of property, and may be invoked by persons interested, if their rights exist in present, and sometimes when their interests are only in future. "Fourth Class. This class contains those cases in which a receiver is appointed after judgment for the purpose of carrying the decree into effect." Id., sec. 1335. It would also take in the matter and duty of appointing a receiver, if it becomes necessary to have such property and effects reduced to possession, or otherwise, cared for and preserved pending the litigation, where there is a contest between the parties interested with the estate, growing out of the validity of the will, and a receiver has been appointed or applied for prior to the appointment of an administrator, and the contest is likely to be protracted; but in such a case if a receiver is actually appointed prior to the appointment of an administrator *pendente lite*, it is proper to order the receiver to turn over to the administrator the personal and real estate belonging to the testate. This is based upon the fact or reason, that the probate court appointing the administrator is the proper court for the settlement and distribution of the estate according to the will or under the law; and the jurisdiction of the chancery court in such case would be only temporary, for the purpose of preserving the property until such time as the probate court appointed a person with full power to protect and preserve the property.

A court of chancery cannot appoint a receiver after the granting of letters *pendente lite* by the probate court, and if such receiver has been appointed prior thereto, his powers cease after the grant, and he will be discharged and directed to deliver over the property to such administrator. In re Colvin, 3 Md., Ch. 278.

Section 6019a, Rev. Stat., prescribes the duties and fixes the powers of an executor. Where the will is contested, it provides that: "Whenever a will is contested the executor, or the administrator, or administratrix *de bonis non*, with the will annexed, or the testamentary trustee, shall have power during the contest of said will, to control all the real estate not

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specifically devised, included in said will, and all the personal estate of said testator, not before said contest duly administered; to collect the debts, and convert all assets into money, except such as may be specifically bequeathed; pay all taxes on said real and personal property, and all debts according to law; and, whenever necessary to preserve said real property from waste, to repair buildings and other improvements, and insure the same upon an order therefor first obtained from the probate court having jurisdiction of such executor, or administrator or testamentary trustee, and for such repairs, taxes and insurance, to advance or borrow money on the credit of such estate, which shall be a charge thereon; and shall also have power to receive and receipt for any distributive share of any estate or trust to which such testator would have been entitled, if living. The probate court may require such additional bonds as from time to time may be proper."

While there are frequent instances where the English courts of chancery have allowed receivers, pending litigation as to the probate of a will, when the relief was necessary for the preservation of the estate, the fact that after a will has been admitted to probate, litigation is instituted to recall or revoke the probate, does not of itself constitute sufficient ground to justify a court of equity in interfering by a receiver with the possession of the parties entitled thereto under the probate. *Newton v. Rickets*, 10 Beav, 525; *High on Receivers*, sec. 701; *Johnson v. Cochrane*, 91 Hun., 163; s. c. 36 N. Y., Supp. 287; and the valuable monographic note to *Kinsman v. Spokans*, 72 Am. St., Rep, 24, 29, 63 especially pages 63, 64, 65 and 66 and authorities there cited.

The Supreme Court of Alabama in *Randle v. Carter*, 62 Ala., 95, 102, says: "A strong case is required to induce the appointment of a receiver to take assets from the custody of an executor or administrator, displacing his authority. The executor is appointed by the testator, who has the right to declare in whom the management of his estate after his death shall be reposed. The administrator derives his authority from, and is, in a qualified sense, the officer of another court of exclusive jurisdiction, compelled to give and keep a bond, with sufficient sureties, for the prompt and faithful discharge of the trusts of the administration. The court is, therefore, reluctant to interfere with them by the appointment of a receiver. There must be actual misconduct or fraud, and immediate danger of loss, of the appointment of a receiver cannot be justified. A different rule obtains, and should obtain, than in the case of trustees. The court of probate has, by the constitution, a general jurisdiction over the grant of letters testamentary, and of administration, in which is involved the power of revocation. The grant may be revoked whenever gross misconduct is shown, or whenever a necessity exists, additional security may be required."

In the case of *Johnson v. Cochrane*, *supra*, it is held:

First—"Where an action is brought in the Supreme Court under sec. 2653a of the code of civil procedure to determine the validity of a will, the issue is confined to the question whether the writing produced is or is not the last will of the testator and the subject of the action is the validity of the will."

Second—"The court has no power in such an action to appoint, by virtue of sec. 718, of the code of civil procedure, a receiver, after final judgment, to preserve the real property of the decedent during the pendency of an appeal."

Sanker v. Mattison.

Third—"A court of equity possesses the power, independent of statute, to appoint a receiver to preserve property *pendente lite* but such power can be exercised only in cases where the property is the direct subject of the action, and where the judgment to be granted will act upon the specific property."

Fourth—"While the judgment in such an action is conclusive as to the title of real and personal property of the testator, it does not deal with or relate to the possession of any specific property of which the decedent died seized, and the plaintiff cannot, under any process that can be issued to enforce the judgment, obtain possession of the real estate in question."

Fifth—"The effect of a judgment adjudging a will to be void is to leave the parties in the situation which they would have occupied had the testator died intestate."

In view of the authorities cited, and of the statute, (sec. 6019a) in a case of the contest of a will, where an administrator with the will annexed has been appointed and qualified prior to the commencement of the action to contest the will, and after the case has been taken to the circuit court on error, an application for the first time is made for a receiver, such application should not be granted either by that court or judge thereof. If the necessity for a receiver exists, on account of disqualification or other disability of the administrator, the application and appointment should be made by the probate court that proved the will. *Good v. Wiggins*, 12 Ohio St., 341. The circuit court on error is not a court of equity, secs. 6709, 5573, Rev. Stat.; *Atwood v. Whipple*, 48 Ohio St., 308, 314.

The petition in error in this case does not transfer to the circuit or common pleas court the settlement of the estate of William M. Mattison, deceased, nor does it involve the appointment or qualification of the administrator. The only question litigated in the common pleas was the validity of the will, leaving to the probate court jurisdiction to make all orders usual and proper to be made during the pendency of the litigation, for the care and preservation of the property, and for the protection of the rights and interest of the parties. The jurisdiction so remaining and conferred on the probate court by the probating of the will, and the appointment of the administrator is exclusive in all respects in which it is adequate. *Saylor v. Simpson*, 45 Ohio St., 141; *Havens v. Horton Jr.*, 53 Ohio St., 342; *Mercer v. Cunningham*, 53 Ohio St., 353, 361.

A creditor cannot, nor can an heir or devisee transfer the settlement of the estate of the decedent from the probate court to a court in chancery. *McDonald v. Aten*, 1 Ohio St., 293.

This application for a receiver should be denied, and the same is refused.

Bowers & Black, for motion.

Douglas & Mengert, contra.

NEGLIGENCE.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

CINCINNATI STREET RAILWAY CO. V. WM. JENKINS.**1. NEGLIGENCE—INSTRUCTIONS TO JURY.**

In a suit for personal injuries, resulting from negligence, the defendant is entitled to have the jury instructed that if the negligence of both parties contributed "directly," which is equivalent to "proximately," to the injury complained of, the plaintiff is not entitled to recover.

2. INSTRUCTIONS AS TO PROXIMATE CAUSE.

Where the evidence tends to show that the plaintiff was himself negligent, the jury should be clearly instructed that before plaintiff can recover it must be shown that the proximate cause of the injury was the negligence of the defendant after he became aware, or should have become aware, of the plaintiff's peril. And a charge which makes no distinction as to whether the negligence of the plaintiff contributed directly or remotely to the injury, or whether it arose before or after the plaintiff was placed in a position of danger, is held to have been misleading.

3. PLAINTIFF'S NEGLIGENCE DEFEATING RECOVERY.

Where the evidence showed that the plaintiff, driving a vehicle, and a street car of defendant company running at a lawful rate of speed, were travelling close together in the same direction for some distance, and that plaintiff suddenly, without warning or precaution, turned to cross the track on an intersecting street, when the car was but fifteen feet away, the motorman being unable to avoid a collision, the court held that plaintiff's negligence should defeat his recovery.

HEARD ON ERROR.

SMITH, J.

One of the principal grounds urged by counsel for plaintiff in error for the reversal of this judgment is, that the trial judge refused to give to the jury, before the argument of the case, certain specific written charges which had been submitted to him for that purpose and that he was thereby prevented from arguing to the jury the facts in the case in the light of the law, as it should have been presented to the jury before the argument commenced.

The record in this case simply shows that at the close of the testimony in the case, the "counsel for the defendant requested the following special charges to be given;" then follow ten special charges, all of which were refused, and to the refusal to give each one, the counsel for the defendant excepted. But it does not appear that the court was asked to give these charges to the jury before the argument, or that the court refused to do so, or that any exception was taken to the action of the court in refusing to give them, or either of them before the argument. From all that appears, it was just a case where counsel present certain charges to be given by the court when giving the general charge to the jury at the close of the argument. While it is held in *Village of Monroeville v. Root*, 54 Ohio St., 523, that it is the right of a party to have correct written instructions given before argument when properly asked, it is also held that to constitute error as to this, the record must affirmatively show that the court was requested to give such instructions before the argument and that its refusal to do so was the subject of an exception.

Railway Co. v. Jenkins.

We are of the opinion that several of the charges so asked to be given were sound law and applicable to the case, and should have been given to the jury as asked, or in other language which stated substantially the same proposition of law. We understand it to be conceded that this was substantially done in this case when the charges asked were proper, except as to No. 4. This reads as follows:

"If the jury find from the evidence that the plaintiff and defendant were both negligent, and that the negligence of both contributed directly to cause the injury complained of in this case, then your verdict should be for the defendant."

We are not unmindful of the doctrine of the law abundantly sustained by authority, which is a limitation on the general doctrine that a person may recover in an action damages for injury to himself occasioned by the negligence of another, notwithstanding the fact that his own negligence exposed him to the risk of injury (and thereby in a sense contributed to his own injury), if the other party, after he became aware, or ought to have become aware of his danger, either willfully injured him, or failed to use ordinary care to avoid injury to him, and did so injure him.

But it seems to me that the charge asked for and refused excludes the idea of any such case as this. It simply calls for the annunciation to the jury of the well-settled rule of the law that where the negligence of both parties directly contributes to the injury of the plaintiff, that he can not recover; for in my judgment the words "contributed directly to cause the injury" are the equivalent to the words "proximately contributes to the injury," as used in the syllabus of *Railway Co. v. Kassen*, 49 Ohio St., 230, cited in the memorandum of Judge Giffen; and the defendants in this case, therefore, had a right to have the court say to the jury that if the negligence of both parties directly contributed to the injury, or both proximately contributed thereto, that plaintiff was not entitled to recover.

There can be no question, though, but that the trial court was not bound to give the charge in the language used by defendant's counsel, but might give it substantially in other language, and if the evidence justified it, go further and state to the jury the rule as to "the more proximate cause," as stated in the case last referred to and in many other cases.

The question then recurs, whether the court having refused to give this special charge to the jury (which, I think, ought to have been given,) gave it in substance, or whether there were such qualifications made to it as in effect stated a different rule to the prejudice of the defendant.

It may be said that the charge given by the court upon this subject is quite lengthy and in some particulars is not so clear and explicit as it ought to be. In some parts of it, language was used which would seem to be sufficient to convey to the minds of the jury the doctrine of the law expressed in the special charge asked for. For instance, he says:

"The proximate cause is that cause which is immediately operative, without the intervention of any other. Now, if the parties were mutually to blame—were equally at fault, so that you would be entitled from the evidence to say that the proximate cause was the act of both, then the plaintiff could not recover."

Again:

"And if it should be your judgment that the mutuality or fault was such that the conduct of both parties was the proximate cause of this

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accident, the plaintiff can not recover, and your verdict will be for the defendant."

But the paragraph last quoted is immediately followed by this:

"But, gentlemen of the jury, on the other hand there is another rule of law which applies even in cases where both parties are to blame where the conduct of both has contributed to the accident, and that is this: If the circumstances are such, that, notwithstanding the negligence of the plaintiff, the defendant could, by the exercise of ordinary care have avoided the accident, then, notwithstanding the negligence of the plaintiff, the plaintiff can recover. * * * * So if it be your judgment that the defendant was negligent, and the plaintiff was negligent, but that the defendant, by the use of such care as I have described could have avoided the accident, notwithstanding the plaintiff's negligence, then your verdict will be for the plaintiff.

It seems to me that these paragraphs from the charge state the rule altogether too strongly against the defendant below, and if such is the law, that there are very few cases where a plaintiff would not be entitled to recover, even though he had been guilty of negligence himself directly contributing to the injury. There should have been some limitation in the language used, for instance to the effect that although the plaintiff had originally been negligent, for instance in driving on the track, or in suddenly attempting to drive across it in the face of a near and rapidly approaching car, and his danger was discovered by the motorman, or should have been so discovered in the exercise of due care, and that he then failed to use proper care to prevent injury, that in such case the plaintiff might recover. But there was no such limitation, and the jury might well have concluded from this part of the charge that the plaintiff was entitled to recover, even if his own negligence had proximately contributed to the accident, though this certainly could not have been the meaning of the trial judge.

The defendant's counsel having excepted to the whole charge, as they had a right to do in this case, under the recent statute, I am of the opinion that there was error in the charge of the court prejudicial to the defendant and that for this reason also the judgment should be reversed.

GIFFEN, J.

I concur in the judgment of reversal, but prefer to base it on error in the court charging the jury as follows:

"There is another rule of law which applies even in cases where both parties are to blame, when the conduct of both has contributed to the accident, and that is this: If the circumstances are such, that, notwithstanding the negligence of the plaintiff, the defendant could, by the exercise of ordinary care have avoided the accident then notwithstanding the negligence of the plaintiff, the plaintiff can recover."

The plaintiff alleges in his petition that the defendant was negligent in running its car at an unlawful and dangerous rate of speed and failed to sound the gong, either of which may have been a proximate cause of the accident. There was testimony tending to prove that the plaintiff, without looking or listening for an approaching car, suddenly turned his horses onto the track for the purpose of crossing it and thereby contributed directly to his injury.

The jury may well have found, under this charge, that the defendant was liable by reason of a failure to exercise ordinary care in avoiding the

accident, by running the car at a lawful rate of speed, or by sounding the gong, although the plaintiff by his concurring negligence contributed to his injury.

There is no averment in the petition that after the plaintiff placed himself in a position of peril, the defendant knew or ought to have known of it, and perhaps it is not necessary; but if the testimony tended to prove such fact the jury should have been instructed that such circumstance required the defendant to use ordinary care to avoid the accident, and that a failure to do so would make it liable, notwithstanding the negligence of plaintiff.

In *Railroad Co. v. Kassen*, 49 Ohio St., 280, the third proposition of the syllabus is as follows:

"The rule, that the negligence of the injured party, which proximately contributes to the injury, precludes him from recovering, has no application where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him."

The charge makes no distinction as to whether the negligence of the plaintiff contributed directly or remotely to the accident, nor does it specify any circumstance, or whether it arose before or after the plaintiff was placed in a position of danger, that would require the defendant to exercise care to avoid the accident, hence the instruction was misleading.

SWING, J.

This case is in this court on error to the judgment of the court of common pleas. In that court Jenkins recovered a judgment against the street railroad company for \$3,500, on account of injuries received in a collision between a vehicle which Jenkins was driving and one of the cars of said company at Ridgeway and Main avenues, in Avondale.

While there is a conflict of evidence, we think the manifest weight of the evidence clearly shows that Jenkins was driving his vehicle on the east side of Main avenue, going north between the railroad tracks and the curb until he got opposite Ridgeway avenue, when he suddenly turned to the left, crossing the street car tracks right in front of the car which was approaching. The evidence of Jenkins and Miss Harmon and William Carter is to the effect that Jenkins was driving with the left wheel between the tracks, but the evidence of Dr. Adams, Miss Rau, Albert Frazier, the motorman and the conductor and Mrs. Harmon is to the effect that Jenkins was driving east of the east rail. The evidence of Dr. Adams and Miss Rau is very clear and convincing on this point. We can not understand how these witnesses could have been mistaken; they were in a position to observe accurately the position of Jenkins. They testify as to facts that must have happened as they relate them or else they are telling willful falsehoods; and we see absolutely no reason to think that the witnesses are not truthful. The motorman and the conductor may be said to be interested, but their statements seem to be reasonable and straightforward and are borne out in every important particular by Dr. Adams, Miss Rau, Mrs. Harmon and Frazier.

While Jenkins undoubtedly had a perfect right to drive between the tracks, still if he was a careful and prudent driver, he would not, under the circumstances, be expected to drive this distance between the tracks. The curtains of his carriage were down, and he could not observe an approaching car without some exertion, and he was at a point on the

tracks when he had every reason to think a car might come up to him. When he came to Main avenue he did not immediately go on the track, but drove on the east side of the track until he came to a point where the street was obstructed in such a way that he was compelled to go on the track to get around the obstruction, and it is reasonable to think that being a prudent driver, that having 800 or 900 feet to go before leaving the street, that he would, after passing the obstruction, resume his position outside of the tracks. There was nothing in the way to prevent him doing this, and it was the safest place for him to be in; and whatever presumption would arise from this goes to confirm the direct evidence of the witnesses referred to.

We think there can be no question but what the evidence shows that the car and the vehicle were traveling north for quite a distance just previous to the collision, close together, and that the collision was caused by Jenkins turning his horses from their course north to a westerly course to go out on Ridgeway avenue. We see nothing in the evidence that tends to show that the motorman had any willful intention to run Jenkins down. What we think the evidence clearly shows is that Jenkins was driving north on the east side of the track, and that when opposite Ridgeway avenue he suddenly turned his vehicle across the track of the street railroad; that at the time he turned to cross the track the street car was but fifteen feet away and that the motorman was not able to stop his car before the collision occurred. We are unable to see wherein the motorman was negligent, and this the burden was on the plaintiff to prove. There was no negligence in the speed of the car. There was nothing to indicate that Jenkins was going to turn upon the track at the point where he did turn until just at the time he commenced to go on the track, and the car was so near him that it could not be stopped in time to prevent the collision, and there was nothing to show that the motorman was not justified in running his car so close up to Jenkins' vehicle.

The accident, it seems clear to us, was caused by the negligence of Jenkins in attempting to cross the street car track in front of a car that was so close and going at such a rate of speed that it was impossible to stop the car before a collision took place. The street was clear and there was nothing to prevent Jenkins from driving along said street in a proper and safe place, and there was nothing to prevent Jenkins from ascertaining at the time he crossed the track whether there was any danger of a collision with an approaching car; but he did not seem to have taken any such precaution, and there being nothing in the evidence to warn the motorman that Jenkins would, when he got to Ridgeway avenue, turn his vehicle across the track, and it being clear that there is nothing to show that the motorman intended to willfully run him down, we can see no negligence in the case except that of Jenkins, which to us is clear and manifest; and said judgment should be reversed; because it is not sustained by the evidence.

James R. Foraker, for the Street Railway Co.

D. W. Cordell and Frank H. Kemper, contra.

FIRE INSURANCE—INCUMBRANCE.

[Licking Circuit Court, March Term, 1899.]

Adams, Douglass and Voorhees JJ.

EDWARD HICKEY V. DWELLING HOUSE INSURANCE CO.**INCUMBRANCE WITHOUT NOTICE AVOIDS POLICY.**

Where an insurance policy contained the provision that it should be void if the subject should be real property and *be* or *become* encumbered by mortgage, trust deed, judgment or otherwise, unless such incumbrance should be placed on the property by the written consent of the company, and the property is encumbered by mortgage at the time of the issue and acceptance of the policy, which was unknown to the company, the insured cannot recover for a loss even though he made no representations to the company as to incumbrances.

HEARD ON ERROR.**ADAMS J.**

This case is in this court on error. Hickey was the plaintiff below, and his action in the court below was upon an insurance policy to recover four hundred dollars for the loss of a dwelling-house, destroyed by fire on July 19, 1894.

The petition is in the usual form. The insurance company, for its answer, first denied all the allegations of the petition, except certain matters that were afterwards admitted in the answer. For a second defense, it admitted the issuing of the policy, and alleged that the policy contained the provision that "said entire policy should be void if the subject of the insurance should be real property and be or become encumbered by mortgage, trust deed, judgment, or otherwise" unless such incumbrance should be placed on the property by the written consent of the company, etc. That there was no modification of this provision in the policy, with the knowledge or consent of the company, and there was a mortgage for sixteen hundred dollars on the property at the time of the insurance.

For a third defense, the company set up the fact that there were no proofs of loss furnished to the company, within the provisions of the policy.

The reply denies that the policy contained the provision set out in the second defense, and says that Hickey had no knowledge of what the policy contained until it had been delivered to him by the defendant, through the United States mail. The reply sets out at length that he made no application for the insurance, either in writing or otherwise, and made no representations as to encumbrances to obtain the policy, and that he was not asked any questions by the company, or any one acting for it, either before or after the delivery of the policy, whether there was any encumbrance on the title of the real estate. He says that this policy was sent to him by mail, and an itemized bill of its cost; that they demanded of Hickey immediate payment; that he at once sent his check by mail to the defendant in payment for the premium of insurance, and that the same was then paid.

He says that, if there was any lien on the land on which the dwelling-house stood at the date of the insurance policy, it was very small; that the tract of land was large and valuable; that the defendant well knew of the existence of such lien, and if it had not such knowledge,

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it had the means of obtaining such knowledge, and defendant waived its right to assert the existence of such lien by neglecting to ask plaintiff whether there was such lien, and neglecting to examine the mortgage records of this county, for the purpose of finding out whether there was such lien. That the company intended, when it delivered the policy to the plaintiff, that it should take effect; that it did take effect, and was not void, and did not become void thereafter.

For reply to the third defense, in substance, he says, that the agents of the defendant company were notified of the loss; that the company sent an adjuster there, who examined the ruins, or the place where the dwelling had stood, and made inquiries of witnesses as to the fire, and the extent of the loss, and waived the proofs of loss.

The case was tried to a jury in a court of common pleas, and, after the evidence had all been offered, and argument of counsel, the court directed a verdict for the defendant. A motion for a new trial was overruled, and a bill of exceptions taken; and the action of the court, in directing a verdict, is the ground of error here, on which Hickey asks to have the judgment of the court below reversed.

Although there are many pages of this evidence, there is no substantial controversy as to the facts in the case. This insurance policy was sent to Hickey through the mails; he received it; he sent his check in payment for the premium; there was an encumbrance of from nine hundred to thirteen hundred dollars; the exact amount of the encumbrance on the property is not stated, but there was a mortgage on it for from nine to thirteen hundred dollars at the time the policy was delivered to Hickey, and at the time he paid the premium, of which the company had no knowledge. There is no controversy about those facts. After the loss occurred, this proof, as it seems to us, establishes the fact that Hickey did notify the local agent of the company here in Newark, and the company sent a man by the name of Parsons, an adjustor, who went down to the place where this house had been and made an examination there; had certain conversations with Hickey, and then went away; and there was evidence from which a jury might well have found that the proofs of loss were waived.

If the sole question in the case had been whether or not the company had waived the proof of loss, under the evidence it would have been error for the court to have directed a verdict. We are supported in that view by a decision of the Supreme Court in *Ohio Farmers' Ins. Co. v. Danison*, 38 W. L. B., 163, a case that went up from Perry county, where the evidence as to the waiver of proofs of loss was not nearly as strong as it is in this case, and in which the judgment against the insurance company in the court of common pleas, affirmed by the circuit court, was affirmed by the Supreme Court. But the evidence of the encumbrance is doubtless the evidence on which the court below acted, and that appears from what was said by the trial judge in directing a verdict.

Counsel for plaintiff in error, contends to some extent, that this case comes under the provisions of sec. 3643, Rev. Stat.; that the company, before it issued the insurance policy, was in some way bound to make an examination, not only of the physical condition of the property, but some examination as to the title; and, having neglected to make any examination as to the title, and having neglected to ask Hickey whether or not there were encumbrances on the property, that they thereby waived that provision in their policy.

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Counsel cite us to *Dooly v. Fire Insurance Co.*, 58 Am. St., 26, by the Supreme Court of Washington: "Though a policy contains a condition declaring it to be void if the interest of the insured be other than unconditional or sole ownership, it cannot be avoided on the ground that the insured did not own the legal title, he having purchased the property and paid therefor without having received a conveyance, if no written application was made by him for the policy, and no questions were asked of him concerning his title.

"If the language of questions contained in an application for insurance calls for answers which may be, to some extent, a matter of opinion, the insured, if answering in good faith, will be excused, though he does not give the desired answer"

"If an insured is not questioned respecting encumbrances on his property or other facts material to the insurance, and does not intentionally conceal them, their existence does not invalidate the policy."

On page 29 the Washington court cites a case from 52 Mich., 131, where it was held that: "Where insurance is applied for orally, and the applicant is unaware of any provision in the policy regarding encumbrances, and is not guilty of any misleading conduct, his bare silence cannot be deemed a misrepresentation; and if the agent in such a case did not read the policy to the applicant, or call his attention to the clause relating to encumbrances, the existence of a mortgage would be no impediment to a recovery from the insurance company."

They also cite 49 U. S., (8 How.) 235, substantially to the same effect.

In 53 Am. St., 846: "If an insurer issues a policy without an application or any representation in regard to the title to the property upon which the insurance is effected, he cannot complain, after a loss, that the interest of the assured was not correctly stated or that an existing encumbrance was not disclosed."

On page 848, the court say: "Applicants for insurance are not generally aware of the necessity of disclosures which long experience in the business of insurance has shown to underwriters to be necessary, or what disclosures it is important to make; while insurance companies cannot only protect themselves by making inquiries in regard to such things as they may regard to be material, but, as is well known, are in the habit of doing so. And such was the custom of this company. It was admitted on the trial, by its general agent, that the company had blank forms of application for insurance, which contained this question concerning the property to be insured: 'If encumbered, to what amount:' but that such application was not sent in this instance to the insured, or to the broker through whom the insurance was effected, to obtain an answer to the foregoing or any other question."

In the note to that decision, on page 852, it is said:

"Where an insurance policy is issued without any application or written request describing the interest of the insured in the property, and it does not appear that any actual representation of any kind was made by the assured, it will be presumed that the policy was written upon the knowledge of the insurer and was intended to cover in good faith the interest of the assured in the property: *Western, etc. Pipe Lines v. Insurance Co.*, 145 Pa. St., 346; 27 Am. St. Rep., 703, and note."

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These cases support the claim of counsel for plaintiff in error; but a majority of the court are of the opinion that this case is controlled by *Webster v. Insurance Co.*, 53 Ohio St., 558, where the Supreme Court decide: "The examination required to be made by the agent of an insurance company by sec. 3643, Rev. Stat., relates to the physical condition of the property such as an inspection would disclose and does not relate to the matter of incumbrances. The 'change' mentioned in the statute refers to some physical change in the insured property, its use, or its surroundings, and does not relate to a change respecting incumbrances.

"Where a policy of insurance stipulates that if any part of the property shall be encumbered by mortgage without the consent of the company, the policy shall be void, such stipulation is not within the provisions of sec. 3643. And if, after the issuing of the policy and before the loss such incumbrance is created by the insured, without the consent of the company, the policy is thereby invalidated."

Applying that decision of the Supreme Court to the case at bar, if there had been no mortgage upon the property at the time of the issuing of the policy, the other circumstances of the case remaining the same, if Hickey thereafter had mortgaged the property, without the consent of the company, he would have brought himself within the exact terms of *Webster v. Insurance Co.*, *supra*. He would have brought himself within the second clause of this paragraph against incumbrances.

The paragraph says: "If the property be encumbered, or if it become encumbered." Now, the Supreme Court has said that, if it become encumbered, it shall avoid the policy. A majority of the court can see no distinction in principle between those two clauses of that statement in the policy. We are unable to see the distinction,—the reason why, if it become encumbered, the policy should be void, and if it be encumbered that another and a different rule should apply.

It is well said in this case that Hickey practiced no fraud upon this insurance company; he made no misrepresentations to the insurance company. It can be said, with equal force, that the insurance company practiced no fraud upon Hickey. They sent to him, through the United States mail, an insurance policy, which he could accept or reject, as he saw fit. He says here, in his reply, that he had no knowledge of the contents of this insurance policy until he received it through the United States mail. The inference from that would be that, after he received it through the United States mail, he did have knowledge of its contents. If he did not have knowledge of its contents, he had the means of knowing before him; and this was not a case, as this proof shows, of an insurance company dealing with a man wholly ignorant of the subject of insurance. Hickey's own testimony shows that he was a man of considerable affairs, and he had more than the ordinary experience in dealing with the subject of insurance. So that we have here a policy issued to a man, received by him through the mails; and, after he has received it and had an opportunity to examine its terms, he pays the premium on the policy, and he afterwards attempts to assert rights that he claims under that policy.

He is bound by the terms of that policy. If he recovers at all, he must recover on that written contract of insurance; and, by the very

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terms of that contract of insurance, it is void, because the property was encumbered at the time the policy was issued.

The Supreme Court has decided that that is a provision that an insurance company has a right to put in its policies.

The majority of the court are of the opinion, and so hold that the court of common pleas did not err in directing a verdict for the defendant, and the judgment of the court below is affirmed.

J. B. Jones, for plaintiff in error.

Judge S. M. Hunter, for defendant in error.

APPEAL—BONDS—ADMINISTRATORS.

[Belmont Circuit Court, June Term, 1900.]

Frazier, Burrows and Laubie, JJ.

GEORGE W. HANCE, GUARDIAN, v. THEODORE CHAPPELL, ADM'R.

1. NOT REQUIRED TO GIVE BOND ON APPEAL.

Under sec. 6408, Rev Stat., an administrator who has given bond within the state, for the faithful discharge of his duties, is not required to give bond for appeal in a cause or matter in which he has no interest and appeals in good faith for the proper administration of the trust.

2. MOTION FOR NEW TRIAL NOT NECESSARY, WHEN.

When a cause is submitted to the court of common pleas upon an agreed statement of facts, requiring no action of the court, but to declare the law upon the agreed statement of facts, a motion for a new trial in that court is not necessary to authorize a review of the judgment on error in an appellate court.

3. CHILDREN UNDER FIFTEEN—ALLOWANCES.

The children of a deceased widow, who are under the age of fifteen years at the time of her death, are not entitled to have set-off and allowed to them under Title 2; Chapter 2, Rev. Stat., the property exempted from administration in sec. 6038, Rev. Stat., and an allowance for their support for twelve months from her decease.

HEARD ON ERROR.

FRAZIER, J.

From the record and agreed statement of facts it appears that Joseph T. Hinton died intestate March 27, 1898, leaving Amanda L. Hinton, his widow, and Maud Hinton, a minor over fifteen years of age, Edna Hinton, Charles Hinton, Raymond Hinton and Walter Hinton, minors under fifteen years of age. That Joseph T. Hinton, at the time of his death, was the owner of a house and lot in the village of Barnesville, which was incumbered to its value, and a small amount of personalty, not sufficient to pay his preferred debts and the allowance to his widow and children under fifteen years of age for their year's support.

That Amanda L. Hinton, widow of Joseph T. Hinton, died intestate July 26, 1899, leaving the children hereinbefore named her only heirs at law, Maud Hinton being over fifteen years of age, and the other four under fifteen years of age at the time of her death.

On May 20, 1899, one Harrison Brady, was appointed and qualified as administrator on the estate of Joseph T. Hinton and caused an inventory and appraisement to be made, and there was set-off to the widow

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and four minor children under fifteen years of age, such of the articles named in sec. 6038, Rev. Stat., of which Joseph T. Hinton died seized, and they were included and stated in the inventory of the estate, and signed by the appraisers, without appraising the same; and there not being property of a suitable kind to set off to the widow and children, the appraisers certified the sum of thirty dollars in money to each, as necessary for the support of such widow and minor children under fifteen years of age; no part of which has been paid.

On July 31, 1899, Theodore Chappell was, by the probate court of Belmont county, duly appointed and qualified as administrator on the estate of Amanda L. Hinton, gave bond and proceeded to act as such, and August 9, 1899, with the aid of appraisers, duly appointed and qualified, made an inventory of her estate, and afterward returned it to the probate court.

In such inventory, the appraisers set off to her four minor children under the age of fifteen years, such of the property named in sec. 6038, Rev. Stat., of which Amanda L. Hinton died seized, and they were included and stated in the inventory of her estate and signed by the appraisers without appraising the same, and there not being property of a suitable kind to set off to the minor children under the age of fifteen years, the appraisers, certified the sum of one hundred and fifty dollars to each of her minor children under fifteen years of age, or to the four six hundred dollars as necessary for their support for twelve months from the death of the decedent.

The inventory and appraisement including the schedule of property set off to and allowances to her children under fifteen years of age, was by the administrator duly returned to and filed in the probate court of Belmont county.

February 10, 1900, George W. Hance, who had theretofore been duly and legally appointed guardian of Maud Hinton, the minor child of Amanda L. Hinton, under favor of sec. 6024 Rev. Stat., filed in the probate court exceptions to the inventory.

The statute is as follows :

Section 6024. "At any time within one year after the return of an inventory any person interested in the estate may file exceptions to the inventory; and thereupon the court shall set a day for the hearing thereof, and cause written notice of such filing and of the time so fixed for the hearing to be given to the executor or administrator, not less than five days before the time so fixed for the hearing; and for good cause the hearing may be continued for such time as the court shall deem reasonable; and at the hearing the executor or administrator, and any witness subpoenaed by either party, may be examined under oath, and the court shall enter its finding on the journal and tax the costs as may be equitable; and an appeal may be taken to the court of common pleas, by either party, from any finding, order, judgment or decision of the probate court on the hearing of said exceptions to the inventory, as in other cases."

Upon hearing the probate court held and decided that the minor children under fifteen years of age of Amanda L. Hinton were not entitled to receive out of her estate, the property and year's support, set off and allowed to them in the inventory, and ordered that schedule "A" making such allowances be stricken out.

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From such order and judgment of the probate court, Theodore Chappell, as administrator, appealed to the court of common pleas. It is not claimed but that the appeal is in all respects regular, and in conformity with law, unless Chappell is required to give a bond to perfect the appeal.

In the court of common pleas Hance, as guardian of Maud Hinton filed a motion to dismiss the appeal, because Chappell, as administrator, has neglected and failed to file in the probate court a bond for appeal. It is contended that the appeal is not in the interest of the trust.

Section 6408 Rev. Stat., provides: "When the person appealing from any judgment or order in any court, or before any tribunal, is a party in a fiduciary capacity, in which he has given bond in this state, for the faithful discharge of his duties, and appeals in the interest of the trust, he shall not be required to give bond, but shall be allowed to appeal, by giving written notice to the court of his intention to appeal within the time limited for giving bond."

It is insisted on behalf of the plaintiff in error, that the appeal was not "in the interest of the trust," and counsel argue in support of the proposition, that, by the allowances to the minor children under fifteen years of age, the assets in the hands of the administrator will be reduced by that sum; we do not concede the proposition, or that, if true, it would be a correct test; the amount of the trust estate and property is the same whether the allowance to the children under fifteen years of age is sustained or set aside; but the result will increase or diminish the distributive share of Maud, the child over fifteen years of age. It is the duty of the trustee, "in the interest of the trust," to see that the trust estate is properly administered, and that it reaches the persons entitled to receive it. Nor does it depend upon the final result of the action or proceeding; if the trustee act with ordinary care and prudence and in good faith, and not for his personal interest, he may appeal without giving bond.

What is "in the interest of the trust" has not been directly decided or clearly defined by our Supreme Court.

In *Collins, Ex'r v. Millen*, 57 Ohio St. 289, the second proposition of the syllabus is: "Where one who is a party in a fiduciary capacity to an action or proceeding, appeals from a judgment therein, affecting adversely his own pecuniary interests, he is required by sec. 6408, Rev. Stat., to give an appeal bond."

Bradbury, J. in the opinion says: "Where exceptions have been filed to an account of an executor or other trustee, he is, at once, in respect of the matters to which the exceptions extend, placed in the attitude of hostility to the trust estate. As to such matters the estate is in fact represented by the exceptors; they seek to add to it, while his pecuniary interest tends to direct his efforts to its diminution. If they prevail in the contest, the funds of the estate are increased; if, on the contrary, he is successful, these funds are diminished. In respect to such controversies the legislature may be presumed to have considered the real attitude borne by the parties, rather than their nominal relation thereto, and, therefore, to have purposely added the clause under consideration to prevent an executor, or other fiduciary party, who, for the time being, and in respect of the matter in hand, should be interested diversely to his trust estate from using a bond to injure an estate where

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it had been given for its protection and to require of him an independent bond in case he wished to protract a controversy carried on by him adversely to the estate, and for his own pecuniary benefit."

In *Biddle, Trustee v. Phipps*, 1 Circ. Dec. 863, it is held: "An assignee of an insolvent estate having a personal claim against the estate cannot appeal from a judgment against him in the probate court without giving bond. Such appeal is not in the interest of the trust."

The court of common pleas overruled the motion to dismiss the appeal, to which ruling the plaintiff in error excepted, and the cause was submitted to the court upon an agreed statement of facts, which is made part of the record by bill of exceptions; no evidence was offered or other facts stated: and upon the facts agreed upon, the court of common pleas held and decided that the minor children under fifteen years of age were entitled to the property and allowances for year's support as set off to them in the inventory and gave judgment accordingly.

George W. Hance, as guardian of Maud Hinton, files in this court a petition in error to reverse the holding and judgment of the court of common pleas.

Counsel for defendant in error contend: that, in order to review the judgment of the court of common pleas, a motion should have been made in that court to set aside its finding and judgment, or for a new trial, and as no such motion was made this court can not review the finding and judgment of the court of common pleas.

Was the making and overruling of a motion for new trial in the court of common pleas necessary to a review of its judgment in this court? We do not so understand the law. There was no issue of fact. The facts were all ascertained and agreed upon by the parties; there agreed statements took the place of a special verdict by a jury, leaving the court nothing to find, and only the naked duty of declaring the law upon the given statement of admitted facts. The finding of the court, to review which a motion for new trial is necessary, is a finding of facts from the evidence. It does not embrace conclusions of law arising upon the facts.

This holding is fully sustained by the principle announced in the following cases—*Clinton Bank v. Ayres*, 16 Ohio 282, 287; *Earp, Supervisor v. Railroad Co.*, 12 Ohio St., 621; *Westfall v. Dugan*, 14 Ohio St., 276; *McGonigle v. Arthur*, 27 Ohio St., 251, 257; *Brown & Co. v. Mott & Bro.*, 22 Ohio St., 149, 159; *Lockwood v. Krum*, 34 Ohio St., 1, 11.

The principal contention involves the construction of the first paragraph of sec. 6038, Rev. Stat., which reads: "When any person shall die, leaving a widow, or minor child or children under the age of fifteen years, the following property shall not be deemed assets or administered as such, but shall be included and stated in the inventory of the estate, and signed by the appraisers, without appraising the same." A proper construction requires an examination of our legislation on this subject.

In the "act to provide for the settlement of estates of deceased persons" passed March 23, 1840, 38 O. L., 146, the first paragraph of sec. 43 reads, "When a man having a family, shall die leaving a widow or a minor child, the following articles shall not be deemed assets, nor administered as such, but shall be included and stated in the inventory of the estate, and signed by the appraisers without being appraised." Here follows a list of the property not to be deemed assets.

Section 48 was amended May 12, 1868, 65 O. L., 180, so as to read ; " sec. 48. That when any person shall die leaving a widow or minor child or children under the age of fifteen years, the following property shall not be deemed assets or administered as such, but shall be included and stated in the inventory of the estate, and signed by the appraisers, without appraising the same." The other paragraphs of the section were changed to materially, alter and increase the amount and character of the property to be thus set off by the appraisers. Section 48, as amended May 12, 1868, is literally copied into the Revised Statutes, and becomes sec. 6038 thereof. Sections 6039, 6040, 6041 and 6042, Rev. Stat. are literally copies of Secs. 44, 45 and 46, of the act of March 28, 1840 and provide :

" Section 6039 : The said articles, except the wearing apparel of the deceased, shall remain in the possession of the widow during the time she shall live with and provide for such minor child or children. When she shall cease to do so, she shall be allowed to retain as her own her wearing apparel, her ornaments, and one bed, bedstead, and bedding for the same, and the other articles so exempted, and not consumed, shall then belong to such minor child or children. If there be a widow and no minor child or children then the said articles shall belong to such widow."

" Section 6040 : The appraisers shall also set off and allow to the widow, and children under the age of fifteen years, if any there be, or if there be no widow, then to such children, sufficient provisions or other property to support them for twelve months from the death of the decedent, and if the widow or such children have, since the death of the deceased, and previous to such allowance, consumed for their support any portion of the estate, the appraisers shall take the same into consideration in determining the amount of the allowance."

" Section 6041 : When there is not sufficient personal property; or property of a suitable kind, to set off to the widow or children, as provided in the preceding section, the appraisers shall certify what sum or further sum, in money, is necessary for the support of such widow or children."

" Section 6042 : The appraisers shall not include in the inventory the provisions, property, or money set off and allowed by them to the widow or children, but the same shall be stated in a separate schedule signed by them, returned, with the inventory, to the court, by the executor, or administrator."

It is apparent, that the object of the legislature by the amendment to sec. 48, by act of May 12, 1868, was to increase the amount of property to be set off to the widow and minor children, by that section ; and to limit the right of children to allowance under it, to those under fifteen years of age, instead of by their minority.

Did the legislature intend by the substitution in the amended section of the words or phrase, " When any person shall die, leaving a widow or minor child or children under the age of fifteen years" instead of the words, " When a man, having a family shall die leaving a widow or minor child ;" as used in the original act, intend thereby to extend its provisions to the estate of any person dying, other than of "a man having a family?" We think it did not. The subsequent sections remain unchanged and their language is inconsistent with the construction now

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contended for by the defendant in error. The section as amended May 12, 1868, is to be construed as if it was a part of the original act, passed at the same time with it.

We adopt the language used by Boynton, J., in *State ex rel. v. Shelby Co. (Com'rs.)*, 86 Ohio St., 326, 330: "The court is only warranted in holding the construction of a statute, which has undergone a revision, to be changed, when the intent of the legislature to make such change is clear, or the language used in the new act plainly requires such change of construction to be made.

"Neither an alteration in phraseology nor the omission or addition of words in the latter statute necessarily require a change of construction. *Conger v. Barker*, 11 Ohio St., 1; *Sedgw. on Stat. and Const. Law*, 299, 365; *Williams v. State*, 35 Ohio St., 175. The intent to give to the new act a different effect from the old one should be clearly manifested. Here there was no substantial change in the phraseology of the two acts, certainly none in the meaning and effect. The same construction, therefore, must now prevail."

In *Conger v. Barker's Admr.*, 11 Ohio St., 1, 13, Sutliff, J., says: "It is a well settled rule that in the revision of statutes neither an alteration in phraseology, nor the omission or addition of words in the latter statute shall be held necessarily to alter the construction of the former act. And the court is only warranted in holding, the construction of a statute when revised, to be changed, where the intent of the legislature to make such change is clear, or the language used in the new act plainly requires such change of construction.

"Such was the holding of this court at the last term in *Ash v. Ash*, 9 Ohio St., 387. See also 9 Ohio St., 418, for the authorities there cited."

This principal is further sustained by *State ex rel. v. Shelby Co. (Com'rs.)*, and *Conger v. Barker's Adm'rs*, *supra*,; *Ash v. Ash*, 9 Ohio St., 383; *Tyler's Exrs. v. Winslow*, 15 Ohio St., 364, 368; *Warren (City) v. Davis*, 43 Ohio St., 447, 449.

As originally enacted the statute could receive but one construction, and so far as we know has uniformly received the same construction since the amendment of May 12, 1868, and we think it to be the correct one.

Judgment of the court of common pleas reversed and upon the agreed statement of facts, we hold the minor children of Amanda L. Hinton, are not entitled to the allowances as set off to them by the appraisers.

Geo. A. Colpitts, for plaintiff in error.

Petty & Crew, for defendant in error.

MINORS—MORTGAGES—ESTOPPEL.

[Hamilton Circuit Court, January Term, 1900.]

Smith, Swing and Giffen, JJ.

HETTERICK V. PORTER.**1. MORTGAGE BY MINOR VOIDABLE.**

A mortgage executed by a minor to secure a debt for which she was in no way liable, is voidable, and may be repudiated, in some way sanctioned by law, by such minor upon becoming of age.

2. CONVEYANCE BY QUIT CLAIM A REPUDIATION.

A conveyance by quit claim deed of the property so mortgaged, after such minor becomes of age, without any other act affirming or repudiating the mortgage, and without reference to the mortgage in the conveyance, the consideration being the full value of the property free from the mortgage, though to a person having knowledge thereof, amounts to a repudiation of the mortgage.

3. ESTOPPEL—MINOR CANNOT SUBSEQUENTLY RATIFY.

After having so conveyed the property after becoming of age, grantee is estopped from subsequently ratifying and validating the mortgage referred to.

APPEAL.**SMITH, J.**

The principal question in this case and the one to which the most of the testimony was directed, was this. Whether the interest of Mattie Porter (Now Mrs. —) in the real estate which was mortgaged by her and others to The First National Bank and others, is now liable for the payment of any part of the claims intended to be secured by such mortgage under the circumstances shown by the pleadings and the evidence.

It seems to be conceded, that, subject to the life estate of her mother therein, Mattie Porter was the owner in fee simple of the one undivided third of the premises mortgaged. Her brother and sister, the owner each of an undivided third, and her father and mother, joined in the execution of the mortgage sued on in this case, which was given to secure claims held by sundry persons, for which claims said Mattie was in no way liable. That at the time of the execution of said mortgage she was a minor, and was in substance notified that such mortgage was not binding upon her unless she afterwards ratified it on becoming of age. That when she did become of age, her sister asked her to ratify the mortgage, but her mother objected to her doing so, and she did not then do so by word or act, but on the contrary refused to do so. A short time after this, by a quit claim deed, she conveyed her interest in the mortgaged property to her grand-father, James Davis, receiving from him in exchange therefor a tract of 108 acres of land, the value of which was substantially equal to the value of Mattie Porter's interest in the land so mortgaged by her, free of the mortgage claim, which was large. No mention of this mortgage was made in the deed to Davis, though he knew she had executed the mortgage when she was a minor, and that she could legally disaffirm it if she chose to do so, and he had, before the deed was made to him by her, urged her not to ratify the mortgage, and offered her money if she would not.

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Quite a while after she executed this deed to her grandfather, this action was brought to foreclose the mortgage. An answer was filed by Mattie Porter in the case, in which she avers that "she never repudiated or disallowed her signing of said mortgage, but that she always recognized the same as her voluntary act and deed and as a binding obligation upon her after she arrived at the age of majority. That said James Davis had knowledge of the fact that she had so signed said mortgage when he entered into said exchange of real estate and accepted said deed from her. And she further alleges that her said interest in said real estate so conveyed by her was of the full and fair value of the 108 acres."

If, by this latter averment, she intended to state that her interest in the land mortgaged, subject to the lien of the mortgage as a valid one, was equal in value to the 108 acres conveyed to her by her grand-father, she was greatly mistaken, for as before stated, we think the value of the 108 acres conveyed to her, was equal to the value of her interest in the land free of the mortgage.

It is clear also from the evidence, that up to the time she executed the deed conveying her interest in the land to her grand-father, she had not, by word or act, ratified the mortgage executed by her during her minority, and it is equally clear that, as a legal proposition, she was at perfect liberty, as soon as she attained her majority, utterly to repudiate in some way sanctioned by the law, the mortgage before that time executed by her, and thus render it as to her absolutely void and of no effect. The question in this case then is, whether the conveyance by her of the land to her grand-father was, in law and in fact, a disaffirmance and repudiation of her original mortgage, so as to convey to her grantee all the title originally held by her in the property before the execution of the mortgage, and thus put it out of her power to ratify the same, as she seems to seek to do by the answer filed by her in this suit

It is perhaps unnecessary to discuss the question whether the mortgage executed by Mattie Porter during her minority was or was not good until ratified or repudiated. There seems to have been much controversy on this question, but in two cases, *Drake v. Ramsay*, 5 Ohio 252, and *Cresinger v. Welch*, 15 Ohio 156, the Supreme Court announced it to be the better law, that the deed of a minor was voidable only, and was good until disaffirmed. In the last named case the court say, on page 192:

"Such being the law, the deed of an infant will hold good until some act has been done by him to avoid it, although there has been no express act of affirmance after his arrival at full age."

But we have found that there was no act of affirmance prior to the execution of the deed to Davis. Was the execution of that deed a repudiation of the mortgage? With hesitation on my part, we have reached the conclusion that it was—and we think this conclusion is warranted by the language of the court in each of the decisions before referred to. For instance, in *Drake v. Ramsay*, *supra*, the court says:

"We believe that an entry, suit or action, a subsequent conveyance, an effort to restore the parties to their original condition, or any act unequivocally manifesting the intention"—(that is to repudiate the act done during minority) "would render the evidence effectual." And in *Cresinger v. Welch*, *supra*, the court say:

"That a subsequent conveyance would amount to a disaffirmance, has been decided in the supreme court of New York and of the United States. 11 Johns. 541; 14 Johns., 128; Tucker v. Moreland, 36 U. S. (10 Pet.) 59. In fact, I can not well conceive what would be a more decisive act of disaffirmance than the conveyance of the same land to another person. It would be conclusive evidence that the person making such conveyance, did not intend to be bound by his deed made in infancy."

The doubt I entertained, was this; whether, as the deed made to Davis by Mattie Porter was only a quit claim deed, whether it might not be presumed that it was only intended as a release of her equity of redemption, and that her grantee was to take subject to the mortgage. Such was the holding in *Palmer v. Miller*, 25 Barb. 399. But it is to be noted that the language used by our Supreme Court makes no allusion to any difference in the effect of a deed with or without covenants, but seems to hold that any deed conveying the fee simple made after the minor arrives at age, disaffirms the prior voidable act of the infant. Indeed, the conveyance involved in *Cresinger v. Welch*, *supra*, was one without any covenants of seizin or warranty, and was held to disaffirm a deed made during minority. It is true in that case, the former deed was not a mortgage as in this, but in *Tucker v. Moreland*, *supra*, referred to in *Cresinger v. Welch*, the deed executed by the minor, was a trust deed to secure a debt and was thus in effect a mortgage, but in that case the New York Supreme Court held, that a subsequent conveyance made after the grantor therein attained his majority, was a complete disaffirmance and avoidance of the prior deed.

In addition to this we are convinced from the evidence that Mattie Porter intended the deed to her grand-father as a disaffirmance of her mortgage. She was acting under the advice of her grand-father and of her mother not to affirm or validate her mortgage. She must have known that he was convinced that when she conveyed the property to him, he was getting her full title free of the mortgage. He paid her full value for it, as free of such lien. Having executed such a conveyance and received the full value therefor divested herself of any interest in the land, it will not do for her for some reason of her own now to come in and by answer or otherwise seek to validate the mortgage which she had before repudiated.

As to the question of the right of Mattie Porter to be subrogated to a part of the claim of the bank, we have this to say;

As we recall the evidence the bank held one of those notes, secured by the mortgage, on which she was not personally liable. She had a note of \$400 on some one else after the execution of her deed to her grand-father, and after she thus disaffirmed her mortgage. She gave it to her brother for collection, indorsing her name thereon, and perhaps it was to be left with the bank for collection. At all events her brother left it there for collection and the bank collected the money, and applied it to the payment in part of its note secured by the mortgage. It was never authorized to do this, and had no right to do it. She seeks to be subrogated to a proportionate part of said note. We think she is entitled to this relief.

Alexander Hume, for Hetterick.

Millikin Shotts & Millikin, Morey, Andrews & Morey, Nelson Williams, E. A. Belden and S. Z. Gard, for various defendants.

WRONGFUL DEATH.

[Lucas Circuit Court, July 7, 1900.]

Haynes, Parker and Hull, JJ.

WABASH RAILWAY CO. V. MAY J. FOX, ADMX.

1. ACTION FOR DEATH IN ANOTHER STATE.

In an action under Sec. 6134a Rev. Stat., permitting an action in Ohio for a death wrongfully caused and occurring in another state, the court must look to the laws of the state where the wrongful act resulting in death occurred to determine all questions pertaining to the cause of action. *Ott v. Railway Co.* 10 Circ., Dec. 85, followed.

2. OHIO COURTS MAY ENFORCE INDIANA STATUTES.

In view of the provision in Sec. 6134a Rev. Stat., that the laws of other states may be enforced in Ohio in "all cases where such other state, territory or foreign country allows the enforcement in its courts of the statutes of this state of like character," an Indiana Statute which would defeat the enforcement of Ohio laws in that state, would operate to defeat the application of Indiana laws in Ohio. It cannot be assumed, however, that the Indiana Act, known as the Employers' Liability Act, preventing pleading or proof in Indiana courts of the laws of other states in certain personal injury cases against railroads operating lines in Indiana and other states, and which does not specifically interfere with actions for wrongful death, but which, on the contrary, is restricted to action for injuries, would defeat the enforcement of Ohio laws, relating to actions for wrongful death, in Indiana. The statute in question does not, therefore, defeat the rule stated in the preceding paragraph.

3. MOVING LOCOMOTIVES IN RAILROAD YARDS.

Where a locomotive is being moved about in railroad yards where men are at work, and where their duty calls them and where they may be expected to be upon the tracks, the question, in an action for injuries or wrongful death, whether or not it was negligence for an engineer to omit ringing his bell, and loud enough to give reasonable warning, and constantly, is one for the jury to determine.

4. ERROR—OPINION OF TRIAL JUDGE AS TO VERDICT.

A reviewing court, in determining, upon error, whether a verdict was excessive has nothing to do with the opinion of the trial judge, expressed in ruling upon a motion for a new trial. Thus, where the trial judge, in passing upon a motion for a new trial, made an entry that "the damages awarded by the jury in excess of * * * are excessive, appearing to have been given under the influence of passion or prejudice" and ordered a *remittitur*, or, if refused, a new trial, the reviewing court is authorized to look into the record and determine for itself whether the verdict was excessive, and if so, whether the excess was produced by passion or prejudice; and, having so determined that the verdict was not excessive, the judgment of the trial court thereon may be affirmed, irrespective of the fact that it may have been the duty of the trial judge, in view of his finding as to passion and prejudice, to have set aside the verdict instead of ordering a *remittitur*.

HEARD ON ERROR.

PARKER, J.

This action was brought in the court of common pleas of Lucas county, Ohio, on account of the death of Jesse M. Fox, which, it is alleged by the plaintiff below, May J. Fox, as administratrix, was caused by the wrongful act of the Wabash Railway Company, defendant below and which wrongful act and death occurred in the state of Indiana. The trial resulted in a verdict for the plaintiff below for \$8,000; which, upon a motion for a new trial, was reduced by the trial judge to \$6,500 and judgment was rendered for that amount.

It is contended on behalf of the plaintiff in error that the court below upon the trial, erred in various particulars; and, in the first place in holding that this action may be maintained in the state of Ohio. It is contended by the plaintiff in error that it may not be maintained here; and the reasons given by counsel cannot be better stated than in their brief, and therefore I read therefrom.

"The court erred in holding that the law of Indiana can be enforced in Ohio. Section 6134a Ohio Rev. Stat., provides as follows: 'Whenever death has been or may be caused by a wrongful act, neglect, or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state in all cases where such other state, territory or foreign country allows the enforcement in its courts of the statutes of this state of a like character; but in no case shall the damages exceed the amount authorized to be recovered for a wrongful neglect or default in this state causing death.'"

Then follows a provision as to the limitation of the right to begin the action to two years following the death.

"This section was enacted in 1894. 90 O. L. 408. Prior to the enactment of this statute, it was uniformly held by our Supreme Court that the provisions of Section 6134 Rev. Stat., giving the action for wrongfully causing death, do not extend to cases where the wrongful act causing death was committed outside of this state, and that the action would not lie in this state in favor of an administrator appointed here on a cause of action arising under a similar statute of another state."

In support of this are cited the cases of *Woodward v. Railway Co.*, 10 Ohio St. 121; *Hover v. Penn. Co.*, 25 Ohio St. 667 and *Brooks, Admr. v. Penn. Co.* 53 Ohio St. 655.

"The question in this case is, therefore, whether Indiana is a state which allows the enforcement in its courts of the statute of this state of like character, *i. e.* the statute giving an action for wrongfully causing death. This statute is sec. 6134 Rev. Stat., and provides that the action for wrongfully causing death shall exist where the party would have been entitled to maintain an action and recover damages for the injury in case death had not ensued, and it is therefore obvious that the test for determining whether the action for wrongfully causing death is, would there have been a liability had death not ensued? This necessarily makes the rule of law determining the liability part and parcel of the act for wrongfully causing death. Bearing this in mind, let us look at the Indiana act. The Indiana act for wrongfully causing death is correctly pleaded in the petition in this case, and is substantially similar to the Ohio statute. But the rules of law determining whether a liability would have existed had death not ensued are contained in the Employers' Liability Act of Indiana, upon which plaintiff relies and which is necessarily a part of the "death statute" in that state. For there, as here, the action for wrongfully causing death exists only in cases where a liability would have existed had death not ensued."

"Now the fourth section of the Indiana Employers, Liability Act contains this provision: In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in

this act, in any other state where such railroad is owned or operated, and a suit for such injury shall brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

"If this section means anything it certainly means that in all cases where a citizen of Indiana, injured in another state, brings suit in Indiana against the offending railroad company, the rules for determining whether a liability exists or not, are the rules prescribed by the statute itself, and that the rules of law of the state where the accident occurred are to be entirely ignored by the courts of Indiana. In other words, it applies Indiana law instead of Ohio law, in determining whether a liability exists or not. It is true that prior to the enactment of this statute the Supreme Court of Indiana held that it would enforce the statute of Ohio for wrongfully causing death, but it has not held since this Employers' Liability Act was passed that it would apply the laws whether statutory or judicial, of another state in determining whether a liability existed or not. To enforce the Ohio statute for wrongfully causing death and at the same time apply the Indiana law for the purpose of determining whether a liability would have existed if death had not ensued, is certainly not enforcing Ohio law at all.

"The vital thing about the statute giving an action for wrongfully causing death is the question of how it shall be determined whether a liability would have existed if death had not ensued. Unless Indiana is willing to enforce the rules of law for determining this question, it is not enforcing the Ohio 'death statute' at all."

We think there is force in this statement and argument. In the case of *Ott v. Railway Co.*, 10 Circ. Dec., 85, we held that where an action is permitted in this state for a death wrongfully caused and occurring in another state, we must look to the laws of the state where the wrongful act resulting in death occurred to determine all questions pertaining to the cause of action. *Ott v. Railway Co.*, *supra*, has been affirmed by the Supreme Court, for the reasons stated in the opinion of the circuit court, so that, if it had not been settled before, it is now settled that the rule as stated in that decision is the rule in Ohio.

Now it is insisted that our statute requires that a like rule shall be enforced in the courts of Indiana when suit is brought there on account of a death occurring in Ohio; that the statute of Ohio on the subject of right of recovery for death wrongfully brought about is not enforced unless it is enforced *in toto*, in so far as the question of the right of recovery is affected thereby; that the rights of both parties under the statute must be enforced—the right of the defendant as well as the right of the plaintiff—in other words, the right of the plaintiff as given, defined and limited by the statute, and not some other or greater right that plaintiff may have under the law of some other state, otherwise the statute is not enforced. If the plaintiff is given a right of recovery in the courts of Indiana on account of a death claim originating in Ohio, that is denied to him under the Ohio statute, then the Ohio statute is not enforced in the courts of Indiana. It is not that the courts of Indiana shall enforce so much of the statute of Ohio on the subject as is favorable to the claimant, and decline to enforce the part which is favorable to the defendant, but the statute, which includes all the provisions thereof must be enforced.

If it were clear that the courts of Indiana do not, or may not enforce our statute to the fullest extent, then I would not be willing to say that a suit of this character can be maintained in this state, since the right to maintain it is given by sec. 6184a, Rev. Stat., and depends upon and is limited by that section. Our Supreme Court has so held, and though that holding may not be in harmony with the rule adopted in other states, it is obligatory upon us.

But we know of no holding by an Indiana court to the effect that in a case there prosecuted on account of an injury resulting in death occurring in Ohio, the Employers' Liability Act will be given effect so as to modify the right of the parties; or, put the other way, that the law of Ohio on the subject will not be fully enforced without restraint or modification; and it is not apparent to us that the Employer's Liability Act, by its terms, requires that it should be applied in such a case.

It provides for actions brought by or on behalf of injured employees, not for actions brought by others who suffer an injury in their means of support, etc., through the death of such employee. This act is entitled: "An act regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state." (Laws of Indiana, 1898, p. 294.)

The first section reads; "Be it enacted," etc., "That every railroad or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases."

Then it provides a rule to limit the right of recovery on account of injury to an employee. Section 3 seems to expressly exclude this class of cases, that is to say, any case arising out of an injury sustained, not by an employee, but by those who are dependent upon the employee and whose means of support is taken away from them and who are injured through the causing of the death of the employee.

Section 3 reads as follows: "The damages recoverable under this act shall be commensurate with the injury sustained unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions: Provided, that where any person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and, pending such appeal, the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative."

The provision is, in effect, that if death ensues, then the rights of the parties are not to be determined by this statute, but are to be governed, (not only as to amount of recovery but in all respects) by the laws on the subject of actions for wrongfully causing death; and part of the law on that subject, according to the adjudication of the Supreme court of Indiana theretofore made, is that when the death is produced in another state the laws of such state shall be given effect in the courts of Indiana.

That this statute does not apply to death claims is made manifest, not only by the failure to provide therefor explicitly and by the excep-

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tion before noted, but by the provision that causes of action for injuries covered by the act shall not survive unless the claim is reduced to judgment before the death of the injured employee. If he dies before judgment, it is no longer a case of an injury to an employee, a case falling within the pervue of the act, but is an injury of a different character, an injury to a different person or persons, that is to say an injury to the means of support of a dependent relation, etc., arising out of the death of an employee.

That in an action brought in Indiana for a death produced in that state the Employers' Liability Act would affect a recovery under the statute of Indiana which provides for actions for wrongfully causing death, need not be doubted, for that statute provides that the representative cannot maintain the action unless the injured person could have done so had he survived; but that statute is not called in question here. It has no extra-territorial force. It applies to death claims originating in the state of Indiana. If the claim originates in Ohio, it should be governed by the laws of Ohio; and, as before stated, we know of no decision or statute changing the rule adopted by the courts of Indiana and obtaining there before the enactment of this Employers' Liability Act—which was passed March 14, 1893—to the effect that in such case the law of Ohio will be looked to for the determination of the rights of the parties.

It does not appear that in this particular case the laws of Indiana and the laws of Ohio as to the right of the plaintiff to recover, are at all different, and therefore it may be safe and sufficient to say, so far as this case is concerned, that the laws of Indiana and of Ohio being the same, the laws of Ohio would be enforced to their full extent in Indiana in a case like this even though the Employers' Liability Act may be given effect in Indiana in certain death cases arising in Ohio out of different states of fact.

But we do not put the decision upon that ground: we put it upon the ground that the Employers' Liability Act, so far as we can find or discover, would not be given effect in any action prosecuted in Indiana for a death occurring in Ohio. We have no reason to suppose that it would be given effect, but we believe that the courts of Indiana would determine the right of recovery by the laws of Ohio precisely as they did in such cases before the enactment of this statute.

It is also contended by the plaintiff in error that the court erred in submitting to the jury the question whether the engineer looked ahead before starting his engine.

I cannot take time to state fully the facts of this case bearing upon this question. They are understood by counsel concerned in the case, who will understand the application of what may be said upon the subject.

It is charged in the petition that the engineer did not keep a lookout ahead. That is a part of the negligence charged; and we think that under circumstances like those appearing in this case that might be negligence—that the jury might so consider it. The engineer testifies that he did look out; and it seems to be the view of counsel that because no one testified that he did not look out, therefore the court should not have submitted this question to the jury, or, if the court said anything upon the subject, it should have said that that stood as an undisputed and established fact in the case. But there was evidence tending to show

that when the engineer was moving his engine ahead he did not keep a lookout ahead; that his attention and his eyes were in a different direction and upon other objects; so that we think the court did not err in submitting to the jury the question whether the engineer was negligent in that respect.

Counsel for the plaintiff in error requested the court to charge the jury that if they believed the testimony of the engineer, that he heard the bell ring, then there could be no recovery on the ground that no warning signal was given before the engine was started. Whether the bell was rung was not made clear, but all of the testimony on this point, excepting that of the engineer, tended to show that the bell was not rung. The engineer declared that the fireman rang the bell and that he heard it ring. If the bell was rung, the testimony tended to show very clearly that it could not have been more than a tap or two, and whether it was a very distinct or a very feeble ringing, was very uncertain under the evidence, though the weight thereof tended to show that if it was rung at all, it was done so feebly that it might not be heard at any considerable distance, there being another train passing along at the time and making a great deal of noise. The court modified this request by saying: "If you believe the testimony of the engineer of number 34, that he heard the bell ring when the fireman pulled the bell-cord, there can be no recovery against the defendant by reason of any alleged negligence of the engineer in starting the train without giving a warning signal, notwithstanding the other witnesses testify they did not hear the bell ring"—and the court adds: "—unless you should find that the ringing of the bell was so mild, or the clangs so few, or so little a ringing, that it did not amount to ordinary care, and that it was less than ordinary care required." We see no error in that. We think that the ringing of the bell should be a ringing that would give a reasonable warning under the circumstances. There might be such a ringing as would not serve as any warning at all to a person upon the track who had a right to have warning of the approach of a locomotive, and we think the court charged correctly in charging that the ringing should be such a ringing as would be a fair warning to a person acting under the circumstances under which the testimony tended to show the deceased was then acting.

The case of *L. S. & M. S. Ry. Co. v. Ford*, Admr., 9 Circ. Dec., 786, does not disclose the facts as fully as I thought it did before looking at it, but, as I recall it, one of the charges of negligence in that case was that the engineer was not ringing his bell as he approached the Union depot, through a storm, from the Middle Ground, over that part of the track near the depot. It was a stormy night, an employe walking upon the track, under circumstances not amounting to negligence on his part, was overtaken by a yard engine, ran over and killed. The negligence charged in each of these cases is that of not ringing the bell. That being true, what is said by Judge King upon the subject of what might be negligence in the running of a locomotive in the yard, where men are supposed to be at work, or may be expected to be at work, is more pertinent in this case than appears from the facts stated in the opinion. We think that where a locomotive is being moved about in the yards, where men are at work and where they may be expected to be upon the tracks, where their duty calls them to be upon the tracks, it is not wrong for the court to submit to the jury the question of whether or not it was

negligence in the engineer to omit to ring his bell constantly while moving his engine upon such tracks.

This accident happened in the night time; there was a train of cars just pulling out of the yard. The business of this brakeman who was killed required him to be about and upon this track. The engineer who was at fault, as the jury found, knew that a brakeman was likely to be there, or thereabouts, and likely to be upon or near the track, and, notwithstanding that fact, he moved his engine forward a car-length or more, very quietly, and, as the jury had found, without any signal being given. We think that if the jury found that there was a tap of the bell, or yet a number of taps, but not sufficient to give a fair warning to a person upon the track in the situation of the deceased, because of the noise, etc. and that a constant or a louder ringing of the bell would have given him a warning, then it was fair to submit to the jury the question whether or not the failure to thus ring the bell was negligence. So we find no error in this.

It is urged that the verdict is contrary to the weight of the evidence. I will not take time to discuss that. We have carefully read all the evidence bearing upon the question and listened to its discussion, and we are of the opinion that the verdict is supported by the weight of the evidence.

It is said that the trial judge, when he came to pass upon the motion for a new trial—one of the grounds of which was that the verdict was excessive and that this excess in the verdict had been produced by the influence of passion and prejudice—found that that was true; and then instead of proceeding to do his duty, or what the law required of him, to-wit, set aside the verdict, he reduced it by \$1500 and rendered judgment for the remainder, \$6500.00.

The journal entry is somewhat peculiar and unusual in that respect. It reads as follows: "This day came the parties by their respective attorneys and this cause came on to be heard on the motion of defendant to set aside the verdict of the jury herein rendered, and to grant a new trial of this cause, and was argued by counsel. Upon consideration whereof the court finds that the damages awarded by the jury in excess of the sum of sixty-five hundred dollars are excessive, appearing to have been given under the influence of passion or prejudice, but that the remaining grounds for a new trial in said motion are not well taken. Thereupon the court, being duly advised, orders that unless the plaintiff shall remit from the damages awarded by the jury herein all the amount thereof in excess of the sum of sixty-five hundred dollars, said motion for a new trial will be granted."

The plaintiff did remit the excess and the court proceeded to render judgment for the remainder.

In *Pendleton St. R. R. Co. v. Rahmann*, 22 Ohio St., 446, Judge West at page 449, uses this language with respect to the entry of *remittitur*s and reducing verdicts:

"But in the class of actions in which the opinion of the jury, unaided by any known standard of valuation, determines the magnitude of the recovery, the power of the court over an excessive finding is, in some instances, controlled by statutory conditions. Although the verdict if purged of any supposed excess, might, in the opinion of the court, be well sustained as to the residue by the facts disclosed, yet the presence and influence of passion or prejudice in producing the excess, vitiates

Railway Co. v. Fox.

the verdict *in toto*, and excludes the power of the court to validate, or save, any part of it against the concurrence of either party. Without the consent of both, to a *remittitur* and judgment, the verdict, in such case, must be vacated.

The gist of the view of the court upon the subject seems to be contained in that paragraph, and we believe subsequent holdings are consistent with that view. But what we have to consider and pass upon here is the action of the court below, and the action of the court below consists in rendering judgment upon this verdict for \$6500.00.

We do not understand that we have anything to do with the opinion of the court below that the verdict was excessive, or the views expressed by it as to how the judgment for \$8,000, came to be excessive. We have to pass upon the action of the court and not upon the views expressed by the court or given as the ground of its action, and therefore, we are authorized and required to look into this record and determine for ourselves according to our own judgment whether or not the verdict for \$8,000 was excessive, and whether, if excessive, such excess was produced by passion or prejudice; and, having looked into and considered the record, we are of the opinion that there is nothing therein to indicate that there was any passion or prejudice operating upon the minds of the jury to produce this result. Whether we would have found anything in the record to move us to reduce the verdict from \$8 000 to \$6500, we need not say: it is sufficient for us to say that we find nothing in the record which would authorize or require us to set aside the verdict, and therefore, the judgment of the court of common pleas will be affirmed.

Smith & Beckwith, for the plaintiff in error.

E. L. Twing, and *H. L. Fraser*, for defendant in error.

CONTRACTS—DAMAGES—DEMURRAGE.

[Lucas Circuit Court, January Term, 1900.]

Haynes, Parker, and Hull, JJ.

H. M. LOUD & SONS LUMBER CO. v. ALVIN PETER.**1. MEASURE OF DAMAGES FOR INJURY TO BOAT.**

Under an agreement between a lumber firm and the owner of a sailing vessel, whereby the former agreed to keep a tug in readiness to move the vessel from point to point, to be loaded with lumber, "and in case of storm to move her to a point of safety," a failure, upon the approach of a storm, to comply with the captain's request to be towed from the dock to an anchorage, with the result that the boat, without negligence, was injured and sunk, but not a total loss, or so badly injured that repairs were wholly impracticable, renders such company liable for the cost of necessary repairs, judiciously done, and for demurrage for the time the boat was laid up for repairs, and unfit for use, without regard to the value of the boat at the time the accident occurred and without deduction for the benefit occurring to the owner by reason of the increased value of the vessel after repairs.

2. RULE AS TO EXCEPTIONS TO REFUSAL OF EVIDENCE.

A party excepting to the ruling of the court upon a question asked of a witness in chief must state what he expected to prove by the witness, in order to enable the court to determine whether there was error in the refusal of the court to receive the evidence; and if such party fails to do so, he cannot avail himself of the alleged error in the appellate court.

HEARD ON ERROR.

HAYNES, J.

A petition in error is brought for the purpose of reversing the judgment of the court of common pleas in an action wherein Alvin Peter was plaintiff and the H. M. Loud & Sons Lumber Company was defendant; a case which was tried to the court, a jury being waived by the parties. This case was argued at the last term of this court towards its close. It being a case of importance and in some respects rather novel, not having time to fully consider it then, we continued the case until the present term. We have now taken the case up, and have read the record and the very full briefs of counsel in the case, and all of the decisions that have been cited by counsel on either side, who have been industrious and learned in the collection of decisions and reports.

The plaintiff charged that the defendant the Loud & Sons Lumber Company, in November, 1895, agreed to load the Sprague, a scow so called, belonging to the plaintiff, at and from the docks upon the lake front at Oscoda, in the state of Michigan; and the gist of the action is found in this paragraph:

"It was further agreed between said parties that the said defendant should at all times, while the said Sprague was at Oscoda in the service above stated, keep a tug at said point which should at all times be in readiness to move the said Sprague from point to point, and in case of storm to move her to a point of safety. The defendant was at that time the owner of a tug called the Petrel, which was located at that point, and which was the only tug at that point available for said service, and was the tug which the said defendant agreed to keep at said port for the service above indicated."

The petition then avers that the boat proceeded to receive her load, commencing to load on November 28, 1895; that she had very nearly finished loading about 4 o'clock on the afternoon of the twenty-eighth, when a very heavy storm arose, and was of such severity that the boat was sunk and seriously injured.

This is met by the defendant with a general denial, so far as the material points are concerned, and on those issues the case proceeded to trial.

Testimony was offered, on behalf of the plaintiff below, tending to sustain the allegations of his petition, and on behalf of the defendant in opposition. Briefly, it appears that some little time before this Mr. Peter had made an arrangement with one McGlone, who was then an agent for the Loud Company, at Toledo, to send this vessel to Oscoda to receive a cargo of cedar posts, which the Loud & Sons Company were to furnish. The vessel went in a tow. There were three vessels in the tow, the Swallow being a propeller, the other two being scows. The Sprague was the only boat that was owned by Peter. They proceeded to Oscoda, arriving there about the twenty-fourth of the month. At night a heavy wind came up. These vessels together with the Petrel and perhaps some other vessels, were lying in a dock at Oscoda, called Pennoyer's dock. After the storm had abated the captain of the Sprague, together with the captain of the Swallow, went to the office of the defendant company to inquire about the freight, and were told that the same had not come as arranged, and were informed that the cedar posts were frozen in the bayou during the recent cold weather, and it would be impracticable to load the vessel with those. That statement

seemed to be acquiesced in by the captains, and thereupon they asked Loud if he had other freight, and upon looking over his books he said he had for one vessel, and they might leave whichever one of them they chose. Thereupon the captain telephoned to Alpena to see if they could get freight there. They found they could, for two vessels. Meanwhile the captains had a further conversation with Loud, and it was agreed that the Sprague was to be left at Oscoda, and would have to take her load at different docks. And in that conversation occurred, it is claimed by plaintiff, the disputed agreement, the plaintiff claiming the agreement was as alleged in his petition, and the defendant denying that it agreed to keep a tug there to care for the vessel—or saying anything more than that the tug, when there, could take the boat from dock to dock to take on its load, the tug at the time being used in the fishing business.

Whether the contract is as stated in the petition, or whether it is otherwise, is the point upon which there is a difference in the testimony—a point of difference upon which the court below was called to pass, and which has been discussed very fully by counsel in the argument of the case before us. On that point, the case having been tried to the court, the rule that prevails in the state of Ohio is laid down by the Supreme Court of this state in *Dean v. King*, 22 Ohio St., 118, where the court say, that where there is a motion for a new trial upon the ground that the verdict is against the weight of the evidence, and it is overruled "a reviewing court should not reverse, unless the verdict (or finding of fact, if the jury be waived) is so clearly unsupported by the weight of evidence as to indicate some misapprehension, or mistake, or bias on the part of the jury, or a willful disregard of duty." In case it is set aside, it must appear that the court below rendered a decision against the clear weight of the evidence.

Guided by the rules laid down by the Supreme Court, we are unable to say that the court has erred in coming to the conclusion that this contract was made as set out by this petition. Indeed, the testimony was very strong that it was made as stated. Unfortunately it was not reduced to writing, and perhaps not as distinctly remembered as it ought to have been. But, so far as the main contract is concerned, it was made by these two captains with Henry M. Loud, the secretary of the company, when no other person was present, the two captains asserting on the one hand that it is as stated in the petition; Mr. Loud denying that it went as far as was claimed by these parties, and denying especially that he had agreed to furnish the tug or to keep a tug there for the purpose of protecting the Sprague. Additional testimony to support that is offered by the captain of the Petrel, who testifies to a conversation he had with the captain of the Sprague, which is contradicted by the captain of the Sprague and his mate. I am not certain but that if we were called upon to try this case as original triars, we would have come to the same decision as the court below. Be that as it may, we do not think that we are called upon to interfere with the decision of that court.

I should mention that on the twenty-ninth, the last day, the Petrel, which was engaged at the time in the fishing business for a firm composed in part of the Loud & Sons company and another party, proceeded to a point out in the lake about eighteen or twenty miles, for the purpose of raising nets and bringing in fish. There was left in the harbor only two vessels of any kind that were operated by steam; one was called the Martini, and was a sort of a square rigged scow, propelled by

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steam. That was loaded with lumber, and was perhaps engaged in local trade not a very large boat, nor very much of a sea-going boat, I judge by the description of her and from her build. The other was a small tug, called the Angler. At noon the captain of the Sprague, desiring to go to another dock near by, asked of the captain of the Martini who was lying near him, loading perhaps from the same dock, if he would take the Sprague around. The captain did take her around at the noon hour, and went to his position and went on loading. He continued to load until about 4 o'clock, when the storm commenced, and thereupon he got up steam and started away for safety, and went to Tawas, or started for Tawas; but as he was starting the captain of the Sprague asked him to take a line and tow him out to a place of anchorage, and he declined to do it. The captain then asked the captain of the little tug to pass a line out to the Sprague, and he refused to do it. Neither of those boats would afford the Sprague any help. She was simply lying there at the time, with the storm on her. It is suggested here that she might have kedged out, and a description was given of a kedge anchor, and it was said this anchor which they had could have been carried out with one of the small boats, and the Sprague kedged out. It is stoutly denied on the part of the Sprague that this could be done, and the testimony on that point is conflicting. The court below has found against the witnesses of the defendant in that respect. So far as we can see and so far as we are advised in regard to matters of that kind, we think the court of common pleas was right in that respect.

It is furthermore said that the captain of the Sprague might have scuttled his vessel, and a large amount of testimony is taken for and against on that subject. He had proceeded to load this scow. It was scow below, and whatever cabin it had was up on the main deck. They had her pretty well loaded in the hold, so that no man could go down into that, and had loaded perhaps on the upper deck a large amount of lumber. It is contended on behalf of the defendant in error that they could not have scuttled her—there was no means of doing it. Indeed, from the testimony it would seem that the only means of scuttling the vessel after the storm would have been to go out in an open boat and make a hole in the side of the vessel. It is said that might have been done, but that is denied. On this point the decision is against the defendants below. We do not see how we can disturb that. Indeed, the storm arose very suddenly and rapidly, and the waves came in very heavily, and the vessel was rolling and beating against the dock, and commenced to do it at an early point in the storm. We think the testimony of the defendant there was sufficient to justify the court below in coming to the conclusion that it did on that question.

The boat remained there that night. She was lying at the end of what is called the short dock, and as the storm came up it bore her around the end so she went down on the side of the dock. The captain seems to have been efficient and active with his men in going out with his lines and attempting to hold the boat. He got hold of the dock and was holding on to a certain extent, but some of the lines broke; and it is very evident, with the boat heavily laden with lumber, that she was rolling very heavily, and it was difficult to hold her in a proper position. A portion of the dock was carried away, and the boat passed so far around that her stern came where the water was rather shallow. It was so shallow that the boat finally dragged on the bottom. The skeg of the boat, a contrivance on the bottom for the purpose of holding the steer-

ing apparatus, was broken. The effect of that was the letting of water into the hold, and the boat commenced to and did fill, and the stern rested on the bottom. I don't remember, but perhaps the whole of the steering apparatus was carried away. Great damage was done to the timber around the stern, and some of the railing was carried from the boat, and the boat itself was twisted so that one side was set around about eight inches lower than the other. That was the situation of the boat when the storm left her, which was on Sunday morning. The Swallow came back in the mean time, arriving there after the storm, or in the storm and about the time it abated. She undertook to get the Sprague off, and was unable to do it. Thereupon they telegraphed to Tawas, I believe, for a larger tug, and one came, and she proceeded to pull the boat off, and in a short time had her out in the open water. The boat was filled with water, but did not sink in the open water, for the reason that she had a cargo of lumber. Still, she was flooded, and was partly down. They then took her to Tawas, which consumed some time owing to the fact that the rudder was gone and they had some difficulty in towing her; but she was gotten there some twenty-four or thirty-six hours after, and was docked, and remained at Tawas until the following spring. Some of the lumber was taken off at Tawas. In the spring she was taken in tow, and taken to Bay City, where Mr. Peter, senior, had a dock, saw mill, and other property. The testimony shows that she was put into dry dock, a survey was had of the vessel, and after that survey was had the owner proceeded to repair her. Her cargo was, of course, unloaded before she was sent into dry dock. After she was repaired that portion of the cargo was reloaded, she was brought back to Oscoda, took on the remainder of the cargo she had the fall before, and proceeded to Toledo, arriving here about the twelfth or thirteenth of June, 1896.

It appears that the cost of the towing, docking, repairs, reloading, and all those matters connected therewith amounted to over \$4,000. Added to that there was a claim for damages of several hundred dollars, for demurrage, loss of time on the part of the vessel, during the time that she was being repaired. The repairs themselves, it was said in argument, and I presume it was correct, was about \$1,400 to \$1,700. The towage bills were set down under the evidence somewhere in the neighborhood of \$750, the services of the seamen necessarily employed about the vessel in loading and unloading, etc., amounted to several hundred dollars, and their board to a considerable sum. The result was that the court below rendered a judgment, including interest, for \$5,200, of which it is said that the sum of \$4,800 was for damages and demurrage. A serious contention arises in regard to the correctness of the claim for damages.

In the first place, in regard to demurrage, an objection was made to the introduction of testimony, and that was excepted to all the way through, but the testimony was admitted. Testimony was given in behalf of the plaintiff in regard to these various matters of repairs necessary to be made, and which were made, cost and expenses, and to that evidence, so far as I can find, no objection was made, save and except to the matter of this demurrage: at least as to a large volume of these matters. The testimony so given by the plaintiff showed that the average rate and price for a tug to tow a vessel at that season of the year, when she took the boat in the fall around to Tawas, and in the spring when the vessel was taken down to Bay City, was \$6.00 an hour. When the boat got into the mouth of the Saginaw river she had to be lightered around. She got aground two or three times, and had to be towed stern

foremost. There was no steering apparatus, and she was very difficult to handle. She was then taken up to a dry dock, and she had to await her turn, and it was some few days before she got in. She got into the dry dock and her repairs were completed in about nine days, if I understand the testimony correctly, and she then came out. The testimony offered on behalf of the plaintiff is, that the repairs were made carefully and prudently; that they were made a great deal more cheaply at the dry dock at that point than they could have been made at the dry dock at Detroit or any other point where she might have been taken. The dry dock men claimed that they could do the work a great deal cheaper than it could be done anywhere else. At any rate, it was shown that the work was done as good as it could be at the time. As I have said, Mr. William Peter lived near there, had carried on business there for a long time, and Alvin Peter had lived near there, and the presumption is that they knew what the prices of materials were, and the price of work, and towage, and everything of that kind and were getting the labor done as prudently as possible. It appears that a great deal of repairing had to be done to the stern of the boat, where the steering apparatus was disabled, and the boat had to be re-calked throughout. She had been calked the year before at Cleveland by Mr. Peter, and the calking that came out was new and in good condition, but owing to the wrenching that the boat had received, the calking had to be done again. The boat had to be placed in a frame and braced to bring it back to its natural position, and the repairers had to put in knees and bolts for the purpose of bringing her up to that position and keeping her there. It was done, and she was brought to it. It looks upon the face that these repair bills were very large, but according to the testimony they were as cheaply done as could be, and there is no evidence to the contrary.

As to the question of the rule of damages, there is no case in Ohio like this that I know of, and none was cited to us. A large number of cases were cited, and I think we have read all of them. I refer more particularly to *Williamson v. Barrett*, 54 U. S., (13 How.), 101, 110; *Catherine v. Dickinson*, 58 U. S., (17 How.), 10; *The Baltimore*, 76 U. S., (8 Wall.), 377, 386 and 387; *the Venus*, 17 Fed. Rep: 925; *The Cayuga*, 82 U. S., (14 Wall.), 270; *Wetmore v. Granite State*, 71 U. S., (8 Wall.) 310; *the Glaucus*, 1 Lowell, 372; *Hoffman v. Ferry Co.*, 68 N. Y., 396.

Touching this question of damages the defendant produced two witnesses who had had some knowledge of vessels—scows—perhaps dealt in them, and owned them; had been marine men, or dealing with marine matters for a long time, and counsel first put to them a series of questions in regard to the value of vessels of this kind. One witness had seen this boat, and knew something about her, but not a great deal, and it rather looks to the court as if he didn't desire to; perhaps we misjudge him. But he got down to where they were talking about the value, and he did not know much about that. However, the question was finally put to him in regard to the value of the vessel upon a certain statement of facts and finally the court ruled out his evidence. Another witness was put on the stand and similar questions were put to him, and that evidence was finally ruled out; exactly upon what ground, the record does not show. It was objected very strenuously that the witnesses did not qualify themselves. The questions were more to the value of the vessel before the injury. It was endeavored on the part of the defendant below when he was on the stand to get Mr. Peter to say what he had given for the vessel. It finally came out that he paid some \$1,800 at a marshal's

sale in the year 1894. Some attempt was made to introduce the Inland Lloyd's, and that was ruled out. There was no statement made by counsel in the case as to what it was supposed these witnesses would testify to, and the evidence which it was expected they would give must be determined, if at all, from the questions put. The rule established by the supreme court of the state and by a large number of the courts of the United States, is stated in *Hollister v. Renzor*, 9 Ohio St., 1, 6, and numerous other cases, that the party excepting to the ruling of the court upon a question asked of a witness in chief must state what he expects to prove by this witness, in order to enable the court to see if there has been error on account of the refusal of the court to receive the evidence, and if he fails to do so he cannot avail himself in the appellate court of the supposed error in rejecting the testimony.

We also think the questions did not call for the value at the proper time of valuation to-wit : after the repairs were made ; see *The Baltimore*, *supra*.

In regard to the rule of damages in this case we quite naturally look to decisions of the supreme court of the United States. Many of the cases, it will be observed, which came up in that court are in admiralty, yet I do not see that the rules of damages in regard to matters of this kind are different from what they would be in common law cases. The first case that I call attention to is *Williamson v. Barrett*, *supra*. That was a suit at common law in the circuit court of the United States for the District of Ohio, and was tried in Columbus back as far as 1849 or 1850, before Judge McLean and Judge Leavitt, and was argued by some of the very ablest lawyers in the state, among others, Mr. Timothy Lincoln, who, perhaps, was as good an admiralty lawyer as there was in the west, or perhaps in the east. In that case a steamer was coming up the Ohio river somewhere near the Indiana shore and the defendant had a boat that was going down. The boats collided, and the owner of the boat coming up sued the owner of the boat going down, for damages. The plaintiff's boat was repaired. When they came to the question of damages the law was stated by the judges who decided the case as follows, commencing at page 110.

"The jury were instructed, if they found for the plaintiffs, to give damages that would remunerate them from the loss necessarily incurred in raising the boat, and repairing her ; and also, for the use of the boat during the time necessary to make the repairs and fit her for business."

That clause, it will be observed, covers the demurrage.

"By the use of the boat we understand what she would produce to the plaintiffs by the hiring or chartering of her to run upon the river in the business in which she had been usually engaged.

"The general rule in regulating damages in cases of collision is to allow the injured party an indemnity to the extent of the loss sustained. This general rule is obvious enough ; but there is a good deal of difficulty in stating the grounds upon which to arrive in all cases, at the proper measure of that indemnity. The expenses of raising the boat, and of repairs may, of course, be readily ascertained, and in respect to the repairs, no deduction is to be made, as in insurance cases, for the new materials in place of the old. The difficulty lies in estimating the damage sustained by the loss of the service of the vessel while she is undergoing repairs. That an allowance short of some compensation for this loss would fail to be an indemnity for the injury is apparent."

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They cite here an English case, and say :

"That was a case of collision, and in deciding it, the court observed that the party who had suffered the injury is clearly entitled to an adequate compensation for any loss he may sustain by the detention of the vessel during the period which is necessary for the completion of the repairs, and furnishing the new articles."

The final controversy in this case was in regard to this matter of demurrage. The cost of raising the boat and repairing her was not finally disputed. These judges were in favor of sustaining the charge of the court below, and allowing for the detention of the boat. Mr. Justice Catron, Mr. Chief Justice Taney, and Mr. Justice Daniel dissented. But the rule was established at that time, and remains the rule of the United States court from that time to this. The latest decision on the subject is found in the case of *The Cayuga*, *supra*. No one dissented at that time, and it is the established rule of that court. So that the objection that was made in this case in regard to demurrage by counsel to the admission of evidence was not well taken. The court was authorized by these decisions and by the other decisions of the supreme court of the United States to make that allowance.

There is a case cited by counsel for defendants that they rely upon and argue—*The Venus*, *supra*. That was the lien of a canal boat. The syllabus is as follows :

"Damages allowed for injuries to a vessel, by collision, cannot ordinarily exceed her value at the time of collision, *i. e.*, as for a total loss, with cost of raising, to determine her condition, or to remove her as an obstruction, where that is necessary. To recover more, where the vessel has been repaired instead of being abandoned, special circumstances must be shown proving that the excess accrued notwithstanding the exercise of good faith and ordinary prudence and good judgment in repairing."

But I think the rule is more correctly stated, in *The Baltimore*, *supra*, a decision made by the supreme court of the United States. At page 389, of 76 U. S. (8 Wall.), Mr. Justice Clifford says :

"Restitution in *integrum* is the leading maxim in such cases, and where repairs are practicable the general rule followed by the admiralty courts in such cases, is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred ; and in respect to the materials for the repairs the rule is that there shall not, as in insurance cases, be any deduction for the new materials furnished in the place of the old, because the claim of the injured party arises by reason of the wrong act of the party by whom the damage was occasioned, and the measure of the indemnification is not limited by any contract, but is co-extensive with the amount of the damage."

Further on he says :

"Evidence, however, that the injured vessel is sunk is not of itself sufficient to show that the loss was total, nor is it sufficient to justify the master and owner in abandoning the vessel or the cargo unless it appears that the circumstances were such that the vessel could not be raised and saved, or that the cost of raising and repairing her would exceed or equal her value after the repairs were made."

The difficulty in many of these cases is that the point is not very fully or directly stated in the cases, in many of them the repairs not exceeding the value. There is—*The Glaucus*, *supra*.

"The only remaining exception of the respondents is that the repairs of the vessel and the demurrage together, as allowed, amount to more than the value of the vessel immediately before the collision. They contend that the extreme limit of damages is what would be assessed for a total loss. The assessor finds that the schooner was carefully surveyed, and that the libellants acted in good faith and with care, skill, diligence, and fidelity; that the excess of price over the estimates could not have been foreseen, and that this excess and demurrage were enhanced by the unusually bad weather which happened to set in while the work was going on. The repairs themselves cost much less than the value of the schooner, and appear clearly by the report, to have been such as a prudent owner would have undertaken. Under these circumstances I affirm the allowance of demurrage, even though this brings the total damages to a higher point than they would have reached if the schooner had been abandoned in the first instance."

I have not time to discuss or read further from any decision. All these cases that I have cited are interesting, and profitable to be examined at length. We are satisfied from the evidence that this boat was not a total loss, ought not to be called a total loss. that the plaintiff below was justified in having her repaired. It seems, as I have already said, that the cost of the repairs was high, but the plaintiff below seemed to have exercised all reasonable care and prudence in the matter; and if we were to adopt any rule that would limit that amount, we would adopt it at the price of this vessel after the repairs had been made. That seems to be the logical sequence of the proposition laid down in *The Baltimore, supra*; although the repairs are valuable, useful and more valuable than the old, no allowance is made, and the benefit of that goes to the person who makes the repairs, the owner.

I have endeavored to touch all the points involved, and have occupied more time than I intended. We are of opinion on this record, after a very full and careful examination of it, that it is our duty to affirm this judgment, and it will therefore be affirmed, but reasonable cause will be certified for filing the petition in error, and no penalty will be allowed.

H. S. Bunker and J. C. Shaw (of Mich.), for plaintiff in error.

Kinney & Newton and J. E. Simon, (of Mich.), for defendant in error.

PUBLIC OFFICERS—COMPENSATION.

[Perry Circuit Court, May Term, 1899.]

Douglass, Voorhees and Sibley, JJ.

[Judge Sibley of the Fourth Circuit, taking the place of Judge Adams.]

STATE FOR THE USE OF PERRY COUNTY V. JOHN C. BROWN ET AL.

1. UNLAWFUL RECEIPT OF PUBLIC MONEY—DEFECTIVE PLEADING.

An allegation in a suit to recover money claimed to have been paid illegally to a county official, that such official "unlawfully received on an account duly presented to and allowed by the commissioners of Perry county, Ohio, the

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sum of thirteen dollars for expenses, in addition to his *per diem*," without averring facts, as to the services rendered, from which a court can say that the compensation was unlawfully made, fails to state a cause of action.

2. SAME—PLEADING SUFFICIENT AGAINST DEMURRER.

An allegation in such suit, that at a specified time an infirmity director, naming him, unlawfully received on an account duly presented and allowed by the commissioners of his county, for alleged services rendered to the county as such director in keeping up the journal of the board of infirmity directors, a certain sum, states, as against demurrer, a cause of action for the illegal receipt of public money.

3. INFIRMITY DIRECTORS—COMPENSATION.

No allowance other than his *per diem*, for attendance at meetings, can be lawfully made to an infirmity director, clerk of the board, for keeping a record of the proceedings and transactions of meetings.

HEARD ON ERROR.

SIBLEY, J.

The state of Ohio, for the use of Perry county, by Thomas B. Williams, prosecuting attorney, against John C. Brown, is one of a series of cases depending upon essentially the same state of facts relating to different individuals in their capacity of infirmity directors of this county, and seeking to recover back from them and their sureties on an official bond, certain sums specified and alleged to have been received by them as money from the county, without lawful authority to take it.

I speak now in a general way as to the averments of the petition. There are two classes of counts, I believe, in each of the cases against the different directors. One seeks to recover back money paid by order of the commissioners of the county, for extra services for keeping the journal of the transactions of the infirmity board of directors; and the other as payments for expenses.

These are to be considered separately, because, under our Revised Statutes, they present different questions. The sections involved I will refer to so far as necessary to bring into view the provisions that are in contention. First, I read a passage from sec. 962, Rev. Stat., relied upon, viz:

"The directors shall appoint a superintendent, who shall reside in some apartment of the infirmity or other building contiguous thereto, and shall receive such compensation for his services as they determine. He shall perform such duties as they may impose upon him, and be governed in all respects by their rules and regulations, and he shall not be removed by them except for good and sufficient cause; but in no case shall the directors appoint one of their own number, superintendent, nor shall any director be eligible to hold any other office, directly or indirectly, in the infirmity, or receive any compensation whatever, as physician, or otherwise, either directly or indirectly, wherein the appointing power is vested in the board of directors."

The application of the last clause is invoked—"wherein the appointing power is vested in the board of directors."

Under sec. 961, Rev. Stat., when the board organizes, the law requires it to appoint one of its number president, and another, clerk, and it is the duty of the clerk to keep the transactions and proceedings of its meetings.

I refer to Sec. 962, Rev. Stat., simply because of the reading we give it, which is, that it relates to appointments in connection with the

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administration of affairs in the infirmary. It has no application to an appointment under the other section, but debars the infirmary directors from appointing one of their number for any services done in or about the infirmary, under this provision, and excludes them from compensation for any work of administration in the infirmary, which belongs to the superintendent except as they are paid by their *per diem*. It is not, therefore, a limitation upon payments that may be made to a clerk, simply because, from the language of the statute, he is looked upon as appointed by the directors, by an election of one of their number, a designation or agreement that one shall act as clerk, and another as president.

The case has been fully and ably argued and every consideration presented to the court, perhaps that is necessary to the determination of the case. Counsel, as we understand, do not really differ very much regarding what the law is outside of the question that I have just disposed of. On the one hand, it is contended that the petition, in order to state a cause of action, must show by the facts averred, that the money received by this official was illegally received; which seems to be agreed to by all. The question here is, first, as to the construction of the petition, with regard to its averments; and secondly, as to the application to the petition of the provisions of the statute in regard to compensation.

Section 968 Rev. Stat., limits the compensation of infirmary directors to two dollars and fifty cents a day for each day's attendance, and the directors, it says, may be paid a reasonable compensation for extra services rendered in their official capacity, other than in attending regular and called meetings, not exceeding that sum. So, it is evident that the statute contemplates the performance and the compensation for extra services in their capacity of infirmary directors, when those services are other than their attendance upon their meetings. Of course, there is no dispute about its plain provisions, but only as to one line of allegations in the petition, and that is in respect to the alleged wrongful or unlawful receipt of money for expenses.

I will read one of the counts, in order that the question may be fairly brought into view :

"Second cause of action: That on the third day of March, 1891, said John C. Brown, as such infirmary director aforesaid, unlawfully received on an account duly presented to and allowed by the commissioners of said Perry county, Ohio, the sum of thirteen dollars for expenses, in addition to his *per diem* as such infirmary director, when in fact no expenses had been incurred by him as such infirmary director which he was in law entitled to, and which said sum was paid to said John C. Brown, as infirmary director aforesaid, out of the county funds in the treasury of said Perry county, Ohio."

Now, it is contended, and we think the proposition is well made, that this count is defective in a single particular. We read it as though the word "unlawful" were stricken out, not regarding that as adding anything to its legal import or effect. The defect for which contention is made, and which we think exists in this class of counts is that no fact is averred from which the court can say that a compensation, which the statute authorizes in certain instances, was unlawfully made.

As it is within the power of the county commissioners to make a valid payment for extra services in some instances even though it is alleged that this was in addition to the *per diem* of the directors, the

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the case against them is not made out. There is a failure to specify what the character of the extra service was; hence, for aught that appears, it may have been such as the commissioners were authorized to pay.

Now, it may be that it was impossible for the pleader to particularize—that there is nothing in the county records to show what the exact character of these services was. In that case we think the pleader might save himself without going into the particulars, either by showing that these payments were for services made while in the discharge of duties which entitled to the *per diem* only, or that he was unable to specify, the record not having been properly kept. The commissioners ought not to pay any accounts without its going onto their records, so that any tax payer could look at and see what had been paid out of the county funds and for what. It is their duty, under the statute, to keep that kind of record, and when they fail to do so they fail to discharge the duties that are upon them under and by virtue of their position. But if that was not done, the pleader might aver that he was unable to specify, further than to allege that a service was rendered by the infirmity directors not authorized by law. He must excuse himself by an averment of that character, or else state the facts as they occurred, if he would rely upon them.

We, therefore, are quite clear that this count is subject to demurrer, and that the court below, in sustaining the demurrer to that line of counts in the various cases, fell into no error.

I come back to the other class of counts, one of which, so far as it is material, I now read: "That on the third day of June, 1891, Said John C. Brown, as such infirmity director aforesaid, unlawfully received on an account duly presented and allowed by the commissioners of Perry county, for alleged services rendered said county as infirmity director, in keeping up the journal of said board of infirmity directors of said county aforesaid, the sum of fifteen dollars, which said sum was paid to the said John C. Brown, as such infirmity director aforesaid, out of the county funds in the treasury of said county as compensation for said services."

Now, that count is good on one view of the law, which I shall state presently. By authority *Jones v. Commissioners*, 57 Ohio St., 189, whose form has been followed, and under holding of the Supreme Court, a demurrer would not lie, if the law be, that for keeping up the journal of the infirmity directors no compensation other than the *per diem* can be allowed by the commissioners, or any other authority, out of the funds of the county.

That brings us to the consideration of Sec. 961, Rev. Stat., on which the whole matter depends. The last clause, after providing for their organization, by the appointing of one of their number as president, and another, clerk, says, the board shall meet quarter yearly at the infirmity, and the president may call a special meeting of the board at any time he deems it necessary; the directors shall keep a book, in which the clerk shall record the proceedings of their meetings and all their transactions, which book shall at all times be open to the inspection of the public.

The question here narrows itself down to whether they are entitled to anything other than the *per diem* for this service. We are perfectly clear that they are not. The law prescribes that the board shall organ-

ize and that the journal shall be kept, and it implies clearly, that, as the transactions occur, one of their number shall write them down; he is required to attend the board meetings; he is allowed a sum for that, and the fact that he is made a clerk goes as a duty of his office by the selection of his fellows. He is not to be compensated for extra services; it is not an extra service; it is simply a service that he is called to perform by virtue of his position and what the law requires in order that they may have a record of their transactions. We do not think the case is really open to serious debate on that proposition.

Now, whether he sees fit to make a memorandum or brief note and write it up afterwards, or to take it down as it occurs, is wholly immaterial; if he wants to take two or three days to write it, he cannot charge the county. It would open the door to wide abuse, if the infirmity board were to allow him to make a mere note in discharging any duty in that regard, or any considerable portion of his duty, and take it home and work at it day by day until he would put in a week's time in writing up a record.

The tendency is sufficiently marked to increase compensation of county officials, without the courts opening the door to anything which would be so susceptible to abuse. They accept the office understanding what its duties are; what compensation is provided, and in the discharge of their duties it should not be permitted that they should have anything beyond what the law expressly provides, or by reasonable implication entitles them to receive. The result is, obviously, that this count shows an illegal receipt of money.

For this class of counts it is not necessary to aver particularly that it is illegal, as the Jones case has perfectly well settled, and if there was money received when there was no authority to receive it out of the treasury, it makes such payment unlawful, as against the policy of the law, and as against those who are entitled to have the money held in the treasury of the county.

We think, therefore, in this respect, the learned court fell into error in sustaining the demurrer; that the demurrer to that line of counts should have been overruled, and the defendants put to their answer, if any they have.

The judgment will therefore be reversed and remanded, with instructions to overrule the demurrer to one class of counts—those for keeping up the journal of the board.

T. B. Williams, Prosecuting Attorney, for plaintiff in error.

Tussing & Kelly, Donahue, Spencer & Donahue, John Ferguson and Owen Yost, for defendant in error.

CARRIERS—BILLS OF LADING.

[Lucas Circuit Court, January Term, 1900.]

Haynes, Parker, and Hu'l, JJ.

B. A. STEVENS v. L. S. & M. S. RY. CO.**1. BILLS OF LADING CANNOT BE VARIED BY PAROL EVIDENCE.**

In the absence of fraud or mistake, a bill of lading, signed by the receiving agent of a common carrier, containing no restrictions upon its common law liability, delivered to a consignor contemporaneously with the receipt of the goods for shipment, and acquiesced in by him, becomes the contract of shipment, and its terms cannot be contradicted by parol evidence. *C. C. C. & I. R. R. Co. v. LaTourette*, 1 Circ. Dec., 486, approved and followed.

2. CONTRACT OF CARRIAGE—LIABILITY OF CARRIER.

It is competent for the parties to a contract of carriage to stipulate that the initial carrier shall be bound for the safe carriage of the goods beyond its own line, and for delivery to the consignee, and it is also competent for the parties, by their contract, to limit the liability of the initial carrier to the safe carriage of the goods over its own line only; and, in the latter case, the receipt of the freight charges for the whole distance by the initial carrier does not alter its liability further than to make it the agent of the shipper for the purpose of paying the connecting carrier its share of such charges.

3. EXPLICIT PROVISIONS LIMITING CARRIERS LIABILITY.

In the absence of stipulations on the subject, the acceptance of goods by a carrier for shipment beyond its own line, and receipt of freight charges for the whole distance, may involve an undertaking on the part of the carrier to transport them the whole distance and deliver them to the consignee; but when the bill of lading contains explicit provisions on the subject, they must be given effect, in the absence of averments and evidence which would authorize a court to ignore or set them aside.

4. RULES APPLIED LIMITING CARRIERS LIABILITY.

Where stipulations in a bill of lading are consistent with common law liability, as where it limits the liability of the carrier to its own line, and the shipper seeks to impose greater liability upon the carrier, the fact that the shipper may not have noticed the terms of the printed bill of lading, is not enough to warrant a departure from such terms, and the imposition of a greater obligation on the carrier, because of an implied undertaking arising out of the circumstances of the acceptance of the goods by the carrier marked for shipment beyond its line and the receipt of freight charges for the whole distance; and especially is this so where, as in case at bar, the shipper is aware, at the time of shipment, that the destination is beyond the carrier's line, in which case the shipper is bound to know that if any obligation is imposed upon the carrier beyond its own line it must be by contract extending or enlarging its common law liability.

HEARD ON ERROR.

PARKER, J.

This action was brought by B. A. Stevens, as plaintiff, against The Lake Shore & Michigan Southern Railway Company before a justice of the peace, alleging a liability on the part of the defendant as a common carrier. The case went to judgment before the justice, and was appealed to the court of common pleas, and was determined there by a judgment in favor of the railway company, and Stevens prosecuted error to that judgment.

The defendant, as a common carrier, accepted for transportation goods consigned to Knowlton, Wis., a station beyond the western terminus of defendant's railroad, which is at Chicago and on the line of the Chicago, Milwaukee & St. Paul railroad an independent road, having its eastern terminus at Chicago. The defendant collected the freight charges for the whole distance, that is, over both roads. The goods were duly delivered by the defendant to the Chicago, Milwaukee & St. Paul Railroad company at Chicago, and were by it transported to Knowlton, where they were claimed by and delivered to a person other than the consignee, whereby they were lost.

The plaintiff contends that the defendant is responsible to the plaintiff for the value of the goods, on the ground that the agreement between them involved an undertaking on the part of defendant that the goods should be safely transported to their ultimate destination and delivered to the consignee. The defendant, on the other hand, contends that it discharged its whole duty upon delivering the goods into the hands of the common carrier at Chicago.

No doubt it is competent for the parties to contract so that the initial carrier shall be bound for the safe carriage of the goods beyond its own line, and for their delivery to the consignee. *Steamboat v. Thompson*, 16 Ohio St., 98; *C. H. & D. and D. & M. R. R. Co. v. Pontius*, 19 Ohio St., 221. Under such a contract the connecting carrier becomes the agent of the initial carrier, and for the neglect or default of the former, the latter becomes responsible. On the other hand, it is competent for the parties, by their contract, to limit the liability of the initial carrier to the safe carriage of the freight over its own line only, and the delivery thereof to the connecting carrier; and in such case, though the initial carrier receives the freight charges for the whole distance, that does not alter its situation farther than to make it the agent of the shipper for the purpose of paying to the connecting carrier its share of such charges. To determine the extent of the undertaking we must, therefore, look to the contract of shipment.

The facts upon which this case was submitted to the court below were agreed to and reduced to writing, and I read from that agreed statement of facts:

"It is agreed between plaintiff and defendant and their respective counsel, that the following are the facts in this case, and the same may be used and read in evidence by either party upon any trial, in any court between said parties, their successors and assigns; subject, however to any objections or exceptions thereto for incompetency or irrelevancy:

"1. That the defendant is now and was upon November 21, 1896, a corporation duly incorporated under the laws of the state of Ohio, owning and operating a line of railway extending from the city of Toledo, in the state of Ohio, to the city of Chicago, in the state of Illinois; and as such was then engaged in the business of a common carrier of freight for hire.

"2. That on November 21, 1896, said plaintiff delivered to the defendant at said city of Toledo, Ohio, certain merchandise, of the value of \$7.50, for transportation by said defendant, consigned to C. Weisenicker, Knowlton, Wis. Said goods were delivered by said Stevens to said defendant and said shipment and carriage made upon the following conditions, set forth in said bill of lading on receipt for said goods:

“ ‘ Which said company agrees to carry to the said destination, if on its road, otherwise to deliver to another carrier on the route of said destination.

“ ‘ It is further mutually agreed in consideration of the rate of freight, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are hereby agreed to by the shipper and by him accepted for himself and assigns as just and reasonable upon all the conditions, whether printed or written, herein contained.’

3. That among such conditions were the following :

“ ‘ a. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof, or damage thereto, by causes beyond its control.

“ ‘ b. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

“ ‘ c. No carrier shall be liable for loss, or damage, not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee.’

“ ‘ Property destined to or taken from a station at which there is no regular appointed agent shall be entirely at the risk of owner when unloaded from the car or until loaded into car.’

“ 4. That at the time of said shipment the only connecting carrier of said defendant by which said carriage could be made, was the Chicago, Milwaukee & St. Paul Railroad Company, which fact was known to plaintiff.

“ 5. That said goods were by said defendant delivered to said Chicago, Milwaukee & St. Paul Railroad Company in good order and condition.”

Then follows a statement of the further facts that I have heretofore briefly stated as to the circumstances of the loss of the property.

Under the plain reading of this bill of lading it seems to us clear that the undertaking of the defendant is thereby limited to the safe delivery of the goods into the hands of the connecting line at Chicago.

But it is said that the true meaning and intent of the agreed statement of facts is, not that the plaintiff and defendant expressly agreed that the goods should be shipped on the terms and conditions set forth in this bill of lading, but that the defendant delivered to the plaintiff this bill of lading containing these conditions upon receipt of the goods and the freight charges, and that the question of plaintiff's assent or absence of assent has not been determined by this agreed statement of facts, but it is to be determined by the circumstances stated as to the delivery of the receipt to him, and the rules of law applicable thereto. If we were able to put this construction upon this agreed statement of facts, the case of plaintiff would not be materially improved ; there is no statement from which we may find that any imposition was practiced upon the plaintiff by the defendant in procuring the acceptance of this bill of lading by the former, nor is there anything in the record from which we can find that plaintiff was ignorant of the terms of this bill of lading when he received the same. As a rule, the terms of the agree-

ment between the shipper and the carrier are to be found in and determined from the bill of lading; and that written contract between the parties is subject to the general rules applicable to the variation of written contracts by parol evidence.

We are of the opinion that in the absence of any specific stipulations on the subject, the acceptance of the goods by the carrier for shipment to their ultimate destination, and receipt by the initial carrier of the charges for the whole distance, may involve an undertaking on the part of the carrier to transport them the whole distance and deliver them to the consignee, and so make it responsible for the default of connecting lines. But when the bill of lading contains explicit provisions on the subject, these must be regarded and given effect in the absence of averments and evidence that would authorize a court to ignore or set aside such contract of shipment.

However the rule may be as to stipulations limiting the common law liability of a carrier, where, as in this case, the stipulations are consistent with the common law liability, and the shipper seeks to impose greater liability upon the carrier, the fact that the shipper may not have noticed the terms of the printed bill of lading is not enough to warrant a departure from such terms, and an imposition of a greater obligation upon the carrier, because of an implied undertaking arising out of the circumstances of the acceptance of the goods by the carrier marked for shipment beyond its line, and the receipt of freight charges for the whole distance. Especially is this so where, as in this case, the shipper is aware at the time of the shipment, that the destination is beyond the carrier's line; for, in that case, he is bound to know also that if any obligation is imposed upon the carrier beyond its own line, it must be by virtue of a contract extending or enlarging his common law liability.

That the mere failure to notice the terms of the bill of lading is not sufficient in such a case to authorize a court to disregard the same is decided in *Cleveland C. C. & I. R. R. Co. v. LaTourette*, 1 Circ. Dec., 486. The opinion in this case is by Judge Shauck, now of the Supreme Court. We cannot find that this case has ever been before the Supreme Court, but we believe that the rules laid down, and the decision, are consistent with the former decisions of the Supreme Court, and the case is so nearly in line with the one we have before us, that we do not feel disposed to carry the argument of the matter further, but we place our reliance and our decision upon the argument and decision in this case. The syllabus is:

"In the absence of fraud and mistake, a bill of lading signed by the receiving agent of a common carrier, containing no restriction upon its common law liability, delivered to the consignor contemporaneously with the receipt of the goods for shipment and acquiesced in by him, becomes the contract of shipment, and its terms cannot be contradicted by parol."

Judge Shauck, in the course of his opinion, points out clearly the distinction between a case where a bill of lading undertakes to vary the common law liability by relieving the common carrier from certain of its common law obligations, and a case where, as in this case, the common carrier does not, by the written or printed stipulations of the bill of lading, seek to limit its common law liability.

This agreement we find is consistent with the common law liability of the carrier. In other words, as already stated, the common law would require of the carrier under these circumstances only the safe carriage of

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the goods over its own line and delivery to the connecting carrier ; and if that liability is to be extended to the safe carriage of the goods by the other carrier, then that must be the subject of an express contract between the parties. While the courts have gone a good ways in holding that where there is an effort upon the part of a common carrier to limit its own liability, the shipper will not be bound by the stipulations contained in the bill of lading unless he expressly assents thereto, we find no such holding with respect to a case like this, where there is no attempt to limit the common law liability of the carrier. The judgment of the court below will therefore be affirmed.

Geo. F. Wells, for plaintiff in error.

E. D. Potter, for defendant in error.

MORTGAGES—FORGERY—EVIDENCE.

[Lucas Circuit Court, January Term, 1900.]

Haynes, Parker and Hull, JJ.

R. AUGUSTA FEAGLES V. ELIZABETH TANNER ET AL.

1. MORTGAGES—NOTARY'S CERTIFICATE—PRIMA FACIE CASE.

The record or certified copy of a mortgage introduced in evidence makes a *prima facie* case that the instrument was in fact executed and acknowledged as therein stated. The certificate of the notary that it was duly signed and acknowledged is not conclusive where fraud or forgery is established, but the certificate is given such weight that to overcome it, the evidence must be clear and convincing; a mere preponderance is not sufficient.

2. FORGERY—EVIDENCE SUFFICIENT TO OVERCOME NOTARY'S CERTIFICATE.

The testimony of a wife that the signature to a mortgage of her real estate is a forgery, corroborated by the fact that the handwriting is wholly unlike that in her signature to another instrument, admitted to be genuine, and bears a striking resemblance to the handwriting of her husband, who negotiated the loan, and by the testimony of one of the witnesses to the mortgage that her signature is also a forgery, which is also corroborated by a comparison of handwriting, supported by the further fact that a witness representing the mortgagee is unable to identify the wife as the person who accompanied the husband when he returned the mortgage to the office signed and acknowledged, and, in the absence of any testimony on the part of the husband, or other evidence in support of the validity of the mortgage, is sufficient, under the foregoing rule, to overcome the certificate of acknowledgment of the notary, since deceased, and the mortgage should be declared void.

APPEAL.

HULL, J.

This action comes into this court on appeal from the judgment of the court of common pleas.

An action was commenced in the court of common pleas against Elizabeth Tanner and Samuel F. Tanner upon a promissory note for \$500 and a mortgage which it was alleged was given to secure this note, the mortgage being signed or purporting to be signed by Samuel F. Tanner and Elizabeth Tanner, his wife who were the two original defendants in the action. The property covered by the mortgage was owned by Mrs. Tanner. Samuel F. Tanner has never filed any pleading in the case. Elizabeth Tanner filed an answer, in which she denied that she ever signed or executed either the note or the mortgage, or

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that she ever acknowledged the mortgage. She, in short, charges in her defense and answer that the note and mortgage, so far as she is concerned, are fraudulent and forged. After the action was tried in the court of common pleas and appealed to this court, Elizabeth Tanner died. She was living and testified at the time the case was tried below, and her testimony was taken by a stenographer. After her death the case was revived as against Charles F. Watts, the administrator of Elizabeth Tanner, and Clara Vohlbusch, a daughter of Samuel Tanner, and Mrs. Tanner, and Clara's husband were also made parties. Clara Vohlbusch now being the owner of the property covered by the mortgage it having been devised to her by her mother.

The note was dated June 11, 1895. The mortgage bears the same date. The note and mortgage were made to Marietta M. Sutton, and soon after their execution they were assigned and endorsed without recourse to the plaintiff. The plaintiff, in fact, it is said, furnished the money which was loaned on the note and mortgage. So that the question to be decided here is whether or not this mortgage—no personal judgment is asked—is a forgery, so far as Mrs. Tanner is concerned. The issue is squarely made.

Testimony was offered by the plaintiff and in behalf of the defendants, and it is urged in behalf of the plaintiff that the evidence is insufficient under the law to warrant the court in holding that this mortgage is a forgery.

We understand the rule of law to be, in this state, that to warrant a court in so holding, the evidence must be clear and convincing. The record of the mortgage, or a certified copy of the mortgage, being introduced in evidence, makes a *prima facie* case that the instrument was in fact executed and acknowledged as therein set forth. The certificate of the notary that it was duly signed and acknowledged is not conclusive where fraud or forgery is established, but the certificate is given such weight that to overcome it, the evidence must be clear and convincing a mere preponderance is not sufficient. Whether the evidence offered here by the defense is of such character and of such high order as that, in the question to be determined.

The plaintiff in making out her case offered in evidence the record of the mortgage and the testimony of a witness by the name of D. C. Williams, whose testimony was taken in the court below, but who was not present at the trial in this court, but his testimony was read as given below. The loan was negotiated in the office of T. S. Merrill, and through him. The mortgage was executed, or purported to have been executed, before C. Weber, a notary public, who is dead, and was dead at the time of the trial below, so that we do not have his testimony. Mr. Merrill is also dead. Mr. Williams says that he had an office in the office of T. S. Merrill where this loan was negotiated, and says Mr. and Mrs. Tanner came to the office, and he says that they said they wanted to borrow some money. The description of the property was taken the office, and after they went out Mr. Merrill told the witness to draw the papers, and the witness drew the mortgage. Tanner came back and took the mortgage away, and afterwards came back with the note and mortgage apparently duly signed and executed and acknowledged by him and his wife, and the money, the \$500, was paid to Tanner. After the witness had stated that he did not think Mrs. Tanner was in the office but once, he was asked by the court, "Did you know her before that?" and

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he answers "No, sir." The court then asks Williams, "Do you see the lady in the court-room?" and he answers "I don't believe I would know her if I would see her, because I only saw her the one time, and I didn't really know until after she was gone." Then he was asked the following question by Mr. Flickinger: "How do you know it was Mrs. Sam Tanner?" He answers: "I only know her from her being there, and Mr. Tanner said it was his wife." So that after all it appears from his testimony that he was not acquainted with Mrs. Tanner, and was unable to testify that the woman, whoever it was that was with Mr. Tanner, was his wife, for he knew nothing about that, he said, "except that Mr. Tanner said that it was his wife." Williams testifies further that certain payments of interest were made upon this note. The note drew interest at the rate of 8 per cent. payable semi-annually, \$20 every six months. He testifies that the payments of interest were made by Mr. Tanner. He says that he wrote several letters addressed to Mr. and Mrs. Tanner in regard to the interest, and that the interest was due; that he deposited these in the post office; that they were not returned; but he says he never saw Mrs. Tanner during any of these times, and he never heard of or from her, or from any irregularity with regard to the transaction.

The plaintiff also called a witness by the name of Sutton, who simply testified to the giving of the check for the \$500 that was loaned upon the note and mortgage; and having offered the note and the record of the mortgage and the mortgage itself, the plaintiff rested her case with the testimony that has been referred to.

Under the rule in this state, as has been stated, in order to overcome this testimony, the defense must establish the fraudulent and forged character of this mortgage by clear and convincing evidence. One of the names appearing upon the mortgage as a witness was that of Clara Tanner, written on the mortgage "Miss C. Tanner." She was a daughter of Mr. and Mrs. Tanner. Her name at the time of the trial in this court was Clara Vohlbusch, she having since married. She was called as a witness by the defense, and testified positively that she did not sign this mortgage as a witness, that she did not see her mother sign it, and was not present, and knew nothing of the mortgage; that her signature was forged. A mortgage was put in evidence, which she did witness sometime before that, which was dated April 24, 1895,—the same year as the mortgage in controversy. On that mortgage her name is signed "Clara V. Tanner," and there is a very noticeable dissimilarity in the handwriting between the signature on that mortgage and the signature "Miss C. Tanner" upon the mortgage in dispute. She was asked to write her name when she was on the witness stand, on cross-examination; she wrote it twice on a piece of paper, and the two signatures so written were offered in evidence—one written "Miss C. Tanner," and the other "Clara V. Tanner." These signatures were written freely, and without any hesitation, apparently, or study, and they look very differently from the disputed signature. So we have the testimony of Miss Tanner, now Mrs. Vohlbusch, positively swearing that her signature on this mortgage is not genuine, and the admittedly genuine signature, which apparently is very different from the disputed one, and in addition to that, the signatures of the witness made upon the witness stand in the presence of the court.

Mrs. Tanner's testimony as given in the court below was read upon the trial here. She testifies positively that the name Elizabeth Tanner upon this mortgage and note are not her signatures; that she was not acquainted with Mr. Merrill, through whom the loan was negotiated; that she never saw him—never had any business relations with him. She says she was acquainted with Mr. Weber, who was the notary whose signature is attached to the certificate. She does not say anything more on this subject. How well she was acquainted with him, or whether he knew her when he saw her, she did not state. She says she was acquainted with him. She says she did not acknowledge this mortgage before him—that she is positive of that. She in short pronounces this signature a forgery; denies that she signed the mortgage or note, or authorized them or either of them to be signed; in effect swears that she had no knowledge of the making or execution or acknowledgment of his mortgage or of this note; and that she received no part of the money derived as the proceeds of the loan, and knew nothing whatever about it.

The plaintiff in rebuttal, called as a witness Mr. William H. Chapman, who testified that he had an office in Mr. Merrill's office at the time this mortgage was executed; that he saw Mr. Tanner there, but that he never saw Mrs. Tanner in Merrill's office. By the testimony of a son-in-law of Mr. Weber—Mr. Austin—Mr. Weber's signature as a notary is proved; there is no dispute about that signature being genuine.

This, in brief, was the substance of the testimony offered upon the trial: the testimony of the plaintiff consisting practically of the record of the mortgage, and the certificate of the notary that Mrs. Tanner appeared before him on June 11, 1895, and acknowledged the signing of the mortgage to be her voluntary act and deed. Mr. Weber signing the mortgage as a witness; the defendants offering testimony tending to prove that the signature of one witness was forged, and the signature itself bearing evidence that it was not genuine when compared with the genuine signature; Mrs. Tanner testifying positively that she did not sign the mortgage, it being admitted that the money was paid to Tanner and not to Mrs. Tanner. There is no evidence that any of the money came into the hands of Mrs. Tanner, or was used for her benefit, and no positive testimony that she had any knowledge of the making of this note and mortgage, until shortly before the commencement of this action; the testimony of Mr. Williams, that he mailed letters addressed to Mrs. Tanner is evidence tending to show that she might have had knowledge of the mortgage, but she testifies that she never received any of the letters nor had any knowledge of them. By an examination of the signature of Mrs. Tanner as it appears upon this mortgage and note with that of her husband, and comparing it with an admittedly genuine signature attached to the mortgage of April 24, 1895, it is apparent to one who is not an expert that the disputed signature is very different in its character from the admitted signature. No expert witnesses were called by either side, and the signatures were submitted to the court without the aid of any testimony of that character. Nor are we troubled by the conflict of such testimony, which often appears. But we have examined very carefully these signatures with the aid of a magnifying glass that was provided by counsel, and it is apparent, and we think it is clear, even without the aid of a glass, that the disputed signatures were not written by Mrs. Tanner. The whole trend and character are differ-

ent from those of the genuine signature; they bear rather a striking resemblance to the handwriting of Samuel Tanner, whose signature appears under the name of Elizabeth Tanner on the note and mortgage. It should be said in this connection that Samuel Tanner, who is practically charged here with either forging this signature or obtaining this money on a fraudulent mortgage, was not called as a witness by either party. Although, as state in argument, he was subpoenaed by the plaintiff, the defendants might have called Samuel Tanner as well as the plaintiff. Nevertheless, it does not add any strength to the case of the plaintiff that the person who is charged with forging this signature is present in the court room under subpoena by the plaintiff, and is not put upon the witness stand. He alone of all others knows, perhaps, at least of all others now living, whether this signature is genuine or not.

It is not necessary to go outside of this state to cite authorities upon the question here. In *Baldwin v. Snowden*, 11 Ohio St., 203, the Supreme Court held, as stated in the syllabus:

"A regular statutory certificate of the acknowledgment of a deed of conveyance, made by husband and wife, is, in the absence of fraud, conclusive evidence of the facts therein stated.

"The failure of the husband to disclose to his wife the character of a mortgage which she executed at his request, and in entire ignorance of its contents, the grantee not being present, and having no reason to suspect imposition, does not constitute such fraud as will enable her to contradict, by parol, the certificate of acknowledgment."

It appears from the syllabus in that case, as will be seen, that the wife actually signed the mortgage, but claimed that the character of the instrument that she was signing and executing was not explained to her, and that she signed it in entire ignorance of its contents. The court held that that was not sufficient to overcome the certificate of the notary. The judge in delivering the opinion uses language more emphatic, and goes farther than the syllabus of the case. He says on page 211:

"The certificate of acknowledgment is an essential part of the conveyance, and without it the title cannot pass. And we think it can no more be contradicted by parol than any other part of the deed. It is true, the deed may be impeached and set aside for fraud. But that fraud must be something more than a breach of the confidence reposed by one of the grantors in the other. Where the grantee does not participate in the fraud, and is not cognizant of it, nor of any circumstances which would put an honest and prudent man upon inquiry, and has acted on the faith of the conveyance, we apprehend it can not be set aside on the ground of fraud."

And he says at the bottom of page 212:

"We doubt whether a case can be found where the certificate of the magistrate has been allowed to be impeached, on the ground of fraud, without evidence charging the grantee with notice of the fraud or the officer taking it with complicity therein."

This is not in harmony with the syllabus of the case, or the later decisions.

In *Williamson v. Carskadden*, 86 Ohio St., 664, the rule in this state is very clearly stated. The syllabus of the case is:

"In an action to enforce a written instrument, in the form of a real estate mortgage, and purporting to have been executed and acknowledged as required by statute, an answer setting forth that the defendant had never acknowledged the execution of such instrument, is sufficient.

"In such action, where it appears that the delivery of such instrument was made by one of several persons who signed the same, it may be shown by the others that the delivery as to them was unauthorized and fraudulent.

And the court say, on page 665 :

"In Pennsylvania, the officer taking the acknowledgment of a deed performs a judicial act, and in favor of *bona fide* purchasers, the certificate is conclusive. * * * In Ohio, 'the magistrate does not exercise judicial functions in taking such acknowledgment. * * * His act, though official, is purely ministerial.' Truman v. Lore, 14 Ohio St., 144, 151. Nevertheless, the certificate of such officer, where the grantor actually appeared before him, is, in the absence of fraud, conclusive evidence of the facts therein stated."

It will be observed that the Supreme Court say here, "The certificate of such officer, where the grantor actually appeared before him, is in the absence of fraud, conclusive evidence of the facts therein stated," citing Baldwin v. Snowden, *supra*. Continuing, the court say :

"The rigid enforcement of this rule is required for the security of titles and the repose of society, and, indeed, by every consideration of public policy. Hence, where the testimony to impeach a certificate is uncertain or unsatisfactory, a court should decline to interfere; but, according to the decided weight of authority, where fraud is clearly shown, the certificate of acknowledgment should be declared invalid."

This we understand to be the law in this state. There, of course, could be no greater fraud than forgery. The last case on this subject, is Ford v. Osborne, 45 Ohio St. 1, where a wife disputed the legality of a deed; and the court say in the syllabus :

"Where it is claimed by the wife that a deed, signed by her husband and herself as a conveyance of her lands, had not been acknowledged by her as it purports to have been, the burden is upon her to show the fact by clear and convincing proof; a mere preponderance of the evidence is not sufficient to support a finding contrary to the certificate of acknowledgment."

The wife, in that case, claimed that she signed a deed without any knowledge of the character of the paper that she was signing, through the undue influence of her husband; the Supreme Court reviewed the testimony in this case. The wife brought an action below to set aside this deed, and the court below found that the evidence was sufficient to set aside the deed. The only witnesses called by the plaintiff in the action below were the wife and her husband, and the court say :

"Therefore, when the plaintiff rested her case, it might well be questioned whether she would have been entitled to a decree if the defendant had introduced no evidence whatever. She had not called the notary. It was no answer to this, to say that she was not bound to call one who was, or might prove to be, an adverse witness; the failure to call him could not add to the strength of her case. It rested upon her own evidence and that of her husband—both directly interested in setting aside the deed."

They say further along on the same page :

"But the testimony of the husband was affected, not only by his interest, but also by his admitted turpitude. His evidence shows one of two things to be true; either he was guilty of perjury in the testimony

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he gave at the trial, or he had been guilty of a felony in obtaining a large amount of money upon what he knew to be a fraudulent deed. It would be utterly unsafe to base any judgment upon the unsupported testimony of such a witness."

They then discuss the signature of Mrs. Osborn and the ink that was used, and finally conclude that the evidence was not of such a character as to be denominated "clear and convincing evidence," and not sufficient to warrant the court in setting aside this deed, and the cause was reversed on that ground. Chief Justice Owen, however, dissented from the opinion of the majority of the court. 'From these authorities, the rule, it seems to us, is very well established in Ohio that where the evidence is clear and convincing, that notwithstanding the certificate of the notary, the court will be warranted in setting aside a deed or mortgage and declaring it fraudulent or forged. But a mere preponderance is not sufficient.

The general rule might be stated as laid down in *Jones on the Law of Real Property*, in Conveyancing, vol. 2, sec. 1196. He says:

"The burden of proof is on those who assail the verity of the certificate, and it can be successfully impeached only by clear and convincing evidence that fraud or imposition was practiced, or that the deed was not executed by the grantor, when the issue is limited to the fact of execution."

"Clearly proven" does not mean exactly the same as "proven beyond reasonable doubt." In *Farrer v. State*, 2 Ohio St., 77, 78, this is touched upon by Judge Thurman, in an opinion where he says:

"'Clearly proved' and 'proved beyond a reasonable doubt,' have not, I think, been generally considered as convertible terms. The latter, if I am not mistaken, has usually been held to imply a higher degree of certainty than the former. If the preponderance of testimony is clearly on the side of insanity, the fact ought, in my judgment, to be considered as clearly proved, although there is a reasonable doubt of its existence."

After carefully considering the testimony offered by the parties to this case, the testimony of Mrs. Tanner, and of her daughter, who signed as a witness, and all the facts and circumstances as they have been stated here, in connection with the signatures themselves, we are of the opinion that the proof is clear and convincing that this note and mortgage, so far as Mrs. Tanner is concerned, were forged and are, therefore, fraudulent and void. A decree will therefore be entered accordingly.

Mrs. Tanner having died, her husband now has a dower interest in these premises which is subject to this mortgage and the amount of plaintiff's claim may be found and the same by virtue of this mortgage declared to be a lien on Samuel Tanner's unassigned dower interest in the property.

K. A. Flickinger and G. W. Kinney, for plaintiff.

C. F. Watts and E. B. Southard, for defendants.

PROCESS—ERROR—ATTORNEYS.

[Hancock Circuit Court, December, 1899.]

Price, Norris, and Day, JJ.

GEORGE W. WHITMAN v. JOHN M. SHEETS.**1. WHEN MOTION TO QUASH SERVICE OF SUMMONS CANNOT BE REVIEWED.**

A motion to quash service of summons cannot be reviewed where the finding of the court was based upon facts and no motion for a new trial was made.

2. SERVICE OF SUMMONS UPON AN ATTORNEY, MAY BE SET ASIDE, WHEN.

An attorney at law, while acting in his professional capacity, in an action pending in a county other than the one in which he is a resident, is exempt from service of summons, and any service so made should, on motion, be set aside.

3. SUBSISTING DEFECTIVE SERVICE PRECLUDES SECOND SERVICE.

Unless set aside a defective service of summons will support a judgment, and, while subsisting, such service precludes a second service being made.

HEARD ON ERROR.**NORRIS, J.**

The petition was filed in the office of the clerk of the court of common pleas of this county against divers parties, one of the defendants being the defendant in error, John M. Sheets. The petition was upon an account.

Precipe for summons was filed with the clerk, and service issued in the usual form directed to the sheriff of Hancock county. This summons was served upon the defendant in error on August 1, 1899. On August 17, the defendant, Sheets, filed his motion to quash the service of this summons for the reason that he is a resident of the county of Putnam, state of Ohio, and by profession an attorney at law in full practice. That when the summons was served on him, he was present in Hancock county for the purpose, and no other, of representing and acting as attorney for a litigant in a case then to be heard, and which upon said first day of August, was heard by the circuit court of Hancock county, Ohio, and that immediately after the hearing, and before he could leave the court house in the city of Findlay, and before he could return to the county of Putnam, the summons was served on him, and that no other service was made.

While this motion to quash was pending, and before disposition thereof by the court of common pleas, and while this first summons was subsisting, another summons was issued upon the same petition, and on September 7, 1899, while defendant, John M. Sheets, was in Hancock county, the second summons was served upon him. The other defendants have never been served.

The defendant, Sheets, filed his motion to quash the summons served on him, on September 7, 1899. The ground of the last motion is that said summons was issued and served upon him without any authority of law. On October 26, 1899, both motions came on to be heard upon the evidence. The first motion was supported by the affidavit of the defendant, the substance of which I have recited. This motion was sustained and the first service made in August was quashed. To this finding of the court and order sustaining the motion, plaintiff filed no motion for a new trial.

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On the same day the motion to quash the service made on September 7, 1899, of the summons, came on to be heard and was submitted to the court upon the evidence. The evidence was the summons served August 1, the affidavit in support of the motion to set that service aside, the finding and judgment of the court sustaining that motion and the summons served on September 7, and the court made its finding and judgment, sustaining the motion as to the second service and set the same aside.

Plaintiff filed its motion for a new trial which was overruled, and it institutes proceedings in error to reverse the finding and judgment of the common pleas. The errors assigned are, that the finding of the court is not sustained by the weight of the evidence; that the court erred in sustaining the motion to quash the service made August 1, 1899, the first service, and in giving its judgment in support of said motion, and error in sustaining the motion as to the second service and giving a judgment in support thereof.

We are not at liberty to review the finding of the court upon the first motion, nor the judgment upon that finding. The evidence upon which the court based its determination is not before us, no motion for new trial having been presented, and the consideration of the court upon the facts, for this reason, is not challenged. While this is true, we cannot render ourselves oblivious to the facts presented in support of that motion, because all the evidence thereon submitted, the court finding, upon that evidence and the judgment upon that finding, were received as evidence in support of the second motion and are embodied in the bill of exceptions here presented to reverse the proceedings on the second motion.

The action of the court upon the first motion is in accord with the rule of public policy, which, in the proper administration of justice, recognizes the necessity of safe conduct to suitors and counsel to and from jurisdictions foreign to those of their residence and locality, and that counsel and client whose presence are necessary at the forum wherein the rights of the suitor are pending, may be free to come and go without incurring liability or submitting to inconvenience, which otherwise to avoid, he must absent himself from the jurisdiction in which the client's interests are being determined. The rule applied to counsel as well as to the suitor. It requires no argument to reach the conclusion that the presence of counsel is always necessary, and at times and upon occasions far more necessary than the presence of the client himself; so that the application of this rule by the trial court in support of the first motion was far from erroneous. The objection to the second service is that it was made while the first service subsisted, while the first summons was in performance of its office. In this case the first writ had not become lost, was not destroyed and hence unavailable for use at the proper time; but it had been used, it had been served, and served upon the same party upon whom the second writ was served, and for the same purpose. By the potency and command of the first writ, the defendant was then in court, and there would remain until the forum from which the writ issued would otherwise determine. The writ was not lost, or destroyed or returned not summoned, but was returned served; the return imported legal service, and without attack would bear a judgment against the defendant in the case. Now, in this situation the second writ was issued and the second service was made. A majority of the court are of the opinion that without invading the realm of technicality

the issuing of the second writ and the service of the same was without authority of law. And that while the service of the first writ thus subsisted, and while the party was then in court, no other writ to perform the same service might issue, and no other legal service could be made. Defendant might never attack the service, or if he did not attack its legality, he was at liberty to withdraw his motion and submit to the jurisdiction acquired by the first writ. It performed its office until the court acted upon it, and while performing its office, another writ could neither strengthen its efficacy nor destroy its effect: the two could not be co-ordinate and concurrent and exist together. The second writ could not wait in full strength until the first had lost its potency, If the first performed its office until otherwise determined, the other, when issued and served, had no office to perform.

We find no error in the record to the prejudice of the plaintiff in error, and the judgment of the common pleas is affirmed.

Day, J., does not agree with the majority of the court.

W. H. McElwaine, for plaintiff in error.

John M. Sheets, for defendant in error.

SCHOOLS—EMPLOYMENT OF TEACHER.

[Vinton Circuit Court, October Term, 1899.]

Russell, Cherrington and Sibley, JJ.

EVA L. RUSH V. CLINTON TP. (BD. OF ED.)

1. EMPLOYMENT OF TEACHER—VOTES REQUIRED.

In order to constitute a legal employment of a teacher for a school within a township, by the board of education, its record must show that a majority of all the members of the board voted "aye" on the proposition.

2. SAME RULE AS TO CONFIRMATION.

The same rule applies to the "confirmation" of a teacher, elected by a board of subdirectors. Hence, where a township board consisted of its clerk, and five directors, a motion to confirm the election of a teacher, which had the votes of but two directors and the clerk, does not have the number necessary to carry it, and such election is not confirmed.

3. SAME—NO CONTRACT.

In that case, the person to whom such action relates, has not thereby been employed as a teacher for any school of the township, and consequently cannot maintain an action against the board for debarring her of alleged rights as such.

HEARD ON ERROR.

SIBLEY, J.

This was an action in the Vinton county common pleas, by Eva L. Rush, to recover damages for the alleged wrongful action of the board of education of Clinton township, in preventing her from teaching a certain school which it was averred that she had been employed to teach. On issues made by an answer filed, the case was tried to the court, with finding and judgment for the defendant. To reverse these, error is prosecuted here.

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The record upon which the case is presented to us consists of separate findings of fact, in the common pleas, and conclusions of law therefrom. They are as follows:

First—"That on August 15, 1898, and during said year 1898, the board of education of Clinton township, Vinton county, Ohio, consisted of five members and the clerk of said township.

Second—"That the plaintiff, Eva L. Rush was on the ——— day of June, 1898, elected by the subdirectors of subdistrict No. 6, of said Clinton township, to teach the school in said subdistrict for the term of twenty-four weeks; that said election was certified to said township board on June 21, 1898; said township board rejected said action of said subdirectors in electing plaintiff as such teacher and refused to confirm said election of said plaintiff.

Third—"That on August 6, 1898, said subdirectors of said subdistrict No. 6 re-elected said plaintiff as teacher for said subdistrict for the term of twenty-four weeks to commence September 5, 1898; that said election as teacher was duly certified to said township board of education; that on August 15, 1898, at a regular meeting of said township board of education said board acted on said certificate of said election as shown by the records of said board, to-wit:

"Minutes of previous meeting read and approved, after which the certificate of teacher in district No. 6, Miss Eva Rush was presented to the board for approval. Moved by Wortman and seconded by Nutt that the board confirm the action of the subdirectors in District No. 6, the roll being called the result was as follows: Nutt voting, yes; Wortman, yes; Hall, No; Kirkendoll, No. The vote being a tie, the clerk cast his vote to confirm the action of the subdirectors in hiring Eva Rush as teacher for the term of twenty-four weeks.

"G. W. Cooley was employed and J. T. Ogier received \$15.50.

"After the above business was disposed of, George Potts, a member of the board from District No. 7, put in an appearance. Thereupon D. R. Hall made a motion to allow Potts to vote on motion to confirm the election of the directors in District No. 6. The president refused to consider the motion on the ground that the motion referred to had been disposed of. Motion by Hall to reconsider the vote taken on the election of teacher in District No. —. The president refused to put said motion. Moved by Hall that Emma Depue be hired to teach school in District No. 6 and ordered roll called.

"The vote was as follows: Nutt, No; Wortman, No; Hall, yes; Kirkendoll, yes; Potts, yes.

Fourth—"That the clerk of said board after said August 15, 1898, meeting gave to said plaintiff a certificate of her election as teacher of said school for twenty-four weeks commencing September 5, 1898.

Fifth—"That the said plaintiff, after the refusal of said township board to permit her to teach said school as averred in the petition, the plaintiff was unable to obtain employment at her usual occupation of school teaching, but during the succeeding six months was without employment, after effort to obtain it.

And, as conclusions of law, from the foregoing facts the court finds:

First—"That a majority of all the members of said board did not vote to confirm the hiring of said Eva L. Rush as required by statute.

Second—"The clerk of said board had no right nor power to cast a deciding vote at said election, as he assumed to do.

Third—That plaintiff was not legally employed to teach said school, and is not entitled to recover."

There is no error apparent in this record. But for the fact that the action of the board was on a motion to "confirm" a teacher, instead of directly, and in form, to employ one, it would not present a debatable question. The explicit requirement of sec. 3982, Rev. Stat., is that "upon a motion to * * * employ a superintendent, teacher, janitor, or other employe * * * the clerk of the board shall call publicly the roll of all the members composing the board and enter on the record required to be kept the names of those voting "aye," and the names of those voting "no;" if a majority of all the members of the board vote "aye," the president shall declare the motion carried." Obviously, though the statute does not so in words say, if there is not a majority voting aye, the motion should be declared lost; for that is its unquestionable effect.

The record discloses that this board of education consisted of five directors, to which is to be added the clerk, (sec. 3915, Rev. Stat.,) he having no vote, however, "except in cases of a tie." Now, what was done? Four directors were present. On motion to confirm the plaintiff's election, two voted "yes," two "no." There being a tie, the clerk also voted "yes." Such are the facts. Do they show the plaintiff's legal employment? We think not. The situation in which she is placed, is this: Of the five directors she got but two votes which it must be admitted would not confirm. But if the clerk could vote, he also is to be counted as one of the board. That would make its number six, of which with him, she had only three, thus leaving her still without the "majority of all," which the statute requires.

The one question left then is, whether the statute of March 11, 1898, 93 O. L., 45-49, will avoid that result. By this act, sec. 3918, Rev. Stat., which had been repealed in 1898, 90 O. L., 76, was re-enacted, and authority thereby conferred upon boards of subdirectors to "meet as frequently as they deem necessary for the purpose of electing teachers." Section 4017, Rev. Stat., is amended also, so as to provide: And, in township districts divided into subdistricts, the board of subdirectors shall elect the teachers in their respective subdistricts, but such election shall be subject to confirmation by a majority of the board of education.

* * * If the board of education fails to confirm the teacher elected by any board of subdirectors, such board of subdirectors shall elect another teacher before the next regular meeting of the board of education; if the board of directors fail to elect a teacher for their school, or if the board of education shall fail to confirm such election on or before the third Monday in August of any year, the board of education shall then employ a teacher for such subdistrict."

Without deciding the point as to the power of the subdirectors to reelect a teacher who had just been rejected by the board, as was done here, —though inclined to think it well made—we rest the case upon the proposition that under sec. 4017, Rev. Stat., the rule as to the vote requisite to "confirm" the election of a teacher, is the same as for one's employment. Both are provided for, and sec. 3982, Rev. Stat., is left unaffected. However, to make it clear, "a majority of the board of education" is expressly required for "confirmation." But going down to the last clause, relating to employment by the board, no rule is given. It, therefore, must be under sec. 3982, Rev. Stat. Quite clearly, as it

seems to us, the vote requisite to confirm an election, and that necessary to employ, is the same. In the latter case, a "majority of all the members of the board," is the form in which the requirement is stated; while for the former, "a majority of the board of education" is demanded. That these are equivalent expressions, in the rule which they establish, hardly can be questioned. The "Confirmation" to which an election of one as teacher is "subject," really constitutes the employment; inasmuch as it leaves the determination of whom the teachers in the sub-districts shall be, to the township board. Hence no reason appears for a different policy in the law as to confirming from that provided when the township board itself elects; and none is evidenced by the later provision. Our unhesitating conclusion, then is, that the judgment below should be affirmed.

Cherry & Holland, for plaintiff.

J. M. McGillivray.

PARTNERSHIPS—PLEADING—RES ADJUDICATA.

[Scioto Circuit Court, October Term, 1897.]

Cherrington, Russell and Sibley, JJ.

CALVERT V. NEWBERGER & BRO.

1. LAWS RELATING TO PARTNERSHIP RIGHT TO SUE.

The right conferred upon a partnership formed for the purpose of carrying on a trade or business in this state, by sec. 5011, Rev. Stat., to "sue" in the "usual or ordinary name which it has assumed, or by which it is known," is not affected by the act of May 19, 1894, 91 O. L., 357, requiring partnerships to file certificates, giving names of members, unless it be shown that the persons constituting such firm have been "doing business as partners contrary to the provisions" of said act.

2. AVERMENTS OF COMPLIANCE WITH ACT UNNECESSARY.

When an action is brought by such a partnership in the firm name, under said section 5011, to show a *prima facie* right or capacity to maintain it, averments of compliance with the act of 1894 are wholly unnecessary. The limitations of section 6 of said act are in the nature of exceptions to the authority given by section 5011, and the facts, therefore, showing their application in bar, constitute and are matters of defense.

3. FAILURE OF PROOF ON UNIMPORTANT ISSUE.

When a partnership sues in the firm name, and by proper averment brings itself within sec. 5011, Rev. Stat., but also alleges compliance with the act of 1894, which is denied, mere failure of proof on that issue will not prevent recovery upon the cause of action set out, if that be duly established. Hence where, as in this case, what purported to be a certificate such as is provided for by section 7 of said act, was the only evidence on the question, whether it was rightly or wrongly admitted is unimportant, as in the latter event the error, if such there be, is not prejudicial.

4. RES ADJUDICATA—ENTRY FAILING TO CONSTITUTE

Where at the close of the plaintiff's evidence the defendant moved to take a case from the jury, and the court found the motion to be well taken, but before arresting the case, allowed the plaintiff leave to withdraw a juror, and discharged the jury; and thereupon also permitted the plaintiff to dismiss his action without prejudice, at his costs, afterward entering judgment "that said action be dismissed without prejudice to a new action," and for defendants costs, this is no bar to a later suit between the same parties on the same cause of action.

Calvert v. Newberger & Bro.

HEARD ON ERROR.

PER CURIAM (Reported by Sibley, J).

This was an action in the common pleas of Scioto county, by Newberger & Bro. as a partnership formed for the purpose of carrying on business in the state of Ohio, against Robert A. Calvert, to recover the amount of a judgment and costs before a justice of the peace for which, to stay execution, he had become surety. The petition also averred compliance with the act of May 19, 1894, 91 O. L., 357. There was a prayer for judgment, \$86.75, debt, and \$2.25 costs. The defendant answered first, by a general denial. Next, a payment of \$20 was alleged. The second defense, was a plea of *res adjudicata*. To this a general denial was made by reply. Upon issues thus joined, the case was tried to the court, a jury being waived. On the trial, to show compliance with the act of 1894, the plaintiff offered in evidence a certificate duly certified, the material parts of which are as follows:

"Certificate of Partnership.—State of Ohio, Hamilton county, ss: This is to certify that Leopold Newberger, residing at No. 725 West Ninth street, Cincinnati, Ohio; Meyer D. Newberger, residing at No. 725 West Ninth street, Cincinnati, Ohio; David M. Newberger, residing at No. 725 West Ninth street, Cincinnati, Ohio; and Sylvan Hirschberg, residing at No. 32 Moorman avenue, Cincinnati, Ohio, are interested as partners in the partnership, transacting business in this state, under the name of L. Newberger & Brother.

The principal office, or place of business of said partnership is at Nos. 225, 227 and 229 East Third street, Cincinnati, in this county.

The above are the names in full of all the members of said partnership and their places of residence.

Signed and acknowledged by us this 12th day of October, 1895.

LEOPOLD NEWBERGER.

MEYER D. NEWBERGER.

DAVID M. NEWBERGER.

SYLVAN HIRSCHBERG.

State of Ohio, Hamilton county, ss:

Be it Remembered, That on this 12th day of October, 1895, before me, the subscriber, a Notary Public in and for said county, personally came the above named Leopold Newberger, Meyer D. Newberger, David M. Newberger and Sylvan Hirschberg, and acknowledged the signing of the foregoing certificate.

In Testimony whereof, I have hereunto subscribed my name and affixed my official seal, on the day and year last aforesaid.

[SEAL.]

ALFRED MACK.

Notary Public in and for Hamilton county, Ohio.

OFFICE OF CLERK OF COURTS,

CINCINNATI OHIO, November 25, 1895.

State of Ohio, Hamilton county, ss:

I, George Hobson, clerk of the court of common pleas, being a court of record within and for the county of Hamilton and state of Ohio, do hereby certify that L. Newberger & Brother, a partnership formed for the purpose of and doing business in said county, filed with me a certificate of partnership, October 29, 1895, a copy of which is hereto attached and made a part hereof, stating the names in full of all the

members of said partnership and their places of residence, and that the name of said partnership, and of each of said partners interested therein, were on the same day entered by me in my register of the names of firms, kept by me in my office, as required by law."

This, as the record shows, in which all the evidence is set out, was received over the objection of defendant, he duly excepting, and was the only proof upon that issue.

On the question of *res adjudicata*, after showing the pendency of a former action in the same court, by the plaintiffs against him, for this same alleged liability, and that it went to trial by a jury, the defendant also put in evidence the final action in the case, as follows:

"And the plaintiff, having introduced all his evidence, and rested his case, the defendant moved the court to take the evidence from the jury, and direct a verdict for the defendant, for the reason that said evidence failed to sustain some of the material allegations of plaintiff's petition; and the court after hearing the arguments of counsel upon said motion, and being fully advised in the premises, do find that said motion is well taken, and should be sustained, and the plaintiff thereupon moved the court for leave to withdraw a juror, discharge the residue of the jury from a further consideration of the case, and dismiss said action without prejudice, at plaintiff's costs; to which motion the defendant, by his counsel, objected, and insisted on his motion, and the court, after hearing the arguments of counsel, do find that such leave should be granted to the plaintiff; to which ruling of the court, the defendant by his counsel excepted.

Thereupon, William H. Ware, Jr., one of the jurors, is withdrawn from the panel, and the residue of the jury is discharged from further consideration of the case; and the plaintiff thereupon, with the leave of court, and against the objection of the defendant, dismissed this cause at its costs, without prejudice to a new action: to all of which action of the court, the defendant by his counsel objected, and excepted, and asked that his objections and exceptions be noted of record.

It is therefore considered by the court that said action be dismissed without prejudice to a new action, and that the defendant recover of the plaintiff his costs herein, taxed at \$———, and it is further ordered that the plaintiff pay the same, and the costs by it made herein, taxed at \$———, within ten (10) days or that execution issue therefor."

The finding and judgment below were for the plaintiff. To reverse these, error is prosecuted to this court. The action of the common pleas in admitting the certificate relating to the partnership, and in holding that the record in the former suit was no bar to this, are the alleged errors relied upon.

I. Sec. 5011, Rev. Stat., provides that "a partnership formed for the purpose of carrying on a trade or business in this state, * * * may sue or be sued by the usual or ordinary name which it has assumed or by which it is known," without alleging the names of the members of the firm.

The act of May 19, 1894, to "Prohibit the use of fictitious names in partnership," by sec. 6 enacts, that after its passage and approval, "any persons doing business as partners contrary" to its provisions, "shall not maintain an action on or on account of any contracts made, or transactions had in their partnership name in any court of this state until they shall have first filed the certificate and made the publication herein required."

Calvert v. Newberger & Bro.

The contention of the plaintiff in error was (1) that averment and proof of compliance with the act of 1894 were indispensable to a recovery; and (2) that the certificate in question being the only evidence on the point, and inadmissible, because defective, regardless of the merits of the controversy, the judgment should have been for him. But this claim is not well founded.

The broad, unlimited right to sue in the firm name, is given by sec. 5011, Rev. Stat. This must be taken, therefore, as declaration of the general policy of the law on that subject. Hence it should control in all cases unless by later provision an exception has been engrafted upon it. The act of 1894, does not qualify the right, except by the effect of acts done by the partners "contrary" to its requirements. Clearly, therefore, the authority to proceed under sec. 5011, Rev. Stat., must continue until proof of a violation of the provisions of the later act. No limitation is discoverable by mere inspection of the statute. It depends upon matter *in pais*, which the court can notice only when averred and proved, as the established rule is that "all persons are presumed to have duly discharged any obligation imposed on them by written or unwritten law." Best on Evidence, sec. 348. The act of 1894 then simply makes an exception to sec. 5011 Rev. Stat., based upon acts done "contrary" to its provisions. The party who would avail himself of them, therefore, in bar, should plead the facts. The same principle governs in charging offenses in indictments. As the general rule, "an exception or *proviso* which is not in the enacting clause whether in the same section or not, need not be negatived." I. Bishop's New Cr. Proced., sec. 639. And *a fortiori* this would be true, if it were in a later enactment. Nor is the result changed by the circumstance that in this case the plaintiff below needlessly averred compliance with the act of 1894. In an indictment, that might be "rejected as surplusage." I. Bishop *Supra*, sec. 640. Making an issue on the averment opened the door to evidence from both sides. But none whatever was offered, save the certificate objected to. The consequence is, that if it were properly admitted, the unnecessary averment was proved; while if it should have been rejected, and the record is to be considered with it stricken out, there is not a scintilla of evidence on that point; Hence, nothing to show a bar under the act of 1894. The form of the issue cannot be regarded as dispensing with proof of facts which must be established in order to defeat the action, and that regularly should have been averred by the defendant. As the legal presumption is that the partners had complied with their duty under the statute it is manifest that the defendant could not be aided by mere failure formally to prove a superfluous allegation of that fact. Upon this record, then, he is in this predicament: If the certificate is left in, the case on that point has informal proof against him; while if it be disregarded, because wrongly admitted, there is no evidence of the facts upon which the supposed bar depends, and so it must fail. Hence alike in either event, on this question, the finding was necessarily for the plaintiff. Consequently, whether or not the court below erred in receiving the certificate in evidence becomes wholly immaterial here, as by such error, if it intervened, the defendant was not in the slightest degree prejudiced.

II. The adjudication alleged in the second defense is not supported by the record and judgment in the former suit. However irregular or even erroneous the action of the court may have been in that case, what it in fact finally did was (1) to allow a juror to be withdrawn and the jury discharged, without taking the case from it; (2) to permit the plaintiffs to dismiss the case "without prejudice," at their costs; and (3) to enter a judgment of dismissal "without prejudice to a new action." This brings it clearly within the authority of *Wanzer v. Self*, 30 Ohio St., 378. In that case, as here, it was sought to make the action of the court below, in dismissing the petition "without prejudice to a future action," a decision upon the merits. But the court say: "To give it the effect of such a judgment would not only create that which does not exist, but might work a great wrong to the plaintiff by finally determining a just cause of action which the court did not adjudge against him * * *. If the judgment was erroneous, the party aggrieved might have corrected it by a proper proceeding for that purpose. But so long as that is not done * * * it must stand as it was rendered for it cannot collaterally be impeached." It also is added, as should be said here: "The judgment is an entirety, and if it has any validity it must stand as rendered. If the judgment was so far against the law that it must be regarded as void, then there was no valid judgment on the merits, and it is therefore, in legal effect no better than a judgment without prejudice." Moreover, as the Supreme Court further stated, if the "judgment pleaded in bar is not such a judgment as ought to have been or might have been rendered, but never was," still "it is the one actually rendered, which is without prejudice. Upon that judgment the party must stand, and being without prejudice to a future action, it is not a bar to the action to which it was pleaded."

The plaintiff in error, then, is in a *dilemma*. Without the record of judgment in the former action, the defense of *res adjudicata* fails; while if it be considered, either as valid or void, it operates as a judgment of dismissal, and therefore, is no bar. Consequently, there could not be error in the effect given to it by the trial court.

On these views the judgment of the common pleas was affirmed.

N. W. Evans and Duncan Livingstone, for plaintiff.

A. H. Bannon, for defendant.

NEGLIGENCE—ESTATES.

[Ross Circuit Court, May Term, 1900.]

Russell, Cherrington and Sibley, JJ.

MARY P. DESCHLER v. GUSTAVUS S. FRANKLIN, Exr.

ESTATE NOT LIABLE FOR TORTS OF EXECUTOR.

The estate of a deceased person is not liable for the torts of an executor. If a cause of action arises through the negligence of an executor in managing an estate, as for injuries received in the operation of a passenger elevator in an office building owned by the estate, the suit must be against such executor personally and not in his representative capacity.

HEARD ON ERROR.

CHERRINGTON, J.

The action below was brought by Mary P. Deschler, against Dr. G. S. Franklin as executor of the last will of Lewis W. Foulke, deceased, to recover damages for an injury claimed to have been received by said plaintiff while riding as a passenger in an elevator in an office building known as the Foulke block, in Chillicothe. The petition alleges the death of said testator, the appointment and qualification of the defendant as executor, and charges, among other things, that the defendant, as such executor, was managing the building known as the Foulke block, in Chillicothe, Ohio, and was running and operating a passenger elevator in said building for the purpose of carrying passengers from one floor to another, all in the interest and for the benefit of said estate.

Plaintiff further alleges that on April 18, 1897, she was admitted as a passenger in said elevator by the defendant executor's servant, to be carried from the third floor of said building to the first, and while in the act of leaving said elevator, after it had reached the first floor, was dangerously and seriously injured by the carelessness and gross negligence of the operator.

A general demurrer was filed to this petition and was overruled by the court below, and defendant excepted.

Thereupon issue was made between the parties, trial was had and plaintiff recovered judgment for \$1741.00 and costs.

Error is prosecuted to this court upon numerous grounds, among others, the overruling of the defendant's demurrer.

The question to be determined is whether or not the estate of a deceased person can be made to respond in damages for the torts of the executor.

We have examined the authorities at great length upon this question, and can not find any decision which will warrant us in answering this question in the affirmative.

In *Westfall v. Dungan*, 14 Ohio St., 276, the Supreme Court of this state held that an estate was not liable for the false or fraudulent representations of the executor.

The theory of the law has always been that the property of an estate shall be held intact for the benefit of the creditors and beneficiaries, and that the representative can not create any new or additional liabilities against the estate. If any cause of action arises through his negligence in managing the estate, it must be against him personally and not against him in his representative capacity.

We find, therefore, that the lower court erred in overruling the demurrer to the petition, and for that reason the judgment is reversed.

W. Allen, R. A. Harrison and John P. Phillips, for plaintiff in error.

W. Edgar Evans, for the defendant in error.

PARENT AND CHILD.

[Licking Circuit Court, March Term, 1899.]

Adams, Douglass and Voorhees, JJ.

CHARLES M. WING, GUARDIAN, V. EDWARD HIBBERT, A MINOR, ET AL.
SUPPORT OF CHILD WHOSE ESTATE IS SUFFICIENT.

When the father is dead the mother is liable for the maintenance of her minor child; but when the estate of the child is sufficient for its support and exceeds that of the mother, the child should be maintained out of its own estate.

APPEAL.

ADAMS, J.

The case of Charles M. Wing, guardian of Edward Hibbert, a minor, against Edward Hibbert, a minor, Anna Chilcote and William H. Chilcote, has been submitted to the court upon the petition and answer of the guardian *ad litem* of the minor defendant, Edward Hibbert, and an agreed statement of facts.

The petition, pursuant to the provisions of sec. 6202, Rev. Stat., asks the instruction of the court as to the administration of the trust.

The petition sets forth that Edward Hibbert is the son and sole heir at law and next of kin of John H. Hibbert, who died intestate. That the defendant, Anna Chilcote, is the mother of said minor, and the widow of John H. Hibbert, who, since the death of John H. Hibbert, has married the defendant, William H. Chilcote; that this minor is living with his mother and her second husband as a member of her family. The petition alleges that John H. Hibbert left an estate valued, in real estate, at about \$56,800. and personal property of the value of \$8,500. It alleges the net rental value of the real estate, and that Anna Chilcote is entitled to one-third of the income for her life, and Edward Hibbert to the two-thirds thereof. And then, coming to the controversy: Anna Chilcote has presented to the guardian a claim for allowance for maintenance and support of her minor son, at the rate of three hundred and twenty-five dollars per year for four years; that the plaintiff is unable to determine and decide the right of Anna Chilcote to make the claim and of the plaintiff to pay the same; and he also asks the instruction of the court as to whether or not this guardian should pay for the maintenance and support of his ward as long as he resides with his mother, and whether she has a right to charge for the same.

The answer of the guardian *ad litem* says that the mother (Anna Chilcote) has ample possessions and ability sufficient to provide a suitable maintenance for said minor during his minority, and that it is not necessary to provide said suitable maintenance out of the estate of said minor.

It was agreed in the hearing of the case, that the annual rental of the store-building was \$3052; the livery-stable \$400; that the net income, after the payment of expenses and taxes, was \$2056; that one-

Wing v. Hibbert.

third of that belonged to Mrs. Chilcote, \$685., and two-thirds, \$1371, belonged to the minor, represented by his guardian. It was also admitted that Mrs. Chilcote received \$700. in cash from her husband's estate: that she received \$2,000. in life-insurance, which had been invested in a homestead, where she now lives, worth fifteen hundred dollars, and that she had bought thirty-seven acres of land worth twelve hundred dollars, on which there was a mortgage of eight hundred dollars, leaving a net interest in the land of four hundred dollars, so that her estate amounts to seven hundred dollars in cash, a fifteen hundred dollar home, and a title to real estate worth, above indebtedness, four hundred dollars: that would give her eleven hundred dollars over and above her home, and, in addition to that, a net income of six hundred and eighty-five dollars, from the rentals.

There was considerable said in argument about the relative obligations of a father and of a mother to support their minor children.

The case of *Fulton v. Fulton*, 52 Ohio St. 229, lays down the rule. The case of *Fulton v. Fulton* was not exactly like this, but the rule is stated there: I read from page 238:

"The husband and father while living with his family is its head, is entitled to the services of his minor children and is liable for their reasonable support."

Of course, as to that, there was no controversy.

Where, however, the husband is dead, the modern and better rule is that the mother is the head of the family and entitled to the earnings and obedience of her minor children."

"And whenever the mother is entitled to the obedience and services of her minor children, it would seem to follow, necessarily, that she should maintain them. Harsh and anomalous, indeed, a rule of law must be that would give the earnings and custody of a minor child to a parent who was under no reciprocal obligation of maintenance. The duty of maintenance by the mother is asserted by Schouler, *Domestic Relations*, sec. 293; *Mowbry v. Mowbry*, 64 Ill., 383; In *Dedham v. Natick*, 16 Mass., 140, the court say: 'The mother, after the death of the father, remains head of the family. She has the like control over the minor children, as he had when living. She is bound to support them, if of sufficient ability; and they cannot, by law, be separated from her.'

"The cases, indeed, are rare, where a mother, having the ability, has declined to administer to the wants of her minor child. The law of nature is usually strong enough to secure this, and an appeal to municipal law is therefore seldom necessary. But, if a widowed mother with ample possessions should decline to administer to the necessities of her destitute minor child, a rule of law that would allow this, and suffer her to abandon it to private or public charity, would be a reproach to any system of jurisprudence."

We think that the general rule there, as to the obligation of the mother to support her minor child is well stated, by our Supreme Court. But, it will be noted there that emphasis is laid upon the statement as to her refusal to support or maintain a destitute minor child; and the case at bar differs from that case, and differs from the facts that are referred to in the statement of law by the Supreme Court. In this case there is a minor child, who is the owner in fee-simple of real estate worth sixty thousand dollars, as was agreed, subject

only to the dower-interest of his mother, and, practically, the minor child has twice the income of his mother; it is exactly twice on the rentals, but, making an allowance for what the mother would receive from her other property, the income of the minor very greatly exceeds that of the mother.

Section 6271, Rev. Stat., reads: When a guardian is appointed to have the custody, maintenance, and education of a minor, his duties shall be as follows:

"First: To protect and control the person of his ward. Second: to provide a suitable maintenance for his ward, when necessary, which shall be paid out of the estate of such ward in the hands of the guardian of such estate, upon the order of the guardian of the person of such ward.

Third: When such ward has no father or mother, or having a father or mother, and such parent is unable or fails to maintain or educate such ward, it shall be the duty of the guardian so appointed to provide for him such maintenance and education as the amount of his estate may justify, which shall be paid out of the estate of such ward in the hands of the guardian of such estate, upon the order of the guardian of the person of such ward."

It is claimed that the statute fixes the rule that, no difference what the amount of the estate of the ward is, and how small, relatively, the estate of the parent, so long as the parent is able to maintain or support the child, the parent must do so, out of the parent's own estate, and the entire estate of the ward preserved to him until he comes of age.

This statute indicates what we think is the rule in all these cases, that what would be a proper maintenance and support for a minor who had a few thousand dollars of an estate would be one thing, and a proper maintenance and support for a minor who had an estate of sixty thousand dollars or a hundred thousand dollars, or even of a million dollars, would be a different sort of maintenance and support.

The statute says: "Such maintenance and education as the amount of his estate may justify."

Here is a woman with a comparatively small income. It is small compared with the income of her minor son. To say that she must support not only herself but her child out of her income of six or seven hundred dollars, and that the child, who has an income of nearly fourteen hundred dollars, should pay nothing for his support, is unjust and unfair to mother; and we would not so hold unless we were compelled to do so by the language of the statute; and we think that this statute must be construed in the light of the facts as they are presented to us in this case, looking to the relative size of the estates of the mother and of the child, and to the relative amounts of their income.

It seems to us that, under these circumstances, construing the statute in the light of these facts, this mother, with this comparatively small income, is unable to fairly maintain, support and educate this ward in the way that the amount of his estate would justify; and, so far as the future maintenance and support of this ward are concerned, we direct the guardian that it is his duty to support and maintain the ward out of the ward's estate.

So far as the maintenance and support that has gone before is concerned, we think that the amount of that, and whether it is to be paid or not, cannot be determined in this action; that the mother, who has furn-

ished this support, must have her right to be repaid, or to be paid for that, determined in an action at law; and a very important fact in that case would be whether she had furnished the maintenance and support voluntarily, and without the expectation of being paid for it.

There will be a decree directing or instructing the guardian in accordance with this opinion.

Kibler and Kibler, for plaintiff.

Judge C. W. Seward and J. R. Fitzgibbon, for defendants.

MUNICIPAL CORPORATIONS—CROSSINGS—NEGLIGENCE.

[Pickaway Circuit Court, May Term, 1900.]

Cherrington, Russell and Sibley, JJ.

CIRCLEVILLE (CITY) v. ELLA M. SOHN.

1. EVIDENCE—PARTIALLY INCOMPETENT ANSWER TO QUESTION.

Where a witness is asked a question which is proper and competent, and the answer of the witness to it is partly competent and partly incompetent, and a motion is made to strike out the answer, it is not error to refuse to sustain such motion.

2. PRESUMPTION AS TO ALLOWING MOTION TO STRIKE OUT.

Where a witness for the plaintiff, upon cross-examination was asked and answered a question in reference to a matter competent for the defendant to prove, in support of its defense, but not inquired about upon direct examination, and a motion was made and sustained to strike out the the answer of the witness, the grounds of the motion and the reason of the court for sustaining the same not appearing, it will be presumed that the court sustained the motion for the reason that the testimony was being introduced out of its order, the order of the introduction of testimony being discretionary with the court.

3. ANSWER EXPRESSING OPINION SHOULD BE STRICKEN OUT.

Where the question for the jury to determine was whether the plaintiff's injury was caused solely by the negligence of the defendant, or whether she was guilty of contributory negligence which caused her injury, and the plaintiff having been asked a proper question, answered: "I was using all due caution," it was error for the court to refuse to strike out said answer upon defendant's motion for that purpose.

4. INSTRUCTIONS AS TO PURPOSE OF CERTAIN EVIDENCE.

In an action against a municipal corporation to recover damages for an injury alleged to have been caused by slipping and falling on an alley crossing, evidence having been offered tending to show that the alley crossing had been substantially in the same condition for a number of years, and that during that time divers persons had slipped or fallen at that point, the court should at the time of receiving said testimony, then instruct the jury that it can only be used by them for two purposes: First, as tending to show the defective condition of the alley crossing, at the point where the plaintiff claimed to have received her injury; and second, as tending to show that the city authorities had knowledge or should be charged with knowledge of such defective condition; but that it is not competent for them to consider such evidence for the purpose of proving that the defendant was negligent in permitting said alley crossing to be and remain in such condition, nor that such condition, as between the plaintiff and defendant, was the sole cause of her injury.

5. DEGREE OF CARE—APPREHENSION OF DANGER.

In an action for damages, where one of the issues is the contributory negligence of the plaintiff, an instruction which measures and limits the degree of care to be used by the plaintiff's apprehension of danger, is misleading.

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6. RECEIPT OF TESTIMONY WITHOUT OBJECTION—MOTION TO DISREGARD.

In such an action, where the evidence shows that the plaintiff's injury was caused by some negligent act of the plaintiff, not alleged in the petition, and no objection is made to the introduction of such testimony, the objection cannot be saved by asking the court to charge the jury that they cannot consider such testimony.

7. DEGREE OF CARE NOT DEPENDENT UPON APPREHENSION OF DANGER.

In an action to recover damages from a municipal corporation on account of its negligence, it is necessary that the evidence should show that the plaintiff exercised that degree of care that an ordinarily careful and prudent person, under the same or similar circumstances, would have exercised, and an instruction which makes the degree of care to be used dependent upon the apprehension of danger entertained by the plaintiff is misleading.

8. MUNICIPAL CORPORATIONS—CROSSINGS.

Where the plaintiff claims to have been injured by falling on a defective crossing, it is necessary, in order to make a municipal corporation liable for damages, that it should have had notice of such defect, or that the defect existed for such length of time that it is presumed to have had such notice, and an instruction to the jury which does not contain such qualification as to the liability of a municipal corporation is erroneous.

9. ACCUMULATION OF ICE AND SNOW—RULE AS TO LIABILITY.

A municipal corporation is not liable for an injury caused by the recent accumulation of ice and frozen snow on an alley crossing, which it knew or ought to have known was defective or out of repair, and which accumulation of ice and frozen snow on said crossing, in its defective condition, combined with its icy and slippery condition, caused the injury complained of, unless such accumulation of ice and frozen snow might reasonably have been anticipated as the natural and probable result of such defective construction or lack of repair.

10. ADOPTION OF IMPROPER PLAN FOR AN ALLEY.

A municipal corporation is not liable for an injury caused by reason of the improper plan of an alley crossing adopted by it until it be shown that it had notice that the plan so adopted by it was not reasonably safe for use under ordinary circumstances.

HEARD ON ERROR.**CHERRINGTON, J.**

This is a proceeding in error to reverse the judgment of the common pleas court of this county. The action in the court below was brought by one Ella M. Sohn against the city of Circleville to recover damages for an injury, which she claims to have received, on March 16, 1895, from a fall at the intersection of south area alley and the west side of Court street in said city, resulting, she claims, from the negligent and defective construction of the alley crossing at said point, together with ice and snow that had accumulated thereon making the same slippery.

The answer contains three defenses. The first and second defenses may be said to be denials; the the third defense sets up contributory negligence on the part of the plaintiff. There is a reply to the third defense which denies contributory negligence on the part of the plaintiff.

On the issue thus made the case went to trial before a jury, resulting in a verdict for the plaintiff. A motion was filed by the defendant asking for a new trial, which was overruled, to which ruling the defendant excepted. A bill of exceptions was prepared, allowed and filed, setting out all the evidence and the entire history of the case. A petition in error was filed in this court, by the defendant in the court below

assigning the errors claimed to have been committed by the lower court.

The first error which we will notice occurred in the testimony of Dr. Russ. The doctor was unable to be present at the trial of this case, but by agreement of counsel the testimony given by him on a former trial of this case which had been reduced to writing by a stenographer, was so far as the court held the same to be competent and relevant, read to the jury as being his evidence. On cross-examination by counsel he testified as to the condition of the street saying: "It was very bad," and on re-examination counsel asked him this question: "Q. I was going to ask you one thing, I understood you to say it was more dangerous or slippery than any other?" "A. Taking it on the average, yes, I may have made that remark, but I will say that I believe that it is, on the average, the most dangerous alley in Circleville, on account of the great slope it has, and on account of the roughness of the stone, the inequality and unevenness." The defendant moved to strike this answer out, which motion was overruled and exceptions taken by the defendant.

The question was a proper one as referring to matters the witness had stated on cross-examination, and the first part of the answer was proper, but the remainder of it was incompetent. If the motion of the defendant had been limited to the latter part of said answer, viz., "the most dangerous alley in Circleville on account of the great slope it has," etc., the motion, no doubt, would have been sustained. But the motion was too broad, it included a whole answer, some of which was perfectly competent. That being the case the court did not err in refusing to sustain the motion.

The next alleged error that we shall consider arose upon the examination of one Wayne Caldwell as a witness for the plaintiff. The witness was questioned as to the condition of the streets on which this accident happened, and probably as to other streets in the vicinity of where the accident occurred, and on cross-examination he was asked: "What was the condition of the other walks over which you passed that night?" And the answer was: "I think they were all slippery." The plaintiff made a motion to strike this question and answer out, which motion was sustained, and the defendant excepted, and now claims that was error.

We think it was competent for the defendant to show the condition of the streets all over the city of Circleville on that night, for the sole purpose of reflecting upon the matter as to whether or not the plaintiff was guilty of contributory negligence, because if there was an unusual condition of snow and sleet and ice upon the streets in Circleville that evening, it is sufficient to say that that fact alone should have put the plaintiff on notice, and she should have been on the alert in traveling on any of the streets and in attempting to go over any of the crossings, and in that way it would reflect upon the question whether she was guilty of contributory negligence. While it was competent for the defendant to show this state of facts when it came to offer evidence in support of its case, it was not proper for it to do so in the first instance by cross-examining the witnesses of the plaintiff, unless testimony had been elicited by the plaintiff upon direct examination that justified such cross-examination. We do not see anything in the testimony of the witness on direct examination that justified his cross-examination at that time on that subject. The grounds of the motion are not stated

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and the reason of the court for sustaining the same is not given, and as the court in its discretion had a right to control the order of the introduction of the testimony and refuse to permit that testimony to be introduced until the defendant reached its case, we must presume that the court acted upon the correct reason and sustained said motion because the testimony was being offered out of its order, so that there was no error in the ruling of the court on that point.

The next error alleged presents a more difficult and serious question. It arises in the testimony of the plaintiff, who, when upon the witness stand was asked this question: "State, Mrs. Sohn, how you were conducting yourself in going down to the alley crossing, at the point where you slipped, as to using care?" "A. I was using all due caution."

Defendant's counsel moved to strike this answer out, the motion was overruled and the defendant excepted.

The question being tried by the jury was whether the plaintiff's injury was caused by the negligence or want of care on the part of the defendant, and also whether the plaintiff, by reason of her own negligence or want of care, contributed to her own injury.

Negligence, as we understand it in this case especially, is a mixed question of law and fact which it was the duty of the jury to determine from the facts properly put before it. The plaintiff by her answer undertook to determine that very question. It was a question for the jury to say whether under all the circumstances she "was using all due caution," and not for her.

We are aware that it is difficult at times to get witnesses to confine their answers to the question propounded to them, and it probably was in this instance, but where the answer of a witness is clearly incompetent, it is the duty of the court, upon a motion being made for that purpose, to strike out the answer of the witness and withdraw its consideration from the jury. We have no hesitation in saying that the answer of the witness in this instance was wholly incompetent, and that the court in refusing to sustain the motion of the defendant to strike it out committed a prejudicial error.

The next alleged error arises upon the rejection of the evidence of John W. Stump and Howard Sweetman, who were both surveyors and who were both offered as witnesses by the defendant to prove that the alley crossing where the plaintiff received her injury was, in their opinion, constructed in the manner in which such crossings are usually and ordinarily constructed. In other words, the defendant attempted to examine these witnesses as experts, on the theory that they were better qualified, by reason of their profession, and that they had a better understanding of such matters than men in common, and it was objected that they were not experts, and the court so held.

Judge Okey, in *Railroad Co. v. Shultz*, 43 Ohio St., 282, on this question of experts, says: "A few general propositions are submitted, which, it is believed, fairly reflect the current of authority on the subject of the admissibility of the opinions of witnesses as evidence. 1. That witnesses shall testify to facts and not opinions is the general rule. * * *

6. Where it is practicable to place palpably before the jury the facts supporting their opinions, the witnesses should be restricted in their testimony to such facts, and the jurors left to form their opinions from these facts, unaided by the mere opinions of the witnesses."

We think that the sixth paragraph above quoted covers the case of these witnesses, and that that paragraph should govern in cases of this kind. The most that these witnesses could have testified to would have been in a comparative way ; they might have said that they had observed and knew something about such crossings as this ; that they had seen crossings constructed in other cities and towns in the state of Ohio, and have compared them with this crossing in reference to which they were being questioned. That is as far as these witnesses could have been permitted to go concerning it. We do not think that the court erred, therefore, in excluding both of these witnesses.

The plaintiff in the court below was permitted to prove by a large number of witnesses that they, the witnesses, had slipped or fallen, or that they had seen other persons slip or fall at the alley crossing where the plaintiff claimed she was injured. This testimony covers a long period of time prior to the injury of the plaintiff. The defendant claimed that this class of testimony if it was competent at all, was only competent for a limited purpose, and that it was the duty of the court at the time such testimony was received to instruct the jury for what purposes it was competent and might be considered by them. At the conclusion of the testimony of the first witness offered by the plaintiff upon this branch of her case, counsel for defendant made the following request of the court : " In reference to this class of testimony it has been held by the Supreme Court, and some of the circuit courts, that the court should charge the jury as to the purpose for which it is received, and the only purpose for which it can be used, and I would ask the court to instruct the jury, that it is competent only in proving a defective character of the street, and knowledge of the city of that fact, and it is not competent to prove actionable negligence on the part of the city at the time the injury was committed."

The court then said to the jury : " I will say to the jury that the purpose of the testimony like this given by the last witness, to the effect that she had slipped and fallen on this crossing, where it was alleged the plaintiff met with her accident, is received for the purpose of showing knowledge on the part of the city authorities of the dangerous condition of the alley crossing, and that is as far as I will go now. When I come to instruct the jury in my general charge, I hope to lay down the correct rule with reference to that." Thereupon counsel for the defendant excepted to the refusal of the court to charge the jury as requested.

The court in its general charge instructed the jury on that subject as follows : " Evidence has been admitted tending to show that the alley crossing in question has been substantially in its present condition for a number of years, and that during that time divers persons have slipped or fallen at that point. This testimony may lawfully be used by you for two purposes : First, as tending to show the dangerous condition at the alley crossing, and second, as tending to show that the city authorities had knowledge or should be charged with knowledge of such dangerous condition. This knowledge, as to its dangerous condition, if such it was, should be brought home to the city in one or the other of the methods that I have stated, prior to the time that the plaintiff's injury occurred, so that if those accidents, if any such there were, which occurred at this time, would have the effect to prove knowledge material in this case, they must be shown to have occurred previous

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to the plaintiff's accident. But if the surface and condition of the alley since the accident has remained substantially as it was for a considerable time before the accident, then you may consider the occurrence of the other accidents there since the plaintiff received her injury, as tending to prove the dangerous condition of such alley at the time and before the plaintiff received her injury." To this portion of the charge as given the defendant excepted.

The defendant then submitted the following special charges upon that subject to the court, and requested that they be given in charge to the jury, to-wit:

"I. Evidence has been introduced to show that other persons, other than the plaintiff, had fallen at the same place where the plaintiff claims to have received her injury. This evidence is only competent to prove the dangerous character of this alley crossing, and that the defendant had knowledge of the same. It is not competent to prove actionable negligence on the part of the city at the time plaintiff was injured, and if other accidents, persons falling there, were caused by the slipperiness of the ice, which ice was common to all parts of the city, and not from the defect in the construction or keeping the same in repair, then you cannot consider such evidence for any purpose."

"II. Evidence has been admitted tending to show that the alley crossing in question has been substantially in its present condition for a number of years, and that during that time divers persons have slipped and fallen at that point. This testimony may lawfully be used by you for two purposes: First, as tending to show the defective condition of the alley crossing, at the point where the plaintiff claims to have received her injury, and second, as tending to show that the city authorities had knowledge or should be charged with knowledge of such defective condition. But it is not competent for you to consider such evidence for the purpose of proving that the defendant was negligent in permitting said alley crossing to be and remain in such condition, nor that such condition, as between plaintiff and defendant, was the sole cause of her injury."

The court refused to give both or either of the special requests above quoted, and the defendant excepted to the ruling of the court.

Was there prejudicial error in the ruling of the court upon either or all of these questions?

It is claimed by counsel for the defendant in error, that by a fair construction being placed upon the language of the court below, that it in effect, at least, if not in words, by its instruction to the jury given at the time, and in its subsequent charge, limited the testimony in question as requested by counsel for the defendant below.

Counsel for the plaintiff in error claimed that the jury were not instructed in reference to the use which they might make of this testimony in the manner required by law; they claim that the rule which should govern in cases of this kind is laid down by our Supreme Court in the second paragraph of the case of *Brewing Co. v. Bauer*, 50 Ohio St., 560, and that that rule is peremptory on the part of the court, when such testimony is introduced, to at the time instruct the jury as to its proper limits. That paragraph is as follows:

"2. In an action by an employee against his employer for damages resulting from an injury received in operating a machine, caused by its defective construction, the defect being charged to the negligence of the

employer, it is competent to prove that, on a former occasion, while it was being operated by another, the machine worked in a manner similar to when the plaintiff was injured. But such evidence is only competent to prove the defective character of the machine and the employer's knowledge of the fact; it is not competent to prove actionable negligence on the part of the employer at the time the plaintiff was injured; and the jury should be so instructed at the time it is received."

We do not agree with counsel for defendant in error that the instruction and subsequent charge of the court below was a substantial compliance with the rule laid down by the Supreme Court, above quoted. That language of the court is in its nature mandatory.

By stating to the jury that evidence is competent for one purpose, it can hardly be assumed that that is equivalent to saying that it is competent for that purpose alone and cannot be considered for any other purpose. The jury were told that they might lawfully use this evidence for two purposes which were named by the court; counsel for defendant had in the presence of the jury requested the court to instruct the jury that they could only use said evidence for the two purposes named by the court and not for any other purpose. This request the court, in their hearing, had refused. Under these circumstances it is only reasonable to presume that the jury believed that they might use this evidence for all purposes, and especially for the purpose of proving negligence on the part of the defendant.

It is said by counsel for defendant in error that the syllabus of the case of *Brewing Co. v. Bauer*, *supra*, especially the second paragraph thereof, does not properly state the law of the case, when compared with the opinion of Judge Minshall, and that it must have been inadvertently prepared or copied. We have read this syllabus carefully and also the opinion of Judge Minshall, and we do not think that the rule laid down in the syllabus differs from the rule laid down in the opinion delivered by Judge Minshall. We understand that the syllabus of the case is supervised by the entire court, and that the court is responsible for it and that it contains the law in the case. The judge writing the opinion may see proper to go outside and state matters which conflict with the syllabus and that frequently are not followed. We think the expression contained in the syllabus of *Brewing Co. v. Bauer*, *supra*, "should be instructed at the time it is received," is as plain as can be, and that it means what it says, and that the court made a mistake in not saying to the jury, as requested by counsel for the defendant at the time the testimony was introduced, that it was not to be considered as proving actionable negligence on the part of the city.

This same question was decided in *Ashtabula v. Bartram*, 2 Circ. Dec., 872, by the circuit court of Ashtabula county before the decision was rendered in *Brewing Co. v. Bauer*, and a very full and able opinion was delivered by Laubie, J., which is in full accord with the views expressed by the Supreme Court in *Brewing Co. v. Bauer*, and which we believe the true rule in this class of cases. See also to the same effect *Brooklyn Street Railroad Co. v. Kelly*, 3 Circ. Dec., 893.

Among the special charges requested by the plaintiff below and which were given were the following:

"No. 14. If you find that the sidewalk on the west side of Court street was the usual one for the plaintiff to take in walking to her house,

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she was not obliged to leave it because it was icy, unless she had reason to apprehend danger, and that she could avoid it by taking some other route."

"No. 15. The sidewalk where the plaintiff was walking, and not the street was the usual and proper place for her to walk under ordinary circumstances and she is not chargeable with negligence in keeping on the sidewalk, because it was icy, unless she had reasonable ground to apprehend danger, and that she could avoid it by going on the street."

The defendant below excepted to the giving of these charges.

Both of those instructions, by a literal construction, may be said to be and probably are misleading, but that is as far as the objection should go. The question was not what the plaintiff below thought at the time, so much as what a prudent person under the same or similar circumstances should do. In view of the record in this case we would not feel like saying that either of these instructions were prejudicial.

The defendant below asked the court to give to the jury the two following special instructions:

"No. 3. If you find from the evidence that the plaintiff was injured at the time she avers in her petition by some act of negligence on the part of the defendant, but that the negligent act which caused her injury is not stated or averred in her petition as the cause, or one of the causes of the injury, then and in that event she cannot recover in this action."

"No. 4. If you find from the evidence that the plaintiff's injury was caused, without fault on her part, by the negligent and careless act and conduct of the defendant in permitting to be removed and in failing to replace certain stones from the alley crossing where she received her injury, and that that was the sole cause of her injury, then I charge you that she cannot recover in this action."

The court refused to give said charges or either of them and the defendant excepted.

These charges were asked upon the theory that the petition of the plaintiff did not charge or allege as one of the grounds of negligence on the part of defendant, that her injury was caused by the negligence of the defendant in permitting to be removed or in failing to replace stones that had been removed from the alley crossing where the injury was alleged to have occurred.

There was testimony offered by the plaintiff below upon this question and, so far as we can ascertain by an examination of the record, there was no objection made to its reception. If objection had been made to the introduction of such testimony, it certainly would have been excluded, but as it went in without objection it is too late now to object in this manner or in any other manner. We therefore think there was no error in refusing to give these charges.

The plaintiff below asked the court to give the following charge:

"No. 8. If you find from the evidence that the alley crossing where the plaintiff claims to have received her injury was defective in having such a slope as to render it unsafe for persons to pass over when covered with ice, or that it was rendered unsafe at such time by the removal of stones therefrom, prior to the time said injury was alleged to have happened, then and in such case I charge you, the defendant was negligent in failing to remedy such defect so as to have made said crossing safe."

The defendant excepted to the giving of this charge.

We think that that charge was defective by not being qualified in this way ; that is as to the defective condition, the city should have had reasonable notice as to the removal of stones, or that it must have been shown that the stones had been removed a sufficient length of time prior to the accident that notice to the city might have been presumed. So we think there was error in giving that special charge.

Special charge No. 8 which the defendant below requested the court to give, and which the court refused, was probably intended to be the converse of a portion of the general charge of the court on the same subject, and on which probably rests the most important feature of this case. Charge No. 8 which was requested to be given by the defendant below is as follows :

"No. 8. If you find from the evidence that the crossing over the alley where the plaintiff received her injury was defective, either by reason of its improper and negligent construction, or by reason of the negligence of the city in failing to keep the same in proper repair, or both, and that the city knew, or ought to have known, of said defect or defects, and if you further find that a short time before the plaintiff fell and received her injury said crossing had become covered with ice and frozen snow, then I charge you that you cannot infer from the fact that the city had knowledge of the defective condition of said sidewalk, that it also had knowledge of the accumulation of ice and frozen snow thereon, and if you further find that the plaintiff would not have received her injury except for the accumulation of ice and frozen snow on said alley crossing, then before she can recover she must show that the city authorities had knowledge of the accumulation of ice and snow on said crossing and neglected for an unreasonable length of time after receiving such notice to cause the same to be removed therefrom."

We think that charge was defective and that there was no error in refusing to give it. It lacks the following qualification:

"Unless the jury should also find that such accumulation of snow and ice might reasonably have been anticipated as the natural and probable result of such defective construction and lack of repair." With that qualification we think the instruction would cover the law in the case.

Now as to the general charge of the court on that point: it is as follows: "If the alley crossing in question was negligently constructed by giving it too abrupt and steep a slope or grade, or if the alley crossing became defective in the respects charged, and the city negligently, that is after reasonable notice, failed to remedy such defect, and those matters or any of them in connection with the slippery condition of the surface of the alley crossing were the cause of the plaintiff's slipping and falling, and if she wouldn't have fallen had said alley crossing been carefully constructed, or kept in repair after construction, then her accident was chargeable to the negligence of the city, unless she was at fault herself."

To make that correct it should have had this simple qualification: "If the jury also find that such accumulation of snow and ice might reasonably have been anticipated as the natural and probable result of such defective construction and lack of repair."

Without that qualification that portion of the charge quoted was objectionable and erroneous. See Beach on Contributory Negligence, page 48, note.

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The following portion of the charge of the court is also excepted to: "The city is bound to adopt a reasonably safe and careful plan, and manner of construction of the alley crossing, and it was bound to know that the plan adopted and used was reasonably safe for persons to pass along and over the crossing." That is too broad; it covers too much. It instructs the jury in substance that if the injury was caused by an unsafe plan which had been adopted by the city, that the city became liable although it may have had prior to that time no notice or knowledge that the crossing or the plan thereof was unsafe. It proceeds upon the theory that because the plan was adopted by the city, that it was conclusively presumed to have knowledge of any and all defects therein, that might under any and all possible circumstances make the same dangerous, and that therefore its liability attached as soon as an injury occurred notwithstanding the fact that it may have had no knowledge or notice that the plan which it had adopted was defective or dangerous.

In *Circleville v. Sohn*, 59 Ohio St., 285 it was made a condition precedent to the right to recover for an injury caused by reason of an unsafe plan adopted by a municipal corporation, that the corporation should have notice of the unsafe condition of the plan.

The same holding was made by the Supreme Court in *Dayton v. Taylor's Admr.*, 62 Ohio St., 11, decided February 20, 1900. We think that the two cases above mentioned are consistent with each other, and that by a careful examination it will be found that they both hold that before the city can be held liable, it must be shown that it had reasonable notice of the defect which is alleged to have caused the injury, and a reasonable time within which to repair that defect, although the defect which is alleged to have caused the injury may have been in the plan itself. For instance, where a city adopts a plan of improvement of its streets, and it turns out that an improvement made in pursuance of that plan is defective and dangerous, before the city can be held liable, it must have reasonable notice of the existence of the defect and a reasonable time within which to remedy it.

We have only attempted to allude briefly to what we consider the principal errors assigned. We have not undertaken to call attention to the numerous assignments of error, some of which are perhaps technically well taken, but we do not find any of them to be of substantial prejudice further than those we have mentioned. We did not examine the record as to the weight of the evidence, and we express no opinion thereon.

For the reasons given this judgment will be reversed.

C. A. Leist, city solicitor, and *Clarence Curtain* for plaintiff in error.

Abernethy & Folsom, *John Schleyer* and *Charles Gerhardt*, for defendant in error.

APPEAL—RECEIVERS.

[Licking Circuit Court, March Term, 1900.]

Adams, Douglass and Voorhees, JJ.

SCHIEDLER v. NEWARK AND GRANVILLE ELECTRIC ST. RY. CO. ET AL.**RECEIVER—APPEAL—JUDGMENT SUSTAINING EXCEPTIONS.**

A receiver cannot appeal to the circuit court from a judgment of the common pleas sustaining exceptions to his final report.

ADAMS, J.

This case has been submitted to the court upon a motion to dismiss the appeal.

The pleadings have not been submitted to us, and it is not necessary for us to examine them: From the statement of counsel, this was an action in which, at the suit of Reinhard Scheidler, a receiver, was appointed for the Newark and Granville Electric Street Railway Company, and, thereafter, answers and cross-petitions were filed by various parties, setting up their liens upon the property of the electric railway company.

The railroad was sold, and distribution was ordered among various lienholders. The receiver filed his final report. The Equitable Trust Company, being the trustee for the bondholders, excepted to the final report of the receiver. Those exceptions, as originally filed, were very numerous, but, on the hearing, all were abandoned except two. These two exceptions were insisted upon.

1. The equitable Trust Company excepted to an item of one hundred and fifty dollars, paid by the receiver to the auditor of state of West Virginia.

2. The receiver, in his report, claimed, as compensation, at the rate of two hundred dollars per month, or twenty-four hundred dollars a year; and the Equitable Trust Company excepted to that allowance of compensation as excessive.

On the hearing of these exceptions to the final report of the receiver, the court of common pleas sustained both. It disallowed the claim of one hundred and fifty dollars for some tax paid to the auditor of state of West Virginia, and it reduced the allowance of compensation to the receiver to fifteen hundred dollars a year, and allowed him five hundred dollars for compensation for making sale of the property.

The receiver gave notice of his intention to appeal to the circuit court, and in due time gave the bond fixed by the court.

A motion is made by the Equitable Trust Company to dismiss that appeal. There are numerous grounds assigned in that motion, but the question is a question of jurisdiction of the subject-matter, and this court would be compelled to dismiss this appeal if it came to the conclusion that it was not an appealable case, whether the exact ground on which the court believed it was not appealable was stated in the motion or not.

Counsel for the motion have cited numerous authorities in Ohio, and counsel for appellant have cited: Beach on Receivers, 774; a case decided by the United States Supreme Court, reported in the co-operative edition, book 26, page 427; 32 Pac. Rep., 536; Smith on Receivers,

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sec. 417 and sec. 117; the same edition of the U. S. reports, book 27, pages 150 and 162; 55 Pac. Rep., 384, and 14 N. W. Rep., 193.

In the text books, Beach on Receivers and Smith on Receivers, the general rule is laid down that, in matters affecting the receiver personally, directly affecting the receiver, the receiver may appeal.

It is not claimed by counsel for the receiver that he is a party to the main action, or that he could appeal any branch of the action, as to the distribution of the fund between the parties, or any other matter that was litigated between the parties; but the claim is made that, when the court directs him to turn over more property than he has in his hands, or refuses him compensation, or refuses him adequate compensation, those matters affect the receiver directly, and that he may appeal; and the rule laid down in these text books states the broad doctrine that the receiver may appeal.

We have examined all of these cases that have been cited to us by counsel, but all of them do not sustain that proposition. Some of them are cases where permission has been given by the court to a party to sue the receiver, and the receiver has been sued, and he has been one of the parties to the principal action, and there he is allowed to appeal as any other party could appeal.

In the case in 32 Pac. Rep., 536, decided by the Supreme Court of Washington, this holding is made:

"The motion to dismiss the appeal is based upon the ground that this court has no jurisdiction of the matter appealed from, because the order fixing the compensation of the receiver in said action is not a final judgment, order or decree from which an appeal lies to this court, and because the fixing of the compensation of the receiver is a matter entirely within the discretion of the court by which he was appointed. While this is a proceeding in the original action, yet we are of the opinion that it is a distinct proceeding in itself, and that the order made with reference to the compensation of the receiver is a final one in so far as the amount allowed is involved. This precise point was decided in *Trustees v. Greenough*, 105 U. S. 527, (and we have examined that case also), "in which such an allowance was held a final determination of a particular matter, and, though it was incidental to the cause, that the inquiry was a collateral one, having a distinct and independent character, and was held to be appealable."

Another case, that we think is in point, cited by counsel for the receiver, is in 14 N. W. Rep., 193: it is there held that "It may be that a receiver who is the mere custodian for the court cannot appeal from an order directing him to turn over the property in his hands; but when the order erroneously fixes the amount of property in his hands, and directs him to turn over more than he has in custody, it is essential to the protection of his rights that he should be allowed to appeal."

These are the authorities that are relied upon to sustain this appeal. It was suggested to counsel, on the hearing of this case, that there is a difference between the laws in Ohio relating to appeals and proceedings in error and the laws of most of the states; and, of course, it is apparent that, while these cases in other states are instructive, unless the statutes regulating appeals and proceedings in error in the states from which these decisions come, are identical with the Ohio statutes, they would not be controlling authorities.

Section 5226, Rev. Stat., provides : " In addition to the cases and matters specially provided for, an appeal may be taken to the circuit court by a party or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court."

It must be a judgment or a final order rendered by the common pleas court in a civil action, before an appeal will lie in any event.

Section 6707, Rev. Stat., provides what is a final order from which error may be prosecuted. It says: " An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title."

In the Washington case, reported in 32 Pac. Rep., 587, it is said that the allowance of compensation to the receiver, or the passing upon the report of the receiver, the hearing of exceptions to the report of the receiver, is a proceeding in the original action, and we think it is a special proceeding within the meaning of sec. 6707, Rev. Stat.

In *McRoberts v. Lockwood*, 49 Ohio St., 374, on page 375, the court say :

" Whatever the law may be elsewhere, it has not been the policy of this state to allow appeals from orders of the court of common pleas in proceedings after judgment, such as confirmations of, or setting aside sales of real estate and the like. The action of the court of common pleas in such cases, is reviewable only by proceedings in error." Citing *Reeves v. Skennett, Jr.*, 13 Ohio St., 574.

While it is not exactly in point in this case, *Fideldey v. Diserens*, 26 Ohio St., 312, indicates the view that the Supreme Court has upon a somewhat similar question. There it is held :

" A master commissioner, or other party entitled to have fees taxed as costs in an action, can not in his own name prosecute a proceeding in error to reverse an order of the court for retaxing the costs, or disallowing his claim for fees in the case."

If a receiver can appeal in a case like this, then an attorney in a partition case, where the common pleas court did not allow a satisfactory fee, could appeal; and appeals could be taken in all similar cases where fees are allowed by the common pleas court.

While we have given consideration to these cases cited by counsel for appellant in this case, and while it is, so far as we know, a new question in Ohio, that is, the exact point has not been decided by our Supreme Court, we think that this was a final order, affecting, it is true a substantial right of the receiver, but is not a final order made in a civil action; it is a final order made in a special proceeding, and if he is aggrieved by the action of the court, his remedy is by a proceeding in error, and not by appeal; and, for these reasons, the appeal is dismissed.

Edward Kibler, for the motion.

Flory & Flory, and *John M. Swartz*, contra.

BONDS—SURETIES.

[Hamilton Circuit Court, January Term, 1900.]

Smith, Swing and Giffen, JJ.

HENRY GERKE ET AL. V. GEORGE WEIDEMANN BREWING CO.**1. SURETIES MAY STAND ON EXACT LETTER OF BOND.**

Sureties stand upon the words of the bond and if the words do not make them liable, nothing can. There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail.

2. VIOLATION OF BOND RELEASING SURETIES.

Where a bond for beer in car load lots provided that the principal should have credit for two car loads and upon ordering a third should pay in full for the first car load, this arrangement to continue until a certain date, when principal should make payment in full and thereafter, during the life of the bond make monthly settlements in full, a failure to require payment for the first car load when the third was ordered, and to require payment in full on the date named, and monthly settlements in full thereafter, and instead continuing to supply principal with beer and receiving monthly payments but not in full, whereby the indebtedness was increased each month, amounts to a material violation of the terms of the bond, releasing the sureties after the first breach.

HEARD ON ERROR.**GIFFEN, J.**

The brewing company entered into a contract with Henry Gerke, in which it was agreed that said brewing company should furnish to said Gerke beer in car load lots in wood and beer in bottles to be sold by said Gerke at Marietta, Ohio. Said contract was to begin February 24, 1896, and to continue for one year. Either party had the right to terminate the contract on thirty days' notice, and any material violation of the agreement by either party must render the agreement null and void. It was provided in the contract that said company will furnish said Gerke the first two car loads of beer on credit, for which said Gerke shall execute a bond of one thousand dollars, and when he orders the third car of beer, he shall pay for the first car of beer he received: all settlements thereafter are to be made on the first day of each month commencing May 1, 1896, at which time said Gerke is to make payment to said company for the beer that may be ordered by or delivered to him.

On said February 24, 1896, said Gerke, together with his wife, Maria Gerke, and B. Meyer, defendants herein, executed and delivered to the brewing company their bond for \$1,000. The condition of this bond was to this effect: "That whereas the above bound Henry Gerke has this day entered into and made a contract in writing with the said Geo. Weidemann Brewing Company for the purchase of beer in wood and bottles by the car load lots from the said Geo. Weidemann Brewing Company for a period of one year or until said parties agree to discontinue as set forth in said agreement. Said agreement is in writing and bears even date herewith, and which is here referred to and made a part hereof. Now, therefore, if the said Henry Gerke shall well and truly perform said contract and shall fully comply with and carry out each and every

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provision thereof and shall pay for all of said beers purchased * * * then this bond shall be null and void " * * *.

Suit was brought by the brewing company against said Henry Gerke, Maria Gerke and B. Meyer. For a first cause of action the plaintiff sets out a claim against Henry Gerke on the contract referred to, and for a second cause of action a claim against the other defendants on the bond referred to. Copies of the contract and bond are annexed to the petition. Henry Gerke filed no answer, and judgment by default was rendered against him on April 2, 1897, for the sum of \$1,598.49, the amount claimed to be due. Maria Gerke and B. Meyer filed an answer, in which they admitted the execution of the contract and bond as set out in the petition, but alleged that they were released from the obligations of the bond by reason of the fact that the said Henry Gerke was not required to pay for the first car load of beer for which he was given credit, nor did he pay for the first car load of beer when he ordered the third car: That no settlements were made on the first of any month as required by the contract and bond. That said company gave said Henry Gerke credit for more than two cars of beer at one time, and that a settlement was not made on May 1st and each and every month thereafter during the continuance of said contract, and that he did not pay on the first of any month for the beer delivered to him. Their answer also contained a general denial as to all matters not admitted.

The plaintiff filed a demurrer to all that portion of defendants' answer except that which sets up a denial, and this demurrer the court sustained. This demurrer was sustained February 20, 1897. On December 29, 1898, the case was heard on the pleadings and the evidence by the court, and judgment rendered against said Maria Gerke and B. Meyer for \$888.00

Error is prosecuted in this court to this judgment.

The evidence shows that the company shipped to Henry Gerke on February 24, 1896, beer in wood to value of \$187.50, and beer in glass \$115; on March 13, \$125 in wood and \$166.50 in bottles or glass. April 8 and 25, \$131.25 each in wood and \$165.50 and \$169.90 in glass. Credit was given Gerke for cash of \$400.00 and \$31.25 allowance up to April 29, 1896. The balance due the company on May 1st was \$867.65. This amount was not paid to the brewing company on May 1st as provided in the contract, neither was any settlement made between the parties. The brewing company continued to furnish said Henry Gerke beer in wood and in bottles until August 28, of said year, at which time the amount due the company from said Gerke was \$1,561.95. No settlements were made at any time between the parties, but beer was shipped to said Gerke by said company during all this time, and payments in cash were made during each month by said Gerke on account, but at the end of each month the amount due was greater than at the previous month.

By reason of these admitted facts, were the sureties on the bond released? I am of the opinion that they were.

The general rule of the liability of sureties on bonds is thus stated by Read, J., in *State v. Medary*, 17 Ohio, 554, 565. "The bond speaks for itself, and the law is that it shall so speak, and that the liability of the sureties is limited to the exact letter of the bond. Sureties stand upon the words of the bond, and if the words will not make them liable, nothing can. There is no construction, no equity against sureties. If the bond can not have effect according to its exact words, the law does not

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authorize the court to give it effect in some other way in order that it may prevail." This rule has frequently been followed by our Supreme Court.

In not requiring Gerke to pay for the first car of beer when the third was ordered and in not requiring settlement on May 1st and the first of each succeeding month and in extending time of payments as was done by allowing the account to accumulate each month, was a material violation of the terms of the contract and bond and necessarily worked an injury to the sureties on the bond.

Judgment reversed and cause remanded for further proceedings.

Milton Sater, for plaintiffs in error.

Louis J. Dolle, for defendant in error.

PARENT AND CHILD.

[Hancock Circuit Court, December Term, 1899.]

Norris, J.

APPLICATION OF WILLIAM B. COONS FOR A WRIT OF HABEAS CORPUS.

1. MOTHERS RIGHT TO CUSTODY OF CHILD CANNOT BE WILLED WHEN.

An order made by the court of common pleas in a divorce proceeding giving control of the minor child to the mother until the further order of that court is a continuing order; and as between the parties to it retains the child in the arms of the law, but does not confer such authority upon the mother as empowers her, by her last will, to appoint a guardian for the child under Sec. 6266, Rev. Stat., or relating to cases where the father is dead or gone to parts unknown.

2. RIGHTS OF THE FATHER NOT EXTINGUISHED.

An order of the character named does not extinguish but merely holds the father's right in abeyance, and, for the cause apparent to the court, makes the mother's right to the custody of the child superior to the father's right to its custody.

3. RIGHTS OF FATHER AS TO THIRD PARTIES DETERMINED ON HABEAS CORPUS.

As between the father and one whose right does not arise out of the order, he is not compelled to seek modification of such order in the court that made it, but may invoke the writ of *habeas corpus* and submit his claim to the court from which the writ issues.

4. CHILD'S WELFARE THE CHIEF CONSIDERATION.

In a controversy as to the custody of the child, the paramount object which governs the court is the benefit to the child, and all rights must yield to that consideration.

5. FATHERS RIGHT TO CUSTODY SUPERIOR.

But when all else is equal, and no present reason exists for departure from the rule, the right of the father to the custody of his minor child is superior to that of any other person.

AT CHAMBERS. On writ of Habeas corpus, issued by the Circuit Court of Hancock county.

NORRIS, J.

Marjorie Coons, a child about seven years old, is the daughter of the relator, William V. Coons, and his wife, Ada Coons, now deceased. The respondent, Mary L. Reigle, is the mother of Ada Coons and the grandmother of the child Marjorie.

On may 19, 1894, Ada Coons, by the decree of the court of common pleas of this county, was, because of the aggressions of her husband, adjudged to be divorced from the relator, and in the same decree she was awarded the care, custody and control of said child, Marjorie, and relator was enjoined from interfering with said custody and control until the further order of that court. The mother and child thereafter became members of the family of respondent and so remained up to April —, 1898, when Ada Coons, the mother of Marjorie, died. Since the death of its mother the child has remained, and still is in the custody and under the care of its grandmother, the respondent, who, relator says, restrains said child without authority, and by force deprives relator of its possession. As the child's father, he claims its custody and control and the possession of its person, and seeks his remedy by *habeas corpus*.

Of the writ due return is made. Respondent brings the child into court, and makes answer that she has care of said child, her grandchild, and denies that she unlawfully keeps the child; she denies that relator has legal or moral right to have its custody, and pleads the decree in divorce, and that the custody was awarded to the wife, her daughter, and alleges that at the time of the decree the child was abandoned by its father, who became a stranger to it: That the child is delicate and afflicted with curvature of the spine, and has been so afflicted since it became a member of her family: That from that time to this she has cared for it and ministered to its wants and necessities and that under her care, and the proper and sufficient treatment which she has afforded, and still affords it, the child is rapidly approaching entire recovery: That relator and his relatives are strangers to the child, and that to take her from her present home and place her with those with whom she is not acquainted will retard her recovery and not be to her benefit.

It is pleaded in the answer, that this court has no jurisdiction to determine the custody of the child. That the court of common pleas retains jurisdiction, that its award of said custody to the mother, being a continuing order, the modification of it must be sought in the court that made it.

The reply denies abandonment of the child, and denies that to change its custodian and its present abode will endanger its life or retard its recovery. These issues were submitted with the evidence.

It appears beyond any doubt that relator and respondent are each of them eminently proper persons to have the custody of this child, and that in the control of either she would receive every care which her necessities might require or her condition suggest. So that the question of fitness or unfitness of either of the parties does not arise in this controversy. It is urged that the right of relator to the custody of this child is a right that was adjudicated by the decree in the divorce proceeding in the court of common pleas; that having determined as between the husband and wife, and having awarded the custody to the wife, the order as to the child is continuing and vital; and that the rights of relator are by it held suspended in that court, and can only be rehabili-

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tated by the modification of that order: That the position of the wife under that order was such as to enable her to name a testamentary guardian; and having done this, and chosen respondent as such guardian, by her last will, the custody of the mother passed unabated to respondent by that instrument. And that such being the case, the rights of these parties to the custody of this child are not a subject of inquiry in a proceeding of this character in this court.

One lawfully entitled to the custody of another, of which custody he is unlawfully deprived, may prosecute a writ of *habeas corpus* to inquire into the cause of such deprivation. So, if this court may have jurisdiction of the controversy, the rights of the parties can be fully adjudicated in this proceeding. That the mother of this child did, by her last will, in writing, name and appoint the respondent the guardian, is not a reason that the father should be denied its custody. The situation contemplated by sec. 6266, Rev. Stat., which provides for the appointment of a guardian of a minor child by will, is not present in the case at bar. The father is not dead, nor gone to parts unknown. If abandonment of the child by the father could be read into the section, as a condition under which the testamentary appointment could be made, the evidence does not verify the claim that the child was or has been forsaken, renounced or rejected by him. He does not appear to have voluntarily yielded control, even to the mother. The inter-position of the court of common pleas and its order was required to compel him to relinquish his custody; and this proceeding would negative the assertion that he refuses its custody and care. So that the will of Ada Coons, the mother, purporting to make respondent the guardian of this child, carries with it no weight in this inquiry and does not create testamentary guardianship. The very fact that the order made by the court of common pleas, as to the custody of the child, is a continuing order, retaining the child in the arms of the law as between the parties to that divorce proceeding, makes untenable the proposition that the decree thus awarding custody conferred authority upon the mother that might be cast by will. However that court may have dealt with the rights of the husband, her rights under that decree in so far as concerns this child, died with her.

And this now brings us to the consideration of the decree of the court of common pleas awarding the custody of the child to the mother, "until the further order of this court," says the decree, and the potency and effect of that decree when applied to the rights of the parties here. Whatever may have been its vitality, and however it may have concluded the parties to it as a continuing order, reserving in the court that made it the power to recall it, to set it aside, or to modify it and make other disposition of the person of this little girl—what relation do these parties bear to it; how far does it conclude them, or either of them, in this proceeding.

Ada Coons, the mother of this child, and plaintiff in the action for divorce in which the decree was made giving to her its custody, is dead; relator was the defendant against whom the order was made. The respondent in this proceeding was not a party to that case; her rights were not created by that decree, nor by authority springing from it, and if she has rights, they are not concluded by it. The effect of that decree was not to extinguish the rights of the father, but only to make them subservient to the rights of the mother. That order disposed of the custody of the child only as between the parties to that suit; and the

mother's right to its custody was made by order of that court superior to the father's right to its custody.

Conditions have arisen when the welfare of the child required it, and the reported cases are many, where, by action of the court, the rights of a parent, or of both parents, cease to exist, and the parent is made an alien to the offspring; but such was not the office of that adjudication, and aside from it, relator is still clothed with all the legal authority and legal rights of a father.

It is urged that the court of common pleas is the forum to which relator must resort, and by modification of the order there made, seek custody of his child. Against whom must he seek its modification? Against the plaintiff to that action in whose favor it was made? No, the plaintiff is dead. Against any party to it? No, there is no party to it. Against one whose rights arise under it, or by it, or through it, to the custody of this child? No, there are none such, and no such rights emanate from it. Why should he be required to seek modification of that order when, as against him whose rights were not extinguished by it, the claim of nobody arises from it or subsists under it?

There exists no reason why he may not, without resorting to the modification of that order, invoke the jurisdiction of any court authorized to issue the writ of *habeas corpus*, and there test the legality of his claim to the custody of his child as against one who is a stranger to that proceeding and that decree.

By the provisions of sec. 6264, of the statutes of this state, the father, if a suitable person, shall have the custody, control and education of his minor children. This is the general rule which yields to the welfare of the child. As announced by Justice Ashburn in *Clark v. Bayer*, 32 Ohio St., 299. As a general rule the parents are entitled to the custody of their minor children. When the parents are living apart, the father is, *prima facie*, entitled to that custody, and, when he is a suitable person, able and willing to support and care for them, his right is paramount to that of all other persons, except that of the mother in cases where the infant child is of such tender years as to require her personal care; but in all cases of controverted right to custody the welfare of the minor child is first to be considered."

In any event, the welfare of the child is the primary consideration, and everything must yield to it. In the action between relator and his wife in which custody was awarded to the wife it does not appear to have been so awarded because his rights were forfeited by relinquishment or by abandonment, or that he was not a suitable person to properly discharge the responsibility of its care; but because the welfare of the child demanded that its mother be the custodian; and so his rights were by the order of the court suspended and held in abeyance to her control. When she died, and the decree so far as her rights were concerned had served its purpose, nothing then stood between him and his child, and the right to custody of his child except the welfare of the child itself.

From the evidence in this case the child's welfare, its life and health and safety, is as assured in the hands of one of these parties as it is in that of the other. The child will receive the best of treatments and instruction wherever it goes as between the parties in this case. Either of those who are here contending for its custody are most worthy of its control.

It surely cannot be for the benefit of this little girl that she continue a stranger to her father, whose right to her custody is superior to that of

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any other person. It surely cannot be to her interest and happiness that her father's people, who are among the best in this community, should remain unknown to her. At the same time I appreciate the worth of her mother's parents, who now control her, and their affectionate care of her, and her love and attachment to them. And since the hearing of this case, while my time has been fully occupied with other official duties, yet I might have hastened the decision of this case had it not been that I hoped that the bitterness which surely exists between the parties to this case might be in a measure laid aside when they came to consider the feeling of this little girl, and that there might by a measurable reconciliation, and by their voluntary act render it possible, without the harsh interposition of the law, that this little one have, at her pleasure, access to the homes of each, as she surely and permanently has to the hearts of each, and I still have hopes that this condition may be brought about.

While the law gives the custody of this child to the father, yet the transfer must be made in a manner that will least excite and grieve her; neither must the parents of the mother be cut off from her.

The care, custody and control of this child is awarded to the relator, the father, the same to commence on the first day of May next, and thereafter to continue until the further order of the circuit court of this county. In the meantime every facility must be given the child to become better acquainted with its father, and opportunity that its affection may go out to him, and that she be apprised and prepared as well as may be for this change of custodians. There must be given to respondent Mary L. Reigle, and to Francis Reigle, her husband, the grandmother and the grandfather of this child, opportunities to visit her at suitable times, and ample opportunity to the child to visit them frequently, and at seasons deemed reasonable and proper, and this also until the further order of the circuit court of this county. And the costs of this case are adjudged against the relator.

J. F. Axline and Ross & Kinder, for relator.

John Poe and G. F. Pendleton, for respondent.

TRUSTS—LIMITATION OF ACTIONS.

[Hamilton Circuit Court, 1900.]

Smith, Swing, and Giffen, JJ.

IRWIN ET AL. V. H. P. LLOYD, TRUSTEE.

1. TRUST NOT EXEMPT FROM LIMITATION.

A trust created for the benefit of creditors is not a technical and continuing trust which is exempt from the operation of the statute of limitations.

2. IGNORANCE AS TO REAL PRINCIPAL—LIMITATION.

Ignorance as to who is the real principal in a transaction does not give to the claimant four years from the time of discovering the real principal in which to bring an action.

3. DISMISSAL WITHOUT TRIAL—LIMITATION.

The dismissal of an action on motion of the plaintiff without trial does not bring it within the provisions of sec. 4991, Rev. Stat., permitting of the bringing of a new action within one year from that date.

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4. DISMISSAL WITHOUT PREJUDICE IN CIRCUIT COURT.

The dismissal of an action without prejudice which has been appealed to the circuit court does not leave the judgment of the court of common pleas existing and in full force.

5. SECTION 6352, REV. STAT., NOT A LIMITATION OF ACTION.

The thirty days provided by sec. 6352, Rev. Stat., within which to bring suit on a claim rejected by an assignee, is not a period of limitation, but a period after which distribution may be made. A creditor may come in at any time for his equitable share of the assets unadministered or not lawfully disposed of at the time he presents or prosecutes his claim for allowance in the mode prescribed by statute.

APPEAL.**SMITH, J.**

This action was commenced in the court of common pleas of this county September 1, 1897, to require the defendant, as trustee of the estate of Harper, to allow, as a valid claim against said insolvent estate, a judgment which the plaintiffs had recovered against Harper at the October term of said court, 1896, for \$671,860.60, in an action commenced several years after the defendant had been appointed and was acting as the trustee of Harper's insolvent estate, but to which said Lloyd, the trustee, was not a party.

The trustee filed an answer setting up various defenses to the action against him, among others pleading the statute of limitations against the claim, and on the issues made by the pleadings the court of common pleas found for the defendant, and a judgment or decree was entered in his favor. From this an appeal was taken to this court, and was heard before one of the visiting circuit courts in this county, which it is said found that the judgment so rendered against Harper did not constitute a claim against his estate; but gave the plaintiffs leave to file an amended petition, which was done, and the defendant having filed an answer to this setting up his various defenses, including the defense that the claim sued on was barred by the statute of limitation of six years, and a reply having been filed by the plaintiff, the case has been heard by us on the evidence submitted and the arguments of counsel.

The amended petition, in substance, avers that there is due to the plaintiff from the defendant, as assignee and trustee of the estate of Harper, the sum of \$594,331.44, as shown by the account attached to the petition; that it was presented to such trustee for allowance, and rejected, and that subsequently thereto plaintiffs recovered the judgment against Harper, which was mentioned in the original petition, which is still due, and that there are moneys and credits in the hands of the trustee applicable to the payment of debts against Harper; that they presented their said claim to said trustee for allowance August 9, 1897, but that he then rejected the same; that Lloyd was trustee before said judgment was recovered, Harper having made an assignment for the benefit of his creditors; that said estate in his hands has not been closed, and that the trustee still has in his hands assets to pay plaintiff's dividends declared. They therefore pray that he be decreed to allow the claim as a valid one against said estate, and to pay plaintiffs the dividends due to them.

The answer of defendant admits that he is trustee, and admits that as such he has assets of said estate to pay dividend on the claim if it is a valid one; that on May 25, 1894, the plaintiffs presented said account to

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him to be allowed as a claim against said estate which was rejected by him; and on August 10, 1894, plaintiff commenced an action against him in the common pleas court to require him to allow the same, which was afterwards tried and the petition dismissed, and judgment rendered against the plaintiffs.

For a second defense, he avers, the recovery of the judgment before mentioned, which was on the same cause of action set forth in the other action in which defendant recovered a judgment against plaintiffs, and that defendant was not a party to the action in which the judgment was rendered, and that said judgment was rendered by default against Harper individually; that the claim of this judgment was also presented to defendant for allowance, and was rejected by him August 9, 1897. In this action brought on that claim judgment was entered for defendant.

For a third defense, he says that on October 16, 1896, plaintiffs filed their appeal in the circuit court from the judgment in the first case mentioned, and that this action in the circuit court was voluntarily dismissed by the plaintiffs without prejudice February 25, 1898, and therefore the judgment of the common pleas so appealed from remains in force and valid.

Fourth—The defendant avers that Harper made his assignment for the benefit of creditors June 21, 1897; that the only claim presented by plaintiffs to defendant for allowance before August 9, 1897, was on an open account, and that said account and each item thereof and said account now attached to plaintiff's petition accrued more than six years before the commencement of this action; and allegations in the amended petition not expressly admitted are denied. The reply denies the new matter set up in the answer.

There is no substantial controversy between the parties as to the facts in this case. It is admitted that all of the items in the account set up by the plaintiffs against Harper accrued prior to the failure of the Fidelity bank of this city, on June 17, 1887, and that within a few days thereafter Harper made an assignment for the benefit of his creditors to Mr. Zimmerman, who declined to qualify as assignee, and thereupon Major Lloyd was appointed trustee, and qualified as such. If, therefore, the plaintiffs had any right of action against Harper on the account which they now seek to have the trustee allow against Harper's estate, it had accrued prior to June 17, 1887, and as this action was not brought until September 1, 1897, a period of more than ten years after their right of action accrued, it would seem clear that unless for some reason which appears in the pleadings or evidence, that it must be held that the six-year statute of limitations which, as a rule, applies to an action on a claim of this character, would prevent a decree in favor of plaintiffs as asked for. This, of course, is on the supposition that the judgment which was rendered against Harper on this claim, long after his assignment and in an action to which the trustee was not a party, puts the plaintiffs in no better position in this action, as was held by the court of common pleas and the visiting court in this very case, and as we think correctly.

It is the claim, however, of the counsel for the plaintiffs that the statute of limitations of six years does not apply to a case of this kind; that the trustee having in his hands money applicable to the payment of dividends to creditors makes it a case of a continuing and subsisting trust, which, under the provisions of sec. 4974, Rev. Stat., are not gov-

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erned by our statutes of limitation. But we think it clear that this claim is not well founded, and that this is not such a trust. As held in many cases in Ohio, this provision only applies to those technical and continuing trusts which are not recognized at law, but fall within the exclusive jurisdiction of chancery, and other trusts are not exempt from the statute. See *Yearly v. Long*, 40 Ohio St., 27-32, *Douglas v. Corry*, 46 Ohio St., 349-351; *Webster v. Bible Society*, 50 Ohio St., 1-9, and other cases cited in *Bates' Dig.*, Vol. 1, 1547. Surely this claim was one on which an action at law might be brought, and when the statute began to run, as it did before the assignment of Harper, it continued to run.

It is also the claim of the plaintiffs that they did not know of the liability of Harper, as an undisclosed principal, until within the period of four years prior to the commencement of this suit, September 1, 1897, and that they are thus brought under the provisions of sec. 4982, Rev. Stat., that because Harper did not make himself known (I suppose to the plaintiffs, though this is nowhere averred in the pleadings) that this was a fraud upon them, and that they have four years in which to bring their action after the discovery of the fraud.

In answer to this claim it may be said, first, that the action is not one for fraud, in the meaning of the section referred to, and if it were, and the proper allegations had been made as to the delay in the bringing of the action, still it would not have prevented the bar of the statute from operating; that ignorance of this kind does not prevent the statute from running. See cases cited in *Bates' Dig.*, 1546.

The plaintiffs invoke the provisions of sec. 4991, Rev. Stat., that if an action is commenced in time, or attempted to be commenced, and judgment for plaintiff be reversed, "or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff * * * may commence a new action within one year after such date."

It is conceded that on June 15, 1891, an action was begun by the plaintiffs in the United States court of this district against E. L. Harper and Eugene Zimmerman, setting up that Harper and Zimmerman were directors of the Fidelity bank, and had charge of its moneys and credits; were represented as looking after the affairs of the bank and severally taking care of and keeping the money; that certain drafts were sent plaintiffs as drafts of said bank that were not paid, and that the bank failed the day they issued them; that defendants were not exercising proper care in taking care of the funds of the bank, and the petition prayed for a judgment on the two counts (as claimed by counsel for plaintiffs here), "they being in effect for the moneys, that, as was afterwards discovered, Harper had sent by drafts through his brokers, Wilshire & Hoyt, to Chicago, to pay to Irwin, Green & Company on account of the wheat deal that Wilshire & Hoyt were running as it afterwards developed for Harper, and which being turned over to Irwin, Green & Company were never paid, because of the failure of the Fidelity bank."

On January 2, 1894, this action, on the motion of plaintiffs, was dismissed without trial.

Even if this cause was the same as that on which an action was commenced by plaintiff in the common pleas on August 10, 1894, against Lloyd, trustee, which we think it was not, and which last case was decided in the common pleas in favor of defendant, and appealed to the circuit court, and on February 25, 1898, voluntarily dismissed by the

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plaintiffs without prejudice, still it is clear under the decision of the Supreme Court in *Siegfried v. Railroad Co.*, 50 Ohio St., 294, that these facts did not allow the plaintiffs to escape the bar of the statute when pleaded in the present action, brought September 1, 1897, more than ten years after the cause of action accrued in the account sued on. In the case referred to *Siegfried v. Railroad Co.*, 50 Ohio St., 294, the syllabus is as follows :

"Where an action which has been commenced in due time is dismissed by the plaintiff after the time limited for the commencement of such action has expired, a new action for the same cause thereafter commenced is barred, though commenced within one year after the dismissal of the former action. Such dismissal is not a failure in the action within the purview of Section 4991 of the Revised Statutes."

Both of said actions were voluntarily dismissed by the plaintiffs, and the last action was barred.

The claim of the defendant that as the judgment of the court of common pleas in the action commenced August 10, 1894, was in favor, that although the action was appealed to the circuit court, and there dismissed without prejudice, that this left the common pleas judgment existing and in full force, we think is not well taken.

Nor do we think the claim made in argument, that as plaintiffs did not sue within thirty days after the rejection of their claim by the trustee, or that they did not present it for allowance within six months after the publication of notice by the trustee, that for these reasons they are barred, are well founded. As to the first of these questions we expressed our opinion in *Kittredge v. Miller*, 5 Circ. Dec., 391; the judgment in that case was affirmed by the Supreme Court, 56 Ohio St., 779, unreported. But as this was but one of the grounds upon which our judgment in that case was based, it can not be said that the point in question was decided by the Supreme Court. The other question is settled by the decision in *Owens v. Ramsdell*, 83 Ohio St., 439.

But on the ground that there was no valid claim against the trustee or reason why he should be required to allow it as a claim against the trust, for the reason that it was barred by the statute of limitations, the decree will be in favor of the defendant and the petition will be dismissed.

C. W. Baker, for plaintiffs.

H. P. Lloyd, contra.

MASTER AND SERVANT.

[Cuyahoga Circuit Court, January Term, 1900.]

Caldwell, Marvin and Hale, JJ.

DAVID TOOMEY V. AVERY STAMPING CO.

1. ALLEGATIONS AS TO SERVANT'S KNOWLEDGE OF DANGER.

There is some uncertainty, under the decisions in Ohio, whether the petition in a suit by an employe against his employer for damages for injuries sustained by machinery in defective or unsafe condition, should aver, not only that such employee had no knowledge of the defective or unsafe condition of the machinery, but also that he had no means of knowing thereof.

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2. OBJECTION TO SUFFICIENCY OF PLEADING IN REVIEWING COURT.

Although it has been held in this state that if the petition is defective in that it does not state a cause of action, the objection may be raised at any time in any court in which the case may be pending, and if the petition is found so clearly defective that no cause of action is stated in it, it is proper for a reviewing court to take that matter into consideration, yet where the objection to the sufficiency of the petition is raised for the first time in a reviewing court, that court should extend to the pleading a liberal construction and should not render any aid in support of the objection beyond what it is compelled to.

3. VICE PRINCIPAL—RULE AS TO MASTER'S LIABILITY

While it is the rule in Ohio that the master is liable for injuries to one servant through the negligence of another to whom control is given, the mere working together, where the advice of one is accepted by another, and where, by superior knowledge, one gives all the advice and direction for the work, is not sufficient to charge the master with the servant's negligence; to have that effect, the direction and authority must be by authority of the master or some one standing in his place.

4. SERVANT'S AUTHORITY A QUESTION FOR THE JURY.

Where evidence is introduced tending to show the relation between two servants, it is proper for the court to leave the question whether one was in authority over and had authority to command obedience from the other, to the jury.

5. DEFECTIVE MACHINERY—RULE AS TO MASTER'S KNOWLEDGE.

A master's liability for injuries to his servant from defective or unsafe machinery is not limited to cases where the master knew of the defective or unsafe condition of the machinery, but extends to cases where he had the means of knowing and was careless in not knowing thereof.

6. SERVANT WORKING NEAR MACHINERY—NOT CHARGED WITH NOTICE.

The fact that an employee had been working near the defective machinery, and might, if he had taken time from his duties, have seen its exact condition, is not sufficient to charge him with knowledge and is not a fair test from which to determine whether he acted prudently or not, especially where it appears that none of the other employees, coming near the machinery, noticed its unsafe or defective condition.

7. RULE AS TO MASTER'S DUTY IN INSTRUCTING SERVANT.

The duty of the master to instruct the servant in regard to the dangers of the employment depends on the nature of the work to be performed. If the danger is a latent one, not readily discoverable by the workman, then the master must point out such danger; and if the danger is one the master is supposed to know, and one not readily known to the servant, and about which the master is uncertain whether he does or does not know, then it is the duty of the master to point out the danger. It is not the law that the master does not become liable and is under no obligations to point out danger, unless he knows that the servant does not know of it.

8. DISTINCTION BETWEEN NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

The distinction between negligence and contributory negligence is, that in negligence the person acts and operates alone, while contributory negligence operates with something else to create it.

HEARD ON ERROR.

The petition filed in this case, so far as material to the decision, is as follows: The plaintiff says that The Avery Stamping Company is, and at all times hereinafter stated was a corporation duly organized under the laws of the state of Ohio for the purpose of carrying on in the city of Cleveland and county of Cuyahoga, Ohio, a general novelty business in iron and steel and the making of frying pans, hoisting buckets, soda water tanks and generally, novelties, especially, things stamped from steel, iron and sheet steel. That for that purpose it had erected before the committing of the wrongs hereinafter complained of, in said city of Cleveland, a factory and plant wherein were located machinery of various kinds, stamping presses, hammers and other appliances and apparatus necessary for its business, all of which was propelled by steam power.

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That among the appliances it owned and possessed and operated prior to the committing of the wrongs and grievances hereinafter complained of, was a certain stamping hammer, otherwise known as a drop hammer, the purpose of which was to stamp out frying pans and other things of that nature.

The power was communicated to this stamping or drop hammer by a bolt from the main shaft, connected with the engine, to a shaft that was connected with the stamping or drop hammer. That the distance from the main shaft to the drop hammer shaft was about fourteen feet; that the main shaft was about fourteen feet from the floor, while the shaft of the drop or stamp hammer was only about eight feet from the floor. That the pulley on the drop hammer shaft was about thirty-eight inches in diameter and the corresponding pulley on the main shaft, that is, the pulley that communicated by means of a belt, motion to the shaft of the drop hammer, was about eighteen inches in diameter; that motion was communicated to the drop or stamp hammer shaft by means of a belt running from the pulley to the main shaft to the pulley on the drop hammer shaft; that this belt was about twelve inches wide and consisted of two pieces of leather glued or pasted together, one upon the top of the other, so as to render it strong and durable, and that the belt was laced together in the usual and ordinary way.

And the plaintiff says that the defendant negligently permitted said belt to become worn and unfit for use by continued and long use. That the two pieces of leather belting separated from each other at certain points and places on the belt, and where said separations occurred, the belt was held to either by what are known as belt fastenings or belt hooks; that these fastenings or hooks consisted of pieces of metal having three prongs; that these pieces of metal were driven through the two pieces of leather of which the belt was composed, and clinched after being driven through; that from long and rapid use, the pieces of leather of which the belt was composed had separated during nearly its entire length and was fastened as above stated by said belt hooks or belt fasteners. That these belt hooks or fasteners, before they were clinched, that is, the prongs thereof, were about an inch long.

And the plaintiff says that when said drop or trip hammer was not in use, the usual custom of the defendant was to throw the belt from both the main shaft and the drop or trip hammer shaft and then tie the belt to the ceiling above the main shaft, and that when so tied up, the belt would then be raised from the main shaft and the trip hammer or drop hammer shaft being stationary the belt did not revolve but was stationary.

The plaintiff further says that some time prior to June 12, 1897, perhaps three months prior to that date, the drop or stamp hammer was stopped and not used thereafter until some time after June 12, 1897. That the person or persons who last used the drop or stamp hammer failed to tie up the belt as it should have been tied, so as to remove it from the action and motion of the main shaft and that in consequence thereof the belt fell upon the main shaft and was caused by the main shaft to revolve; that is, the revolving of the main shaft caused the belt to be carried along and over said main shaft which was about eight inches in diameter.

That after the belt had been removed from the pulleys and rested upon the main shaft and the shaft of the drop or stamp hammer, a portion of it reached the floor; that is, it sagged in the center until it reached the floor, and being thus continually carried along by the revolution of the main shaft, it dragged continuously along the floor for about the period of three months. That the defendant well knew, and by the exercise of due care and diligence ought to have known that said belt had not been tied up and that it was dragging upon the floor and constantly revolving on the main shaft, as above stated. That defendant, its agents and its servants were constantly in said building and had every opportunity of knowing that said belt had not been tied up and that it was revolving on said main shaft and being dragged along the floor continuously.

The plaintiff further says that the dragging of said belt along the floor, as aforesaid, caused the belt to be worn almost through and so worn that the aforementioned belt hooks and belt fasteners became loose on the side of the belt that was dragging on the floor, so that the prongs were separated from the leather and were veritably hooks that would catch in clothing or anything else.

And for cause of action the plaintiff says that he was employed by the defendant as a common laborer; that his business was to do such work as he was directed to do, especially, to help blacksmiths and machinists, and work of such a character; that he had no charge, whatever, over the machinery or any part thereof. That he had no knowledge that said belt was for three months dragging upon the floor, as

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aforesaid. That he had no knowledge, whatever, that the belt hooks or fasteners which had been driven into said belt had become loosened from one side of the leather and were in a position where they would catch into clothing or anything else that would come in contact with it. That his business was of such a character as to call him to such portions of the premises as brought him outside of the sphere or observation of said belt; that he knew nothing of the condition of said belt and had no means of knowing anything about the condition of said belt.

That on June 12, 1897, he was directed by the foreman of the defendant, whose orders he was bound to obey, to aid and assist one Peter Sullivan, who was about to run and operate said drop or stamp hammer; that when he was placed under the charge and control of the said Peter Sullivan, he was bound by the defendant and directed by the defendant and the defendant's foreman to obey all the orders and commands of the said Peter Sullivan and that he was in a position of subordination to the said Peter Sullivan and that the said Peter Sullivan while he was working with him, had authority to direct him and direct his movements and was to all intents and purposes his superior while he was so working with him. That the said Peter Sullivan directed this plaintiff to get a step-ladder and place the same beneath the main shaft which was about fourteen feet from the floor, while the said Peter Sullivan procured another step ladder which he placed beneath the shaft of the drop or stamp hammer, that the purpose of so doing was to throw the aforesaid belt onto the pulleys of the main shaft and the shaft of the drop or stamp hammer.

And the plaintiff says that the belt had been thrown upon the wrong side of the pulley of the main shaft; that after he had mounted said step-ladder he was directed by the said Peter Sullivan to throw said belt over said pulley and onto the other side thereof. That in pursuance of said orders he took hold of said belt for the purpose of throwing it over said pulley; that at the time he took hold of said belt the same was revolving on the main shaft, and that as he took hold of it, some of said hooks that had become worn from the leather and had projected so that their points were sharp, caught into the cloth of his shirt-sleeves and also into the flesh of his arm and pulled him over the shaft; that his clothing became entangled in said hooks, and that by reason thereof, he, himself, became entangled in the belt as it was revolving around the main shaft, and that by reason thereof, he was whirled around the main shaft with great force and velocity. That said main shaft was about two feet below certain girders which were immediately above said main shaft. That as his body revolved around said shaft and was carried around by reason of said belt, his feet struck said girder with great force and momentum; that his arm became entangled between the shaft and the belt, and that as he revolved around said shaft his left arm became broken in two places and that his left leg by being constantly thrown against said girder, became also broken. That he continued to revolve around said shaft, as aforesaid, for a period of about one minute.

And the plaintiff says that the defendant carelessly and negligently provided no engineer to run its machinery and had no engineer running its machinery upon said occasion, and had no person operating or running said machinery, who could stop the same and prevent these injuries to the plaintiff. And that as a matter of fact, the machinery was stopped by the said Peter Sullivan. And the plaintiff says that of this fact, that is, that the defendant had no engineer or suitable person to manage, operate and run said machinery, he was wholly ignorant and had no knowledge.

And the plaintiff says that said injuries so as aforesaid sustained by him, were caused wholly and solely by the carelessness and negligence of the defendant, its agents and servants, and without any carelessness or negligence upon his part. And he says that the defendant, in causing said injuries, was guilty of gross negligence and carelessness in the following particulars, to-wit:

First: That they provided no engineer or suitable person to have charge of its engine and who could stop the same in case of emergency or necessity, and that by reason of that fact and that to that fact his injuries were largely due and attributable. That if the machinery had been stopped quickly and suddenly, as it might have been, had the defendant provided a suitable person to have charge of said engine, his injuries, at most, would have been slight or trivial.

Second: The defendant was guilty of carelessness and negligence in permitting said belt to become out of order, worn and unfit for use, and in permitting it to drag along the floor for about three months, as the plaintiff alleges the defendant did, and that the leather upon one side of the belt became worn away and the hooks

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became exposed and free from the leather, and became, in fact, grappling hooks which caught into his clothing as above stated and fastened into said shaft.

Third—That the defendant was guilty of carelessness and negligence in not causing said belt to be tied up from the main shaft so that it would not revolve thereon and drag along the floor as it did; and the plaintiff says that of this fact he had no knowledge, but that the defendant had full and ample knowledge, and by the exercise of reasonable care ought to have known of it, as it had continued for a long period of time, to-wit: Three months' time.

Fourth—The defendant was guilty of carelessness and negligence in using hook and prongs in keeping said belt together; that the manner in which it fastened said belt together, in itself, was careless and negligent; in keeping and maintaining an unfit, worn out and dangerous belt, which the plaintiff alleges it did. And the plaintiff alleges that said belt was in all respects unfit for the purpose for which it was put on. That the defendant well knew of that fact, and by the exercise of ordinary care ought to have known of it.

Fifth—That said defendant was guilty of negligence in failing to give said plaintiff any proper instruction as to the manner of doing said work, so as not to be injured, as aforesaid.

Sixth—That said defendant was guilty of negligence in not giving said plaintiff any notice or warning of the dangers to be encountered in performing said service.

Seventh—Said defendant was guilty of negligence in ordering said plaintiff into said dangerous position, well knowing and having the means of knowing that he was inexperienced in doing said work, and that he had no knowledge of the dangers attending the same.

Eighth—That said defendant was, under the circumstances hereinbefore stated, guilty of negligence in ordering said plaintiff to perform said service while said shaft was revolving.

Said plaintiff says that he was wholly unaware of the dangerous condition of said premises and said place where he was ordered to work, as aforesaid, nor did he have equal means of knowledge with said defendant, of their dangerous condition; but that defendant did know and by the exercise of ordinary care it might have known of said dangerous condition of said premises and said place and of all the dangers hereinbefore set forth.

And the plaintiff says that he had no knowledge of the way said belt was kept together, and had no knowledge at the time he took hold of it, that it was filled and lined with grappling hooks that were liable to and that did take hold of his clothing and flesh and fasten him into said belt and cause him to revolve around said shaft.

And the plaintiff further says that by reason of his said injuries it became necessary to amputate his left arm, which was done a short distance below the shoulder; that it also became necessary to amputate his left leg which was done above the ankle. That his whole body was bruised, torn and pounded and lacerated and triturated, and that he was sick, and sore for a period of over four months in a hospital. That after he was removed from the hospital he still continued to be sick and sore, and he suffered great and excruciating mental pain and bodily torture, and that he still suffers and will always suffer. That he has been permanently disabled and crippled; that his injuries are permanent, and that he will never be able to follow a calling demanding physical or manual effort.

CALDWELL, J.

This case is before us on a petition in error; and, without stating the facts, we proceed at once to consider the errors alleged and relied upon in the hearing of the case.

The first is, that the petition does not state a cause of action, and, in order to show that the petition is insufficient, the plaintiff in error divides the charges of negligence into three: First. No engineer. Second. Unsafe place. Third. Defective belt. And it is claimed that the charge of negligence as to there being no engineer is insufficient because the plaintiff did not in his petition deny that he had the means of knowledge, although he did deny that he was wholly ignorant and had no knowledge of the fact that there was no engineer.

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There is some uncertainty under the decisions of Ohio, as to whether the averment on the part of the plaintiff that he had not the means of knowledge is necessary in a petition of this kind.

The syllabus in *Coal & Car Co. v. Norman*, 49 Ohio St., 598, does not require that averment in order to make a good petition. That opinion is based largely upon what is said by Wood in his work on Master and Servant.

"It is necessary to aver in a petition in a case of negligence."

And it is not there stated that the averment in question is necessary to make a good petition.

In *Coal and Mining Co. v. Adm'r. of Clay*, 51 Ohio St., 542, where the court is discussing what it is necessary for the plaintiff to show in order to make out his case, the court does say that it is necessary for him to show that he had not the means of knowing the dangers to which he was exposed.

The defendant below filed no demurrer to the petition, nor did he in any way, by motion or by raising the question in any manner on trial, bring this matter to the attention of the court. The question was not raised on the motion for a new trial, nor is it one of the grounds of error stated in the petition in error. It seems never to have occurred to the plaintiff in error that the petition was in any manner defective until on the hearing of the case in this court, and that question hence was not raised at any time prior thereto. And, although it has been held in this state that if the petition is defective in that it does not state a cause of action, the objection to the petition may be raised at any time and in any court in which the case may be pending, and if the petition is found so clearly defective that no cause of action is stated in it, it might be proper and it is proper for the reviewing court to take that matter into consideration in disposing of the case; but a reviewing court will, under all the circumstances herein narrated, extend to the pleading a liberal construction and will not render any aid in the support of such a claim beyond what it is compelled to do.

The separating of the causes or charges of negligence as is done by the plaintiff in error, does not determine the question of whether a cause of action is stated or not, for, in determining whether the plaintiff was entitled to recover under his petition, all the averments of his petition were to be considered and if upon all the averments he has stated a cause of action, the petition is not defective on the ground here alleged. And, in connection with this, it is urged that the want of an engineer was not the proximate cause of the injury the plaintiff below received.

It is impossible in this case, to so divorce the causes that were active in bringing about the injury complained of.

If an engineer had been standing close by the engine, much of the injury received by the defendant in error most likely would not have occurred; there is ground for claiming that the delay in stopping the engine, greatly aggravated his injuries and added to what he would otherwise have received.

These different charges of negligence all enter into to make up the cause of action, and because there may be no averment that the defendant in error had no means of knowing that there was no engineer, would not in and of itself prohibit a recovery under the petition, even if that allegation is necessary.

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It is claimed that the petition is defective also in that the plaintiff does not aver that he did not have the means of knowing of the unsafe condition of the place where he was called upon to work; that his averment is, that he did not have equal means of knowledge with the defendant.

It is claimed that the petition is defective wherein it alleges the defect that is claimed to exist in the belt, for the reason that the measurements set out in the petition are incompatible with the belt's dragging and wearing itself out in the manner averred. This defect claimed to exist in the petition, is clearly not well taken; and, as to the petition as a whole, none of the matters set forth by counsel for the defendant in error having been heretofore noticed, nor the court's attention at any time called to them, we hold that at this time the averments are such that the petition is sufficient to support the judgment obtained in the court below.

It is claimed that the court erred in the admission of testimony. On page 10 of the record the question was asked, "What was the ordinary method in use there of fastening these layers together when they were separated, before this accident?" The court, before allowing the witness to answer the question, ascertained how long the witness had been at work in the factory prior to the time of the injury; and in answering that question the witness answered, "I worked there about seven years. Why they used to have these and pegs and glue and different kinds of ways of fastening these together." And then the question was asked, "Whether they had these hooks also?" And to this, there was an objection, a ruling and an exception, and the answer was, "Yes, sir." We find no error in the rulings of the court in those questions and answers.

On page 76 of the record, it is claimed that the court erred in allowing the case to proceed after it was admitted by the attorney for the plaintiff below, that he would not claim, in presenting the testimony, that the belt was over the main shaft and also over the shaft of the hammer, but was free from the hammer shaft and only on the main shaft, and in that position was dragging upon the floor. And, thereupon, the attorney for the plaintiff in error, asked that all the testimony to the effect that this belt had been dragging upon the floor, be withdrawn from the jury. The court refused to take that testimony from the jury and there was an exception noted, and the question was raised at other points in the hearing of the case.

We think that the fact that the belt was upon the hammer shaft, being alleged in the petition, was merely a description of the surroundings, and was not the statement of a fact that was in any way intended to bring negligence to the defendant below, nor was it a fact upon which any liability was to be fastened upon the company in any manner in the trial of the case. This being true, it was merely descriptive of the situation of things, and entirely immaterial in the case. The only question was, "Did the belt drag upon the floor regardless of how it might be situated?" And the company came into court to show that it did not drag, and the company was not claiming that the belt was so fixed that it could not drag, except as it claimed that the belt was tied up to some part of the building above the main shaft.

We think there was no error in the admission of that testimony.

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Again, on page 99 and page 100 of the record, this question was asked: "You may state what would be likely to happen, if anything, if the shaft was still revolving at 165 times a minute while you were throwing the belt over?" The answer was: "It would be kind of dangerous to say the least; a man would likely be caught in the belt or in the pulley."

It was asked to have this answer taken from the jury. The court took from it the first part, "It would be dangerous," and the court held that the remainder of the answer might stand. This witness was called, or, at least, was examined as an expert to some extent, and as an expert he undertook to tell how the belt should be thrown over the pulley, and he had so described by permission of the court; he had described how the act should be performed, and then this question was asked him which amounts to nothing more under the circumstances of the case and the examination as it took place, than for the witness to point out what dangers there would be. And the witness, and other witnesses in the case, undertook to show, and did testify, that there would be danger of becoming involved in the belt or being involved in the pulley. This witness testified that the danger in performing the act was that the party, if he was not experienced in the matter, was in danger of being caught in the belt or the pulley. And we see nothing wrong with the ruling on that question.

It is claimed in this case that the proof did not warrant the verdict.

In the first place, it is claimed that Toomey was a fellow servant with Sullivan, with whom he was working at the time that he received his injuries.

It is claimed that the law is, that the relation of an artisan or a machinist and his helper, is, that they are fellow servants and one is not the superior and the other the inferior. A large number of cases were cited to show that this is the rule. And it is claimed that the evidence shows that Toomey was the assistant of Sullivan who was the artisan or machinist, and that Sullivan had no authority over Toomey except to ask him to do anything necessary to assist Sullivan in what he was doing.

First as to the law. It is clearly the law of this state that one servant may be the superior of another servant when they are both engaged in a common work of the master. The law of Ohio upon this proposition is somewhat different from that of any other state. That difference sometimes occurs only in the application of the rule; but, in most states, however, the rule adopted by our state is not endorsed at all. The rule in Ohio was first laid down in 20th Ohio Reports by a divided court. The question came before the Supreme Court again in *Cleveland Col. & Cin. Rd. Co. v. Keary*, 3 Ohio St., 202, and the members of the court there agreed upon this rule: That the master is liable for the injury of one servant through the carelessness of another when both are engaged in a common service and one is given control over the other; and in that case, *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 416 the case was affirmed. That doctrine has been many times affirmed in the state of Ohio until it has become a well settled rule of law: In *Mad River, L. E. Rd. Co. v. Barber*, 5 Ohio St., 541; *Whealan v. M. P. & L. E. R. R. Co.*, 8 Ohio St., 250; *Kumler v. Junc. R. R. Co.*, 33 Ohio St., 150; *P. Ft. W. & C. R. R. Co. v. Lewis*, 33 Ohio St., 196; *L. S. & M. S. Ry. Co. v. Knittal*, 33 Ohio St., 468; *Railway Co. v. Ranney*, 37 Ohio

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St., 665; *Dick v. Railroad Co.*, 38 Ohio St., 389; *L. S. & M. S. Ry. Co. v. Lavalley*, 36 Ohio St., 221; *Railway Co. v. Spangler*, 44 Ohio St., 471.

In *Berea Stone Co. v. Kraft*, the 31st Ohio St., 287 the Supreme Court held that it made no difference if the superior servant who was given control over his associate servant, was engaged at the time of his negligence in the work that should have been performed by the inferior servant. The application of this rule is not always easy; and we find in some of the cases referred to, and in others decided by the Supreme Court, that there has been a difference in the members of the court in deciding whether the rule applies to persons situated under particular and peculiar circumstances, such as that of the engineer of a train and the brakeman. But the only question to be determined, is whether one servant is given by the master authority or power to control and direct the work and labor of another servant.

Often servants labor together in a common work, and they direct each other what to do, or one who is more experienced than the other, may direct how the work shall be done; but that does not determine the question whether the master is liable for the negligence of either by which the other is injured; but the liability of the master is determined entirely by a solution of the question whether or not the master has placed one under the direction of the other, or whether he has given one control over another servant in performing a certain work; if he has, and the inferior is injured by the carelessness of the superior, then the liability exists. Some states modify this rule by extending it only to where the master has given authority expressly to one servant to control the acts and duties of another, but our state extends it to a case where the master has put one under another, or where, by his direction, he has put one over another. So that it makes no difference in this case whether by the direct act of the master or the foreman, Sullivan was given charge over Toomey, or whether that act consisted in placing Toomey under the charge of Sullivan. The mere working together, where the advice of one is accepted by another and where, by superior knowledge, one gives all the advice and direction for the work, is not alone sufficient to charge the master with the negligence of either by which the other is injured, but such direction and authority must be by the authority given by the master, or some one standing in his place. This law, being well settled in Ohio, it only becomes necessary to determine what the evidence shows in this case. Without undertaking to repeat the whole of it, Toomey testifies that Einan, the foreman of the shop, came to him and told him to go and help Sullivan and to do as he told him. Einan does not deny this conversation, nor is his attention called to it by the counsel for plaintiff in error.

The superintendent of the shops testifies that where one is placed under another to assist him about a certain work, if he does not obey the orders of the one whom he is assisting, he would be discharged. He might as well say that disobedience of a servant under an artisan in that shop was disobedience to the orders of the company, for certainly no company would discharge one servant for disobeying the orders of another servant unless the one, giving orders, had authority to command obedience. This is substantially all the testimony upon this question, that we find in the bill of exceptions.

It was claimed by the plaintiff in error, that Sullivan had no further authority to command obedience to his orders on the part of Toomey

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than one servant has over another where they are working together without any pretence of authority from the principal. Much evidence was introduced tending to show that that was the relation between Sullivan and Toomey. This being true, it was proper for the court to leave the question of whether Sullivan was in authority over Toomey or not, and whether he had authority to command obedience from Toomey, to the jury. And we feel that we are not authorized in this case to disturb the finding of the jury that Toomey was subordinate to Sullivan.

It is contended, in the next place, that the defective condition of the belt as to the belt hooks,—that there was no evidence that the defendant, either through Sullivan or any one else, had actual knowledge of their defective condition. There is evidence tending to show that the plaintiff in error knew that there were hooks in the belt, or, at least, some of its employes knew,—and employes who sustained that relation to the plaintiff—and that their knowledge would be knowledge to the plaintiff.

There is testimony to show that the belt was dragging for some considerable time upon the ground. There is considerable evidence that the belt was badly worn, so that there were strings hanging from it.

The jury were not confined to finding that the plaintiff in error knew all these things, but that the plaintiff in error had means of knowing, if it did not know, and was careless in not knowing, if it did not know. And if the jury found either knowledge or means of knowledge, and negligence in not putting the belt in proper condition or in not ascertaining its actual condition, it would support the verdict in this case. And we think the evidence clearly shows that the plaintiff in error either knew the condition of the belt, or was careless in not knowing its condition, and, in either event, the proof would support the verdict.

There is a dispute in the testimony as to which way the pulley on the main shaft revolved, whether towards the east or towards the west. If the jury should find either way, the court would not disturb such finding.

It is claimed that the evidence does not show sufficiently clear to support the verdict, just how the accident happened.

There is evidence uncontradicted tending to show that the hooks in the belt caught first the clothing of Toomey, and afterwards caught into the flesh of his arm and lacerated the flesh, and that it was this that threw him on to the pulley and shaft and caused him to become entangled in the belt, and that he thus received his injuries.

There is a great deal of theorizing on the part of the plaintiff in error as to how the accident occurred and what caused it, but such theories are found entirely without facts to support them, and the only facts that would warrant the jury in coming to any conclusion as to how the injuries were received, was, that they were received by reason of the condition of the belt, and more directly by reason of the hooks.

The evidence, we think, warranted the jury in finding that hooks had been placed in the belt, and that they had become so worn that they were in the condition, at the time of the injury, to inflict the injuries complained of in the case, and that this condition in the belt was brought to the jury by the fact that the belt had been long used, had been fastened together by hooks, and was allowed to drag on the ground, and no particular attention seemed to be paid to the belt as to its condition, by

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the company or any one in its employ authorized to perform such work.

It is claimed that the evidence shows that Toomey had the means of knowing the condition of the belt as fully as had the company, and that he was bound to know its condition, as it had been prior to that time within his observation. It is shown that Toomey had been working, prior to his injuries, in the vicinity of this belt; that while he was thus working, the belt was revolving upon the main shaft, with what rapidity the evidence does not show. It is easy now to look back and see that he might, if he had taken the time from his usual duties have seen the exact condition of the belt, but that is never a fair way to determine whether a party has acted prudently or not. In fact, if we take the evidence of all the other persons employed in and about the shop, even the superintendent and foreman of the shop, as to the condition of this belt, we will see that Toomey exercised the same care that they did; that is the standard of care; that a man shall exercise such care as others do when they are similarly situated. Many of these persons were called as witnesses, and they all testified, either that they worked in the neighborhood of this belt, or that they passed by it frequently; and, in fact, they nearly all saw it every day for some days and months prior to the accident complained of in this case, and yet not one of them paid such close attention to its condition that he was able to state whether there were hooks in it or not, and what its condition was.

Two or three testified to seeing strings hanging from it, but, beyond this, no one is able to describe anything like the minutiae that is now required of Toomey, in the condition of the belt—and that is no doubt the truth; for persons engaged about their own work, and having their mind and attention fixed upon that work, and seeing the belt only casually, either by passing or by glance sight of it, would be entirely unable, no doubt, to describe all the minutiae that is required in the testimony in this case. And we do not believe that the jury would have been justified in this case in finding that Toomey was negligent in not knowing the condition of the belt.

Again, it is claimed that the evidence shows that Toomey was guilty of contributory negligence, and it is claimed that he was guilty of contributory negligence in the manner in which he undertook to place this belt on the opposite side of the pulley.

There is very little, if any, testimony in the case showing what would be the proper way to perform that act.

It occurs to the court, and, we think, will readily occur to any one, that to undertake to lift the belt weighing seventy-five pounds over a pulley some sixteen or eighteen inches in diameter, by reaching out several inches to take hold of the belt and lift it over, would be a dangerous operation, and, unless performed with skill and care and knowledge, would be very likely to injure the person who was performing the act.

The evidence does not show that Toomey had any special knowledge of the work, and, in fact, he himself says that he knew nothing about it; that he simply obeyed the orders of Sullivan in all that he did.

So far as the court can learn from the testimony in the case, Toomey undertook to handle the belt in the various steps that he was to perform in that act, in the way that an expert would have done it; he placed his ladder against the shaft, and one side of it on each side of the rod that was above the shaft; he placed it some little distance from the pulley, so

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that his ladder would not come in contact with it. He reached over the pulley and undertook to lift the belt to the other side of the pulley.

We do not see any reason why this was not as safe as any other way that a person could use in performing that work. If he put his ladder on the same side with the belt, there would be great danger of throwing the belt or letting the belt strike on the pulley before it went over, and he would have nothing to take hold of to support himself and hold himself securely while lifting the belt; whereas, where he placed his ladder, he had an iron rod that he could take hold of to steady himself while performing the work. No doubt, from all that we see in the testimony, this belt, while being lifted, in some way struck the pulley which caused it to jump high enough so that the hooks in the belt seized upon his clothing. One person, performing that work and doing it as he would have to with one hand, would be almost sure to let the belt touch the pulley, and the very thing that happened would almost likely occur. It would probably be quite impossible for any one to lift the belt over, situated as Toomey was, without its coming in contact with the pulley, and such contact might produce the jumping of the belt.

The negligence of Einar was in ordering an inexperienced man to perform a duty that was dangerous for one man alone to perform, and which should have been performed by Sullivan and Toomey both.

We think the evidence supports the verdict.

It is claimed that there was a variance in that the testimony showed that the belt was not over the hammershaft during the time that it was claimed it was dragging, but was over the main shaft alone; and it is claimed that that variance is such that the plaintiff in error can even now avail himself of it, and that it is such that this case should be reversed. I have said all on that subject that is necessary to say.

We find that the court did not err in refusing to grant a new trial because of newly-discovered evidence.

It is claimed that the court erred in charging the jury.

First, that the court erred in defining negligence on the part of the plaintiff as a ground for defense. He first said: "You will observe also that the answer alleges that the plaintiff was himself negligent or, to use a common form of speech, was guilty himself of contributory negligence." Then the court says, "That makes it necessary to define contributory negligence." Then the court gives the definition.

Our attention has heretofore been called to this identicle definition given by the judge below, and we have said all that it is necessary for us to say in regard to that matter.

The negligence of the plaintiff below was either negligence, or contributory negligence. The court has clearly defined these terms, and the court said to the jury that the plaintiff could not recover if he was guilty of negligence, and he clearly said to the jury that the plaintiff could not recover if he was guilty of contributory negligence.

The only distinction that can be drawn between negligence and contributory negligence, is, that one may act and operate alone, independent of negligence of any other person, while contributory negligence, as the very term means, is that which operated with something else to create. And the definition, as given by the court, is one that is approved by a great many authorities, and the one that is frequently given in the decisions found in the books.

As we have heretofore discussed this subject to some extent, we will say nothing more about it at this time. But we do not believe that there was any error in the definition of the court, nor was the jury misled in any manner by it.

It is complained that the court erred in charging the jury "that if there were dangers incident to the work at which the plaintiff was engaged, known to the defendant, or which ought to have been known to him by the exercise of ordinary care, but unknown to the plaintiff and not discoverable by him by the exercise of ordinary care, under such circumstances it became and was the duty of defendant to call plaintiff's attention to such dangers."

It is claimed that this is defective in that the plaintiff in error would not be liable unless it was ignorant of defendant in error's ignorance. It is claimed, in other words, that the defendant below was or ought to have been itself aware that the plaintiff was in need of such instruction. That depends entirely upon the nature of the work that is to be performed. If the danger is a latent one, that is, not readily discoverable by the workmen, then the master must point out such dangers; and if the danger is one that the master is supposed to know, but which is not readily known to the servant, and which the servant may not know and about which the master is uncertain as to whether he will know or not, under such circumstances the authorities hold that it is the duty of the master to point out the danger; and it is not the law that the master does not become liable and is under no obligations to point out dangers until he knows that the servant does not know of it. And the charge as given by the court when it comes to applying the evidence to the law as laid down by the court, is correctly stated.

This was a case where the master knew or ought to have known the dangers attending the moving of that belt; and yet the great danger, the very danger that injured the party, was one that might not be known and not likely to be known by one not experienced in the business—that of allowing the belt to touch the pulley and cause it to kick and strike him.

What is said in regard to this matter, applies equally well to the next objection taken to the charge of the court, as stated in the brief of counsel for plaintiff in error.

We find no error in the charge of the court as given to the jury.

It is claimed that the court erred in refusing to give requests asked.

Request eight assumes, in starting off, that this was a manufacturing in which Sullivan was an artisan and Toomey was his helper; and then the court is asked to say, that the relation of superior and subordinate does not arise from that relation, especially if the artisan is merely to indicate by words or signals when the assistance or co-operation of such helper is required; and asked the court to state that if that was their relation to each other, then the artisan and helper were fellow servants in a common employment, and that the company would not be liable for the injury of either resulting from the negligence of the other.

The court was warranted in rejecting this request, principally because it is not based at all upon the rule in this state. The rule in this state is not determined—a case under it is not determined by whether the persons were artisan and helper, or what their relations were, rather than that one was put in control over the other. And this request nowhere calls for that rule, nor for the case to be determined

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under it; but it states other relations of the artisan or of these persons, such as artisan and assistant, and then assumes certain facts as to how they did act towards each other, and, upon that, asked the court to state that the company would not be liable if either was injured by the negligence of the other. That is not the basis on which the liability of the master is determined in this state.

Complaint is made because request ten was not given.

The want of an engineer, of course, was not the proximate cause of the party becoming entangled in the belt; but it was proper to leave to the jury whether it was a cause acting with other causes that produced the injuries complained of.

Request twelve is complained of, and we think the charge sufficiently covers the law called for in that request, so far as it should have been given.

Requests fifteen, sixteen and seventeen, were properly refused by the court.

The question was not one of presumption on the part of the jury, but whether Toomey was negligent in not knowing what he might have known, and it was proper to present the matter to the jury in that light, and not in the light asked for in these requests.

The judgment of the court of common pleas is affirmed.

Foran, McTighe & Baker, for plaintiff in error.

Ford, Snyder, Henry, & McGraw, for plaintiff in error.

NEGLIGENCE—WRONGFUL DEATH.

[Richland Circuit Court, January Term, 1900.]

Adams, Douglass and Voorhees, JJ.

BRIDGET MCCARTY V. BALTIMORE RAILROAD CO.**1. SCINTILLA RULE GOVERNS.**

If, at the close of plaintiff's testimony, he has offered evidence tending to prove the material allegations of the petition, the case cannot be taken from but must be submitted to the jury under proper instructions.

2. FACTS AUTHORIZING VERDICT FOR RAILWAY COMPANY.

In an action against a railway company for wrongful death, where it appeared that, in broad daylight, a man who had been for years in the employ of the railway company, not in an inferior capacity but as a section boss, having an unobstructed view, saw a train headed in his direction, went to work between the rails and permitted the locomotive to run over him, the court was justified in directing a verdict for the railway company; the fact that deceased was at work with his cap drawn over his ears and with a scarf or shawl wrapped around his shoulders, only increased his duty to use his sense of sight to keep out of the way of a locomotive.

3. REFUSAL OF MATERIAL EVIDENCE—NOT PREJUDICIAL.

Where it appears in an action against a railway company for wrongful death, that decedent was guilty of negligence which would bar his recovery, the exclusion of material and proper evidence as to the negligence of the railway company, cannot be regarded as prejudicial to the party's rights.

HEARD ON ERROR.

ADAMS, J.

This case comes into this court on error. The plaintiff in error was the plaintiff below and brought her action as administratrix of the estate of

Richland Circuit Court.

Patrick McCarty, deceased, against the Baltimore and Ohio Railroad Company, the Sandusky, Mansfield and Newark Railroad Company, and Cowan and Murray, Receivers of the Baltimore & Ohio Railroad Company, to recover damages for the next of kin of Patrick McCarty, caused by his wrongful death on January 4, 1896.

I will say in passing that the Sandusky, Mansfield and Newark Railroad Company is brought in as lessor of the railroad, and that Cowan and Murray are brought in as receivers, although it is alleged that they were appointed receivers more than an month after this accident occurred. There seems to have been some doubt in the minds of counsel who drew this petition as to the exact time of the appointment and qualification of these receivers, and these receivers were made parties out of an abundance of caution.

So far as the case is presented to this court, it is only necessary to notice the issues made by the petition and the answer of the Baltimore and Ohio Railroad Company and the reply of the plaintiff to that answer.

All charges of negligence in the petition are made against the Baltimore & Ohio Railroad Company, and the claim would be made against the other parties more as a legal question if the negligence of the Baltimore & Ohio company should be established.

The case was tried to a jury, and, at the close of the plaintiff's testimony, the trial judge directed a verdict for the defendants. There was a motion for a new trial overruled and they have a bill of exceptions here which sets forth all the evidence. The action of the court in directing a verdict is the principal error assigned; and then there is another error assigned on page seven of the bill of exceptions as to the exclusion of certain testimony.

The petition alleges that Patrick McCarty, on January 4, 1896, lost his life; that the Baltimore & Ohio Railroad Company, at that time and a long time prior thereto, operated a railroad; that Patrick McCarty was in the employ of this railroad company, in this county, as foreman of a section, and it was his duty to work on the line of said railroad, and while engaged in the line of his duty, on January 4, through the negligence of the said Baltimore & Ohio Railroad Company, in the operation of a locomotive and train of cars attached thereto, and without any negligence on the part of said Patrick McCarty, he was run over, crushed and instantly killed.

The petition further alleges that the engineer, fireman and trainmen in charge of said locomotive and train, negligently omitted to keep any lookout for the said Patrick McCarty, and neglected to give any signal by bell or whistle or otherwise of the approach of said locomotive and train of cars, and the said company carelessly neglected to exercise any proper care or precaution by prescribing a rule requiring warning to be given of the approach of locomotives and trains of cars to the said Patrick McCarty and other trackmen so employed on the line of railroad, and by reason of said careless and negligent acts in failing to prescribe such a rule and in failing to give any notice by bell or whistle or otherwise, to the said Patrick McCarty of the approach of said locomotive and train of cars, and in failing to keep any lookout or give any warning to the said Patrick McCarty, he was then and there, while so engaged in the line of his duty, run over and killed. And that his death was caused solely by the said negligent act of the said defendant, the Baltimore and Ohio Railroad Company and without any negligence on the part of said Pat-

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rick McCarty. And then there is an allegation that he left a widow and three minor children surviving him, giving the names and ages of the children, with a prayer for damages.

The answer of the Baltimore & Ohio Railroad Company, so far as this issue is concerned, denies all acts of negligence on its part and sets up contributory negligence on the part of McCarty, which allegation of contributory negligence is denied by the reply.

I will take up the question as to directing the verdict first. It has grown almost into a custom for lawyers and a great many courts to criticize what is known in Ohio as the *scintilla* rule; and whether that rule ought to be changed by statute or not is a debatable one. Yet, as far as this court is advised, the rule is still in force in Ohio, and, whatever may be the opinion of the members of this court as to the wisdom of the rule or otherwise, we are bound to follow it. That rule is: if, at the close of the plaintiffs testimony, he has offered evidence tending to prove the material allegations of the petition, the case cannot be taken from the jury but must be submitted to them under proper instructions. Speaking for myself, I might say that, if we are to have more than a form of jury trials, I cannot see how any other rule can logically be applied to the trial of cases; but that does not aid us in the disposition of this matter.

The facts in this case, as disclosed by the testimonys are that McCarty was foreman or boss of a section gang; that their accident occurred on his part of the line of road; that a train of cars had run off the track north-westerly on the Baltimore and Ohio, and Big Four crossing at Shelby junction; that McCarty and two other men had gone there to make repairs in the track; that the Baltimore and Ohio train, headed northwesterly, was standing on the track, near the station, at Shelby junction; that this accident occurred between 7 and 8 o'clock in the morning, and there is nothing disclosed here that it was a windy, rainy or stormy day,—except that the testimony shows that it was a very cold day. McCarty went down within a few hundred feet of this train, probably within two hundred feet, and another man went to the tool house where an ax was procured, and McCarty and another man were working on the track between the rails; McCarty was using the ax that had been procured at the tool house, and, in his use of this ax, he was facing toward the engine which was headed northwesterly; and the track is comparatively straight there; the testimony shows beyond all question that this locomotive was in full view of anybody standing where McCarty stood; it shows that McCarty was stooping over in his work to the extent that a man would stoop over in using an ax as he was using it, on the ties and on the ground between the rails; that the train, starting up from where it was standing, ran over him and killed him; that the train was running probably from six to ten miles an hour; that the other man who was working on the track with his back to the approaching engine and a few feet nearer the engine than McCarty was, narrowly escaped losing his life; he was struck by the engine, but, as far as this record shows, he was not killed; and not seriously injured, at least, there was no showing made here that he was hurt.

The evidence tended to show that the engineer and fireman were not looking out, didn't have their heads out of the side windows of the cab, and we think the evidence tended to show that they did not see McCarty on the track.

Richland Circuit Court.

Counsel for plaintiff in error rely upon and cite us to three cases in Ohio. It is not claimed that these cases are exactly like the case at bar, but it is claimed that they are so near like it that they should have controlled the common pleas court in this action. Of course, these negligence cases are not all exactly alike.

In *Dick v. Railroad Co.*, 38 O. S., 889, the facts are disclosed in the opinion of the court, on page 395 (and I may say that *Dick* was a boss of a section gang), where the court says :

"The evidence strongly tends to show that the locality is a dangerous one, that it was a double or triple curve, and that it was impossible for one engaged at work where deceased was, to see an approaching train but a short distance ; that there were several public crossings which the train had to cross in approaching the place where deceased was at work ; that it was in a thickly settled neighborhood, within the city limits ; that no signal of the train's approach was given by bell or whistle, either at these crossings or in approaching the curve, which he could have heard, if given, and that the train was engaged in a brisk race with another train on a parallel road. One passenger says: "The train was going at a terrific rate of speed. I was thrown against the window ; the velocity of the train threw me." Another says: "The train was behind time and was racing with the O. & M. train, that in going around this curve, he was thrown off his feet." Still another gives a graphic description of this exciting race and several testify that no signals were given. It was a train in charge of a conductor and engineer. There was no evidence tending to show that this dangerous proceeding was owing to the recklessness of the engineer. For aught appearing, it was in strict accord with the directions of the conductor and with the rules and regulations of the company. In the absence of proof to that effect, the court below erred in assuming that *Martin Dick* came to his death by the negligence of the engineer and in holding, as it must have done, that there was no evidence tending to show that the company was liable."

The material facts in which that case differs from the case at bar are these : In the *Dick* case, the train was running at a high and dangerous rate of speed, it was a double or triple curve, and it was impossible for one engaged where the deceased was to see the approaching train. The facts in this case are: That there was an unobstructed view and that the train was running at a comparatively low rate of speed.

We are also referred to *Railroad Co. v. Margrat*, 51 Ohio St., 130. There is nothing in the syllabus of the *Margrat* case touching on this case, but on page 137 there is a statement of facts of that case and some remarks by the Supreme Court that throw some light on the case at bar.

"*Margrat* was in the service of the plaintiff in error, as brakeman ; a part of his duties being to help switch cars in its yard at *Deshler*, in this state, and while there engaged in switching, received the injuries of which he complained, from a locomotive which, manned by an engineer and fireman, came up from behind and ran over him. Counsel for plaintiff in error contend that he should have either kept off the track altogether or maintained a lookout for locomotives and cars. The accident occurred about midday ; and if it appeared simply that *Margrat* was on the main track of the company's roadway and, without looking or listening, permitted a locomotive to run him down, the presumption that he was negligent would, perhaps, be irresistible. Other facts, however,

"The evidence tended to show that two cars standing in the yard were to be coupled to the train of which Margrat formed a part of the crew; that he was directed to assist in making the coupling and, being then near the front of the train, had to pass to its rear to perform this duty; that his train stood on a side track which, for probably four hundred to six hundred feet from its connection with the main track, ran northward close to and parallel with the main track; that the space between the two tracks was icy, causing its use to be difficult and somewhat dangerous as a way for passing to the rear of the train at the speed Margrat's duties required him to move; that his train began to move backward toward the cars to be coupled, just as he started towards them; that it was quite difficult, if not wholly impracticable, for him to pass along on the outside of the side track over which his train had begun to back. The only choice of a practicable way then, open to him by which to pass to the rear of the backing train to make the coupling, was to go along the main track or along the space between the main track and the side track. If he chose the latter, it threw him close to his moving train and, the ground being slippery and uneven, he might be in danger of falling under the cars of which it was composed.

"Under these circumstances, we think it was the duty of the court of common pleas to submit to the jury the question whether Margrat was or was not negligent in choosing the main track, rather than the space between the two tracks, to pass to the rear of his train, to make the coupling in question.

"It is further contended that, if it was not negligent for Margrat to go upon the track as he did, yet, having gone upon it, he was negligent in permitting the locomotive to overtake and run him down; that, being on the track, he should have looked and listened and, if he had done so, it would have been impossible for the locomotive to take him unaware as it did.

"We are not disposed to ignore or doubt the rule that, under ordinary circumstances, one who goes upon a railroad track should be held to the duty of using his senses of sight and hearing, and, if injured by reason of his failing to do so, must abide the consequences; but this rule is not to be extended so as to deny, in all cases, relief to one who may be injured on account of such failure. Conditions may exist which will excuse it; did they exist in the case under consideration? The evidence tends to show that Margrat, when the time arrived to do the switching in question, was sitting on the locomotive of his train; that he then looked up and down the track and, although his view extended a great distance in both directions, he saw nothing at all on the main track, but did see the engine that afterward ran him down, standing on a side track about fifteen hundred feet away; that he stepped from the locomotive, with his back toward the distant engine, and proceeded, as we have before seen, along just outside the main track, towards the cars to be coupled. This led him away from and kept his back towards the distant engine; that as the cars to be coupled were to be added to the train that Margrat was connected with, this train began to back towards them as Margrat stepped from the locomotive on which he had been sitting. It was his duty to pass along this train to its rear, as we have seen, so as to be ready to make the coupling when the cars to be coupled were reached. This required some quickness of movement on the part of Margrat, depending upon the length of his train and the rate of speed at which it was moving, neither of which is very clearly shown."

Now, it will appear in this case that Margrat looked and saw that the track was clear. In the case at bar, the court is forced to the conclusion that McCarty saw this train headed toward the place where he was at work, and McCarty was facing the engine that ran him down while Margrat was going away from it, under circumstances which led him to believe that there was no engine on the track on which he was walking; because he had looked immediately before he had gone on the track and saw that, for a long distance, the track was clear; he saw the engine that afterward ran him down, on a sidetrack 1,500 feet away.

The other case to which we are cited is *Railway Co. v. Murphy*, Admr., 50 Ohio St., 135. It is a case counsel are familiar with, where an employe of a railway company, with a number of other men, called "a gang," at work doing certain repairs on the track, was, from the very nature of his work, that of fastening bolts, in a stooping position with his head over the rail and close to it, when he was run over by a locomotive; the gang of men was in charge of a boss; no warning was given this man or the other men with him by the boss, and no rule was prescribed by the company requiring a watch to be kept for men who were so engaged on the track. The court held that it may be the duty of the railway company to prescribe rules for the reasonable protection of its employes against dangers of that kind and that their failure to prescribe and enforce such a rule may be negligence on the part of the company.

In the case at bar McCarty was the boss and it would not do to say that the railway company must put some one over the section boss himself to guard him and give him notice, although that may be the rule where it was an inferior and the boss failed to keep watch.

The last paragraph of the syllabus in this *Murphy* case lays down a rule which will determine this case: "The evidence as to contributory negligence on the part of deceased made a case which, at least, was doubtful, and about which different minds might differ as to the proper inference to be drawn. Such a question cannot properly be determined by the court, as a matter of law, and should be submitted to the jury."

We think that the court may admit, in the case at bar, that there was evidence tending to show negligence on the part of the company; then the question to be determined is whether, under the evidence, McCarty himself was guilty of contributory negligence so as to bar recovery, which would make it simply a question for the court to determine, without submitting any question of fact to the jury.

We are aware that the statement is made frequently that questions of negligence and contributory negligence are often mixed questions of law and fact; and the rule is that, where the facts are undisputed, and where the facts are such that only one rational inference can be drawn from them, then the question of negligence and contributory negligence is a question of law for the court. And we have in the case at bar, as it was presented to the trial judge, simply this: in broad daylight, a man who had been for years in the employ of the railway company, not in an inferior capacity but as a section boss, seeing a train standing upon the main track, headed in his direction, goes to work between the rails with an ax and allows the locomotive of that train to run over him and kill him. How it could be said that the engineer was negligent in not seeing McCarty and that McCarty was not negligent in not seeing the engine is something that we cannot understand. The engine was certainly as plainly visible to McCarty, if he had looked, as McCarty

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would have been to the engineer, if the engineer had looked in his direction.

It further appeared in this evidence that McCarty was at work there with a cap drawn over his ears and with a scarf or shawl wrapped around his shoulders; and, if the way in which his head was bundled up prevented his hearing the engine, it only increased the duty on his part to use his sense of sight and keep a better lookout for the locomotive.

Without multiplying words on the subject, we think that the action of the court below in directing a verdict in this case was right, so far as the merits of the case are concerned.

As to the exception to the exclusion of evidence on page seven of the record: "Q. You may state whether or not a whistle sounded or bell—you may state whether or not you heard any" and counsel stated what he expected the answer would be. Now, it may be true that this was a place where engineers or firemen of the railway company were not required to ring a bell or sound a whistle for a crossing, but whether or not the whistle or bell was sounded was a fact which bore upon the question of whether or not the engineer and fireman were looking and whether they saw McCarty, and we think this evidence ought to have been admitted. But, taking the view we do, that McCarty was guilty of contributory negligence which would bar his recovery, the exclusion of this evidence was not prejudicial to the party's rights.

The judgment of the court below is affirmed.

Jenner & Weldon, for plaintiff.

Cummings & McBride, for defendants.

LIBEL AND SLANDER.

[Wood Circuit Court, March Term, 1900.]

Haynes, Parker and Hull, JJ.

TILLIE STEEN V. LAURIE FRIEND.

1. DEFENDANT'S WEALTH IN LIBEL OR SLANDER.

In an action for libel or slander, the wealth of the defendant, at the time of the alleged libel or slander, may be shown for the purpose of increasing the compensatory damages and as bearing upon exemplary or punitive damages.

2. DEFENDANT'S WEALTH IN LIBEL OR SLANDER—EVIDENCE OF.

While evidence of defendant's wealth, in an action for libel and slander, to be in proper order, should be given as part of plaintiff's testimony, it is not error, after plaintiff has rested without introducing any such evidence, to permit cross-examination of the defendant on that subject.

3. IMPEACHING EVIDENCE—PETITION IN ANOTHER SUIT.

In an action for libel and slander, based upon words spoken and a letter written, charging plaintiff with improper relations with defendant's husband, a petition for divorce, filed within a week after the domestic difficulties involving the action for libel and slander, brought by defendant in the libel and slander suit, and based upon charges of cruelty, and in which no charge is made concerning the intimacy alleged in answer to the suit for libel and slander, is admissible as tending to impeach the defendant's statements charging such intimacy.

Wood Circuit Court.

4. LIBELOUS PUBLICATION IN FORM OF A LETTER.

A letter to a young woman's father, stating: "I will write you concerning L. I wish you would come out here and take her home as she has caused me a great deal of trouble, so much so that she has separated me and my husband and she is still staying with him alone. Please come at once. My husband has treated me shamefully through her and driven me and my children away from home for her sake. * * * I have caught them in a room together talking about me and now she has got him so far gone on her that I and the children are driven out and she has taken my place," if false and unless a privileged communication, is libelous. (The question of privilege not decided, but the court held that the communication could not, in any event, be subject to more than a qualified privilege.)

5. DEFENSE OF PRIVILEGE MUST BE PLEADED.

To make the defense that a writing, libelous on its face, is privileged, that defense must be pleaded and the facts constituting the privilege set forth in the answer, issue joined and submitted to the jury.

6. MISCONDUCT OF COUNSEL—PREJUDICIAL ERROR.

In an action for libel and slander, in which evidence was permitted concerning defendant's application for divorce, growing out of the same domestic difficulties involved in the libel and slander suit, a statement by counsel for plaintiff to the jury after having asked defendant "how many hundred dollars did he pay you the last time you filed a case against him?", to which objection was interposed, that, "he paid her \$2,800," where the record does not disclose any evidence in support of such statement, should have been ruled from the jury and a refusal, upon defendant's motion, to take such action constitutes prejudicial error.

7. CHARGE TO JURY—INCOMPLETE—NOT ERRONEOUS.

Failure to instruct the jury, in an action for libel and slander, upon the question of punitive and exemplary damages, allowance of attorney fees, character of plaintiff and some other things which might properly have been discussed in the charge, is not reversible error where no requests for further instructions were made and no exceptions were taken except to the charge as a whole.

8. BAD CHARACTER OF PLAINTIFF—VERDICT.

The bad character of plaintiff, in an action for libel and slander, while it might have a bearing in mitigation of damages, is not a complete defense and is not sufficient ground upon which to disturb a verdict for the plaintiff returned by a jury after due consideration of all the facts.

HEARD ON ERROR.

HULL, J. (orally.)

This is an action for slander and libel brought by the defendant in error, who was plaintiff in the court of common pleas, against the plaintiff in error, for certain alleged slanderous words and an alleged libel, which the plaintiff claimed was uttered and published in the form of a letter written by the plaintiff in error.

The petition alleges that in the month of August, 1898, the plaintiff in error, defendant below, uttered certain slanderous language, falsely and maliciously, in regard to the defendant in error, to wit: that she charged her with committing adultery with the husband of the plaintiff in error and with having sexual intercourse with him, and with going out buggy riding with married men; that she called her a common prostitute, and used other language, as set forth in the petition, imputing a want of chastity to the plaintiff below; and in her second cause of action she charges that the defendant below wrote a certain letter about the same time, August, 1898, charging the plaintiff with committing adultery with Mrs. Steen's husband and driving the plaintiff in error, defendant below, out of her house, and the letter is alleged to contain other language, set

forth in the petition, substantially charging the plaintiff below with having driven Mrs. Steen out of house and taking her place in the family.

The defendant filed an answer in which she denied uttering the slanderous words, admitted writing the letter as charged in the petition, but denied that the letter was false or contained anything untruthful or was in any manner libelous or defamatory. The case came on for trial upon these issues and a verdict was returned in favor of the plaintiff for three hundred and twenty five dollars. A motion for a new trial was filed, overruled and judgment entered, and error is prosecuted in this court to reverse that judgment.

There are various things complained of here as error. It is claimed that the verdict was against the weight of the evidence and that a new trial should have been granted upon that ground. It is claimed that the court erred in admitting certain evidence, against the defendant below; that the court erred in its charge to the jury, and in not charging fully enough upon the issues in the case; and it is further claimed that the court erred in refusing to rule from the jury a statement made by counsel for plaintiff below during the progress of the trial, while the evidence was being admitted.

It is urged that the court erred in permitting counsel for plaintiff, during the trial, to cross-examine the defendant when she was upon the witness stand as to her property, and quite a number of objections and exceptions appear in the record as to this kind of testimony. Several of the questions appear upon page 46 of the bill of exceptions. Defendant was asked how many acres of land she owned, and she answered "forty." And "How many oil wells?" Answer: "Two." And "Is there any incumbrance or mortgage on it?" Answer: "No." Have you any money in bank?" Answer: "No."

And she was asked what she was worth in money and lands and in regard to her income and farm. All these questions were objected to and upon the objection being overruled, an exception was entered.

There had been no evidence offered by the plaintiff, in putting in her case, upon the wealth of the defendant and it is insisted that if the plaintiff wished to go into this, that the proper time was when she was offering her testimony, and that it was error after the plaintiff had rested and the defendant had offered herself as a witness, to permit this cross-examination.

There is no question, under the authorities in this state, but that the wealth of the defendant may be shown in an action for libel or slander. The wealth of the defendant at the time the alleged slander or libel was committed may be shown, as the Supreme Court says, for the purpose of showing the standing of the defendant in the community and increasing the compensatory damages that the plaintiff in a slander or libel suit would be liable for; it being presumed that a person of wealth would have more influence and do more to damage the plaintiff than some impecunious person, and for that reason, his wealth, at the time the slanders were uttered, or his reputed wealth, may be shown by reputation. The defendant's reputed wealth may be shown as bearing upon the question of compensatory damages, and there is no question but that the wealth of the defendant at the time of trial may be shown as bearing upon the question of exemplary or punitive damages. And there is, of course, no question that in an action for libel or slander, punitive or exemplary damages may be returned by the jury as a part of

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their verdict, and they are permitted, upon the ground that in such an action it is proper for the jury, within its sound discretion, to punish a defendant for misconduct, and in connection with this, the authorities permit the wealth of the defendant to be shown in order that the jury may know what his wealth is and whether a small amount will be any punishment to him or not.

The case of *Hayner v. Cowden*, 27 Ohio St., 292, is directly in point upon this question. The court say upon page 296: "Against the objection made, the plaintiff offered evidence of the wealth of the defendant, and in the charge the court said this evidence might be considered in connection with the question of exemplary damages. We see no error in the admission of the evidence, or the charge of the court upon the subject. That punitive or exemplary damages in a proper case may be given, is not an open question in Ohio. In *Roberts v. Mason*, 10 Ohio St., 277; *Smith v. P. F. W. & C. R. R.*, 23 Ohio St., 10, the court allowed the jury to consider the wealth of the defendant in connection with the question of punitive damages. If, then, punishment be an object of a verdict, a small sum would not be felt by a defendant of large wealth. The vengeance of the law would scarcely be appreciated, and he could afford to pay and slander still. There are cases which put the admission of the evidence upon this ground. *Alpin v. Morton*, 21 Ohio St., 536, intimates that the reason is to enable the jury to determine how much plaintiff has been injured."

It being competent for the plaintiff to prove this in making out her case, the question of the wealth of the defendant was one of the proper issues in the case, and the defendant, when she went upon the stand, might have testified upon that question, for it was proper for the plaintiff to go into it, and in our judgment it was not improper for the plaintiff to cross-examine the defendant. Although plaintiff failed in making out her case to go into it, nevertheless it was proper testimony for the plaintiff, and the only objection would be that the testimony was not offered in its proper order. The defendant was put upon the stand by the plaintiff when she was offering her testimony and cross-examined about this letter, and it was within the discretion of the court to permit testimony in behalf of the plaintiff after the plaintiff had once rested, and without passing directly upon the question whether it would have been proper for the defendant to have shown her lack of wealth and therefore proper for counsel to have cross-examined her upon this, it is certainly clear that this was proper testimony for the plaintiff, and it was not error for the court to admit the testimony, even though out of order. So that so far as the admitting of this testimony was concerned, we see no error in the ruling of the court.

It is complained that the court erred in admitting a certain petition for divorce, that had been filed by the defendant below against her husband soon after the utterance of these alleged slanderous words, and in considering that question, it will be necessary to briefly state the facts out of which this action for slander and libel grew.

It appears from the evidence in the case, that in August, 1898, plaintiff below was living as a domestic in the house of Mr. and Mrs. Steen, and Mr. and Mrs. Steen having quarreled, having had some trouble perhaps, in regard to his attentions to the plaintiff below, Mrs. Steen, charging him with coming home with her late at night, she (Mrs. Steen) left the house and stayed away over night and came back next day, and one thing she is charged with, relates to what she claimed she discovered

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when she came back, to-wit: that her husband and Miss Friend had been occupying the same bed, from the evidences she saw of two persons having occupied the bed. All of these utterances grew out of the relations of her husband with Laurie Friend.

The defendant claimed at the trial that her husband had had improper relations with Laurie Friend and she testified to what she had seen and heard that led her to believe that that was true, and she set up in her answer, that what she stated in her letter was true, to-wit: that this girl had driven her out of her house, and that she had taken her place in the family, and that "her husband is gone on her," that being one of the expressions used in the letter.

Now a few days after this trouble, and a few days after she had claimed her husband had intercourse with Laurie Friend, she filed this petition for divorce and in that petition no charge is made against her husband with reference to Laurie Friend. She charges her husband with extreme cruelty, but no charge is made as to Laurie Friend, and in our judgment it was competent on that ground to admit this petition, for the reason that while she claimed that there had been improper conduct between Laurie Friend and her husband, she immediately filed a petition for divorce and made no averment in the petition in regard thereto, and it might tend to impeach her upon her charge that she had observed improper things between her husband and Laurie Friend. Her silence in this petition, filed in court during the same week, would tend to impeach her statement, and on that ground if no other, we think it was proper for the court to admit this petition, that was filed at that time against her husband and which contained no reference to Laurie Friend or any misconduct between Laurie Friend and her husband.

The divorce suit came along soon after this alleged slander and is connected with it in such a way that it is impossible to separate them, and so she was cross-examined somewhat along the line as to whether or not she was not in the habit of suing her husband for divorce, and in this connection the petition was offered in evidence, and in our judgment, there was no error in the court in admitting it.

The charge of the court which is objected to, is quite brief and there were some questions in the case that were not touched upon by the court. Questions of punitive and exemplary damages, allowance of attorney fees, character of the plaintiff and some other things that might properly have been discussed by the court in his charge to the jury, were not touched upon in the charge, but no request was made by the defendant below for any further instructions. The defendant, apparently, was satisfied with the charge and the only exception to it was the exception to the charge as a whole. Now, we think that if the defendant desired further instruction upon these questions she should have requested it of the court. The defendant may have been willing to have the case go to the jury without any instruction upon these questions. She may not have cared to have the court instruct the jury upon the questions of punitive or exemplary damages, which the court might have touched upon, and the defendant asked for no further instructions, and in our judgment it could not be held to be prejudicial error against the defendant that the charge of the court was not as full as it might have been. To have reached this question the defendant should have requested further instructions from the court.

There was quite an amount of testimony put in by the defendant below upon the character of the plaintiff, and it is claimed that the judg-

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ment should be set aside because of the bad character which it is claimed this testimony established on the part of the plaintiff below, and for that reason the verdict was against the weight of the evidence or at least excessive; but that question was submitted to the jury: the parties were before the jury, and they saw the witnesses that testified as to the character of the plaintiff, and while this might go in mitigation of damages, it would not be a complete defense, if the words were in fact uttered and were in fact false, and we see no reason to disturb the verdict on that ground.

It is claimed that the letter which was written by Mrs. Steen was a privileged communication, and that, therefore, no damages could be allowed on that account, and that it was not proper to be taken into account, and that it was not proper to be taken into consideration by the jury, under all the circumstances of the case; that it was privileged and that the court should have so held. It appears that after this quarrel between Mrs. Steen and her husband, in which she charged him with being out with this girl at night, she left the house and came back the next day and claimed that there were evidences that her husband and Laurie Friend had occupied the same bed, and soon after that she wrote this letter, which was enclosed in a letter addressed to the post-master, requesting him to deliver it to Laurie Friend's father.

The letter is not very long and is as follows:

"Portage, Ohio, August the 4, 1898.

"My Friend: I will write you Concerning Laurie. I wish you would Come out here and take her home as she has caused me a great deal of trouble so much so that She has seperated Me and my husband and she is still Staying with him Alone. Please come at once. My husband has treated me shamefully through her And driven me and my Children away from home For her sake. I told her I would inform her folks of her conduct and she said she would have me arrested if i did. I have caught them in a room together Talking about me and now she has got him so far gone on her that i and the children are driven out And she has taken my Place. O it is hard to bear, it is Killing me to think of it. We had trouble before but Nothing like this. Please come as soon as possible and look after her and very much oblige

"Mrs. Tillie Steen."

The letter, in our judgment, would be a libelous publication if it is not privileged. Language may be libelous and actionable *per se*, that would not be slanderous *per se*. If it is such language as to bring one into disrepute, ridicule and contempt in the neighborhood it may be libelous; but this language, in this letter, substantially charges her with having crowded this man's wife out of the house and taken her place in the house and living there with her husband, and that she had "got him so far gone on her that she and the children were driven out," that is, he was infatuated with her, and, on the whole, in our judgment, the letter would be libelous published against a woman, if false.

Now can the defendant avail herself of the claim that it was a privileged communication? We do not deem it necessary to determine whether the letter was in fact privileged or not. This defense was not pleaded in the answer but the allegations in the answer simply are, after admitting that the letter had been written, that the statements con-

tained therein were not untruthful and false, and that the letter contained nothing untruthful or libelous.

To make the defense that a paper writing, libelous upon its face, is privileged, it must be pleaded, and the facts constituting the privilege must be set forth in the answer, in order that the plaintiff may be advised of the defense, and the issue is for the jury. The privilege claimed here would only be a qualified privilege at most, and if the letter was uttered maliciously, the privilege would not avail. The Supreme Court say in *Post Publishing Co. v. Moloney*, 50 Ohio St., 71, in the second paragraph of the syllabus, "Where the defense to an action for libel is, that the publication was privileged, and issue is joined upon the allegations of fact on which the alleged privilege depends, the issue is for the jury, and a refusal to instruct them that the publication was privileged, is not error."

So that where privilege is claimed the facts must be pleaded and issue must be joined between the parties, and those issues of fact are to be submitted to the jury. The court say, on page 84 of the opinion, in discussing this question briefly: "Writers upon the subject, include all privileged publications within two classes; those which are absolutely privileged, and those in which the privilege is but qualified. There are not many of the first class, nor is it desirable there should be." And after discussing that, on page 85, they say: "It is not contended that the publication in question was one of absolute privilege; and the facts which the defendant claims made it one of qualified privilege not appearing in the petition, it became necessary to plead them by way of defense. They were so pleaded in the second defense of the answer, and were put in issue by the reply; and being so in issue, it was not within the province of the court to instruct the jury, that the publication was privileged, without regard to what the proof before them might be, or how they might find upon those issues."

That is sufficient to dispose of this question as to whether the letter was a privileged communication either absolute or qualified. The fact that the alleged privilege was not pleaded and the issues made up upon that question, take it out of the case, and therefore there was no error so far as this ruling of the court is concerned.

It is further claimed that there was error in the action of the court in refusing to rule out a statement of counsel made during the trial of the case. In the cross-examination of the defendant below, counsel for plaintiff asked her in regard to one of these quarrels with her husband:

"Q. What did your husband say?" Answer. "He said the same; of course he was under the influence of liquor or he would not have said so."

"Q. He is a real nice affectionate husband he is. How many hundred dollars did he pay you the last time you filed a case against him? (Defendant objected.)

Mr. Emsly to the jury: "He paid her \$2,800."

Then the record contains this: "Defendant moved the court to strike from the jury the remarks made by Mr. Emsly; motion overruled and exception."

Mr. James: "Mr. Emsly has said that Mr. Steen gave Mrs. Steen \$2,800 in settlement of the divorce case. To that we object and ask the court to charge the jury that they have no concern in any statement of

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Mr. Emsly's relative to \$2,800 or any other matter, and I now ask the court to charge the jury to that effect."

This the court refused to do, and an exception was taken.

It is claimed that the court erred in refusing to rule from the jury this statement that had been made by counsel to the jury. The record does not disclose that any evidence was offered tending to show that Mrs. Steen's husband gave her twenty-eight hundred dollars or any other sum upon the occasion of her filing an action against him for divorce.

After this action was taken by the court no further questions were put to her along that line and the record was left in that condition. Now the question is squarely made here. Counsel for Mrs. Steen not only objected to the statement made, which objection was overruled by the court, but formally moved the court to charge the jury and say to the jury that they should not regard this statement, and the court overruled this motion of counsel. That this statement was made to the jury, the record affirmatively shows; that the court refused to take it from the jury and instruct them not to consider it upon formal and express motion to that effect, the record affirmatively shows; the record shows *all* that was said, both by counsel and court.

If plaintiff was bringing actions against her husband for divorce for the purpose of getting money out of him, as this statement would seem to indicate, that would have a tendency to prejudice her case with the jury, and perhaps very materially, as this action for slander was closely associated with the divorce case. The statement was made directly to the jury by counsel for plaintiff; not in argument; not as a conclusion, but as a statement of absolute fact which was not supported by any testimony, and the statement remained with the jury with the apparent approval of the court after a motion had been made to rule it out. One of the things that Mrs. Steen complained of was that she was driven from her home by the plaintiff, and that she had been crowded out, and that plaintiff had taken her place in the family. If it was true that she had made twenty-eight hundred dollars by the filing of a former action for divorce against her husband, that would tend to show that her leaving home was perhaps for the purpose of getting more money out of her husband and that she did not leave for the reasons she gave, but that she was filing one suit after another against her husband for the purpose of making money, and the statement going to the jury in this way, with the apparent approval of the court, probably was prejudicial, and perhaps very prejudicial to the defendant below, under all the circumstances.

In our judgment the court erred in refusing to rule this statement from the jury, after attention was directly called to it and the action of the court expressly invoked; and being of the opinion that the court erred in this respect, and that the error was prejudicial to the defendant below, the judgment must be reversed and the verdict set aside, and the cause remanded for a new trial.

James & Beverstock, for plaintiff in error.

B. Emsly, for defendant in error.

SIDEWALKS—RAILROADS.

[Hardin Circuit Court, October Term, 1899.]

Price, Norris and Day, JJ.

LAVINA LYNCH v. C., C., C. & ST. L. RY. CO.

1. CROSSINGS OVER RAILWAY TRACKS—SEC. 3324, REV. STAT.

Under sec. 3324, Rev. Stat., a railroad company is liable for damages sustained in person or property in any manner by reason of the want or insufficiency of a crossing over its track.

2. "CROSSING" RESTRICTED TO PART OVER TRACK.

The word "crossing," as used in the section referred to, is used in a limited or restricted sense, and includes only that part of the structure immediately over the railway tracks and sufficient space on either side thereof to make a sufficient and safe way over the tracks.

3. NOT LIABLE AS ABUTTING OWNER.

A railway company, merely as owner of abutting lots and lands in a municipal corporation, is not liable for injuries to persons or property resulting from a defective sidewalk maintained on a street crossing its right of way.

4. DIRECTING JUDGMENT ON PLEADINGS.

Where the petition fails to state a cause of action against the defendant, it is not error for the court to refuse to receive evidence offered by the plaintiff on the trial and to give judgment for defendant on the pleadings.

HEARD ON ERROR.

DAY, J.

The plaintiff predicates her right of recovery in this case, upon the provisions of sec. 3324, Rev. Stat., which imposes several duties upon railroad companies at public crossings, and among other things provides as follows. * * * and before operating such road shall cause to be maintained at every point where any public road, street, lane or highway used by the public, crosses such railroad, safe and sufficient crossings, * * * and such company or person shall be liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of any * * * crossing, * * * or any neglect or carelessness in the construction thereof, or in keeping the same in repair, etc.

The petition first filed alleged that the defendant company maintained a defective crossing or sidewalk over its railroad in the village of Mt. Victory, Hardin county, in May, 1897, at a point where the railroad crosses a street of said village. That the railroad company negligently and carelessly suffered said sidewalk or crossing to decay and become in a condition of disrepair, so that it was insufficient and unsafe as a crossing; and that on that day, the plaintiff, while lawfully traveling on said highway, walked on said sidewalk or crossing, and without fault on her part was seriously injured and permanently disabled, to her damage \$5,000, for which sum judgment is prayed. An answer was filed denying negligence on the part of the railroad company, and alleging negligence of plaintiff contributing to her own injury. A reply denied contributory negligence of plaintiff and prayed as in the petition.

The alternative character of the averment in the petition, that the accident and injury occurred on the crossing or sidewalk, left the precise place of the accident uncertain; but an amendment to the petition set-

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ting out the precise point of the casualty, makes it absolutely certain the plaintiff was not injured at a crossing over the railroad track or tracks, but was injured on a sidewalk, some distance from the railroad tracks, and at a point very near the north line of the railroad company's right of way. With the certainty, supplied by the amended pleading, that the scene of the accident and injury was not upon the crossing over the tracks of the railroad, but upon a sidewalk some distance from the tracks, the cause came on for trial, whereupon the court, on motion, excluded all evidence on the part of plaintiff offered to maintain the plaintiff's contention; and also, on motion, gave judgment on the pleadings in favor of the defendant, dismissing plaintiff's petition and requiring her to pay the costs.

The plaintiff prosecutes error here, and assigns the action of the lower court as erroneous.

If the plaintiff in the petition and amendment thereto has stated a good and sufficient cause of action, making the defendant railroad company liable for an injury resulting from the company's negligent breach of duty to plaintiff, then the summary disposition of the case by the lower court was unwarranted, and must of necessity be reversed. It would be otherwise, however, if the petition showed no liability of the railway company.

It has been held by this court, in *Sammins v. Wilhelm*, 3 Circ. Dec., 587, that there is no duty resting on an abutting land or lot owner to keep a street in a safe condition for the public travel, and that such owner is not liable for an injury resulting from a defective sidewalk, even though such owner omitted and neglected to keep the same in repair. That duty is cast upon the municipal corporation in which the defective walk is situate, and the corporation, if negligent, is liable for such injury. Of the same import and in furtherance of the doctrine, is *Wilhelm v. Defiance (City)*, 58 Ohio St., 56, where it is held that a municipality cannot recover from a lot owner indemnity on account of a judgment recovered against it for injuries occasioned by such owner's active negligence in the construction of the walk.

So it seems to be definitely settled as the law of this state, that no recovery can be had in favor of any one, against an abutting owner on account of a defective sidewalk. The rule is different, however, in the case of a defective crossing over a railroad; for sec. 3324, Rev. Stat., expressly provides, in such case, that the railway company shall be liable. The important question, therefore, in this case is: Did the accident occur by reason of a defective sidewalk, or on account of a deficient crossing; or rather, was the immediate place of the accident on a crossing or on a sidewalk?

Section 3324, Rev. Stat., requires a railway company to construct "safe and sufficient crossings," and makes the company liable "for all damages sustained in person or property in any manner, by reason of the want or insufficiency of any such * * * crossing," while sec. 3337-3, Rev. Stat., makes it the duty of such company to construct "crossings" and also "sufficient sidewalks on both sides of streets intersected by their roads" but does not impose liability for damages resulting from omission to construct sidewalk or for insufficiency of construction. From a reading of the two sections, it seems apparent it was the legislative intent to distinguish if that was necessary, between a crossing and a sidewalk. The two are not treated as identical, but as

entirely distinct. Crossings, only, are referred to in the one section, while crossings and also sidewalks, are mentioned in the other, from which fact, and from other considerations suggested on a reading of this part of the railway statutes, we conclude the word, "sidewalk," is used in its broadest and most general sense, while the word "crossing," is used in a limited and restricted one, and was intended to include only that part of the structure immediately over and across the railroad track or tracks, and sufficient space on either side to make a proper and sufficient way across such track or tracks. If this is correct it would seem to follow that all of the structure, other than the immediate crossing, would be "sidewalk," while only that part immediately over and across the tracks would be "crossing," within the meaning of sec. 3324, Rev. Stat.

If this reasoning is not at fault, then, in view of the decisions noticed, to entitle the plaintiff to recover, to enable her to state a cause of action for damages against the railway company in this case, it would be necessary for her to show in her petition and prove on the trial, that the accident and injury to her occurred on the crossing on the structure immediately over the railroad tracks, and was occasioned by the failure to maintain there a sufficient and safe crossing. This was not done; and on the contrary, the amendment to the petition stating the precise point where the accident occurred, as I have said, makes it absolutely certain the injury was not occasioned on, or by reason of an unsafe crossing maintained by the defendant company, but that it did occur on and by reason of a defective sidewalk, for which the defendant company, as abutting owner merely, was and is not liable.

The petition, with the amendment, did not state a cause of action against the defendant; and it was not error for the court to decline to receive evidence offered on the trial, nor to give judgment for defendant on the pleadings. The judgment is affirmed with costs.

Phil. M. Crow, for plaintiff.

Geo. E. Crane, for defendant.

REAL PROPERTY—PAROL CONTRACTS.

[Seneca Circuit Court, December Term, 1899.]

Day, Price and Norris, JJ.

* ENOCH H. FRANCE V. WM. R. MCKENZIE.

1. PAROL CONTRACT RELATING TO LAND ENFORCEABLE.

While a parol contract for land or interest in land, by virtue of sec. 4198, Rev. Stat., the statute of frauds and perjuries, cannot be enforced at law, yet such part performance of such a contract as would make its rescission inequitable, will remove such parol contract from the operation of the strict letter of the law and permit it to be enforced in equity.

2. FACTS NECESSARY TO REMOVE FROM STATUTE.

Payment of an agreed consideration is not alone sufficient to remove such a contract from the operation of the statute, but payment and possession yielded and taken under the contract, with use and expenditure of money in

* The judgment of the circuit court in this case was affirmed by the Supreme Court, June 12, 1900; unreported.

France v. McKenzie.

betterment or improvement, is available to relieve the contract from the imputation of the fraud statute and make it enforceable as a matter in equity, on the lines of *fraudulent estoppel*.

8. RULES APPLIED.

Under the foregoing rules, a parol agreement, succeeding the expiration of a five years' written lease, for use and possession of a strip of land, for private railway purposes, connecting lessee's stone quarry with a railroad, "so long as lessee pays the agreed rental," under which possession was yielded and held for more than six years, or until the death of lessor, and the expenditure of \$600 in acquiring adjoining land for the same purpose, and which, without the original tract, would be worthless to lessee, may be specifically enforced against a purchaser from the heirs of lessor, who (the purchaser) took with full knowledge of the facts and who, during such occupancy of the original tract, sold the second to lessee for the purposes mentioned; such purchaser must be held to have made himself a party to the contract in parol, with the rights and liabilities of lessor.

APPEAL.**DAY, J.**

Plaintiff's action, in the lowest court and here, is for an injunction to restrain the defendant from tearing up and removing from the defendant's land a railroad track, which the plaintiff claims was rightfully constructed there, with the right to remain intact, for the uses and purposes of plaintiff. It is said in the petition that defendant threatens to and will remove the part of plaintiff's railroad track situate on and across lands in section fifteen, now owned by defendant, to his damage, and injunction is prayed. The defense is that the railroad track is located and situated on defendant's lands without good right from defendant, or any one authorized to confer the right, and that plaintiff has no right, either legal or equitable, to maintain said track on his lands.

There is very little disagreement as to the facts; the main and material facts are undisputed. The parties differ, mainly, as to the legal effect of the undisputed facts. The facts are: The plaintiff is, and for a long time has been, the owner of a valuable stone quarry situate a little more than a mile from the line of a branch of the Pennsylvania railroad. The quarry was opened in 1883, and has been operated ever since at a profit. The plaintiff has expended for machinery and appliances for advantageous operation \$10,000. In 1883, plaintiff constructed a railway from the quarry to the said Pennsylvania railroad, a distance of one mile and two hundred feet, by means of which the product of the quarry, for more than fourteen years, has been and still is transported in large quantities to many towns in and out of Ohio. This railway cost \$5,000, and without such means of transportation the quarry will be almost valueless. This railway extends from the quarry south across a number of tracts of land, and especially, for a distance of fifty-eight rods, through lands in section 14, of which defendant became the owner in 1889, and forty rods through adjoining lands in section 15, of which the defendant became the owner in 1895. Prior to the acquisition of the last named lands, in 1893, the defendant conveyed to plaintiff, for a consideration of \$600, all that part of section 14, occupied by said railway, for a term: "As long as the same is occupied and used in connection with the said quarry." This grant is in full force, and is of no value whatever without the right to occupy and operate said railway across defendant's said land in section 15. At the time and before this railway was built, in November, 1883, one Mary Baker was the owner in fee of the land in section 15, and on said date, by a proper instrument in writ-

ing, leased to plaintiff said land in section 15 for a term of five years, with the right to construct and operate the said railway for the purpose of carrying the products of said quarry; and at the expiration of said five year term, covenanted and agreed in parol with plaintiff, that for the consideration of twenty dollars rental per annum, plaintiff should have the right and might continue to occupy and use the strip of land occupied by said track, for the uses and operation of said railway, so long as it was used for carrying the product of the said quarry. Under this parol contract plaintiff used and occupied the said strip of land with his said railway, and paid the agreed rental of \$20 dollars per annum up to and until the death of Mary Baker, which occurred in September, 1894. On March 14, 1895, the defendant, by proper conveyance, from the heirs of Mary Baker, deceased, became the owner in fee of the said land in section 15. There was no reservation of plaintiff's right to the use of said strip of land occupied by his railway, made in said deed of conveyance to defendant. The continued possession and use of the said strip of land in section 15, after the expiration of the five years' term, granted by the lease of Mary Baker in 1883, was referable wholly to the parol contract between plaintiff and the said Mary Baker, made and entered into after the expiration of the term under said written lease.

Under this state of the facts, has the plaintiff any rights of continued possession and use of the said strip of land for the purposes of operating his railway and quarry, that may be ascertained and enforced in this proceeding, as against the defendant? There was no reservation or saving of such rights made in the deed to defendant, from the heirs of Mary Baker, deceased, and plaintiff's contract with Mary Baker, by which alone he secured such rights as he has in the matter, rests in parol, is for an interest in real estate, and not enforceable at law; and if at all, only upon equitable considerations. The claim urged by defendant's counsel, that plaintiff has not the right of eminent domain, nor a contract for the possession and use of this land that is enforceable as matter of law, must be, and is allowed as fully and broadly as claimed; and if plaintiff possesses a right to and continued occupation and use of the land in question, it is because of equitable considerations alone. Has plaintiff such right based on such considerations, is the controlling question in the case.

A parol contract for land or an interest in land, by virtue of the provisions of the statute of frauds and perjuries, cannot be enforced at law. But it is well settled by repeated adjudications of the courts, that part performance of the contract, such part performance as would make a rescission of it inequitable and unjust, will remove such parol contract from the operation of the strict letter of the law and permit it to be enforced in equity. Payment of the agreed consideration alone is not sufficient for this purpose; but payment and possession yielded and taken under the contract, with use and expenditure of money in betterment or improvement, is available, and will have the effect to relieve the contract from the imputation of the frauds statute, and make it enforceable as a matter in equity, on the lines of equitable estoppel.

The original contract, between Mrs. Baker and plaintiff, was a written lease for a term of five years, and it expired, by its own terms, in November, 1888; after that time plaintiff possessed and used the land in section 15 in virtue of an agreement, in parol, between them. This

agreement was, in substance, that plaintiff might have the possession and use of the strip of land for purposes of his railway, to carry the product of his quarry to market, as long as needed for that purpose; and so long as he paid an annual rental of \$20 for such use. Under that contract possession was yielded and taken and held for more than six years, or until the decease of Mrs. Baker in 1894. Plaintiff peaceably and openly took and maintained possession, paid the stipulated rental each year; kept his railway in repair and bettered it; used and operated it as a railway in connection with his quarry; and also, during such operation and occupation plaintiff became the owner, by purchase from defendant, at a very large price, of the right of way for said railway, across defendant's adjoining land in section 14, which right of way was practically without value unless the right of way across section 15 was to be continued. In view of all these facts: Payment of the contract price as annual rental, yielding, taking and maintaining possession, investment of \$600 in right of way across adjoining land, by purchase from defendant; the apparent good faith of the whole transaction—it would seem that plaintiff acquired such rights and equities in the subject matter as would make it inequitable and unjust to rescind or wholly disregard his agreement with Mrs. Baker; and as to her and those claiming through or under her, the suggestion is irresistible that a finding sustaining the integrity of the agreement and a decree specifically enforcing it, is required to perfect and save the rights of the parties. The same suggestion presents itself as to all third persons who obtained an interest in the land, as did McKenzie, with full notice, or who, by reason of the attending and surrounding facts and circumstances, are chargeable with notice of the rights and equities of the plaintiff. The defendant does not occupy the position of an innocent purchaser for value without notice of existing equities. It is morally and legally certain, from all the facts appearing, that defendant had full information as to the exact situation, and became an owner of the land in section 15, charged with the burdens put upon it by the performed contract of its former owner, from whom he got his title; so that plaintiff has the same right to demand relief, as against defendant, as he would have had against Mrs. Baker, were she still alive and owner and a party to this action. By becoming a purchaser, with notice of plaintiff's rights, defendant, in effect, made himself a party to the contract in parol; and has the rights and liabilities of Mrs. Baker. He must permit plaintiff the use of the strip of land in section 15, occupied by plaintiff's railway, for purposes of said railway while used in connection with said quarry, and is entitled to be paid a reasonable sum annually as rental, which reasonable sum, it is agreed by the parties, is \$20 per year; or if defendant prefers he may have \$225 for the entire term, as long as needed to carry the products of the quarry to market. Defendant may have the option in that respect; the choice, however, must be made at once.

There will be a finding in favor of plaintiff and the injunction will be made perpetual upon his paying rental of \$20 per year or \$225 for the entire term.

BUILDING AND LOAN COMPANIES.

[Hancock Circuit Court, December Term, 1899.]

Day, Price and Norris, JJ.

WM. A. DEMLAND V. PIONEER SAVINGS AND LOAN CO.**1. PARTIES MAY CONTRACT WITH REFERENCE TO STATE LAWS.**

Citizens of different states may contract with reference to the laws of either state. Thus, a contract, executed in Ohio, with a Minnesota building and loan company, may be governed, if the parties so elect, by the laws of Minnesota.

2. WHERE NO CHOICE IS MADE—DUTY OF COURT.

But where the contracting parties, residents of different states, make no choice, in express terms, then it becomes the duty of the court to ascertain from the evidence and circumstances, surrounding the transaction, which code of laws was selected or intended by the parties to govern.

3. INTEREST AND PREMIUM ALLOWED—NOT USURY.

Where the Minnesota law permitted the reception of five per cent. interest and five per cent. penalty, the contract, though executed in Ohio, is not usurious.

4. CHANGING FORM OF CERTIFICATE DOES NOT INVALIDATE.

Where the business, when done, was not unlawful, the mere changing of the form of a certificate, as under the Ohio law requiring a deposit and certificate from foreign companies, does not invalidate the transaction.

5. AGREEMENT TO MATURE STOCK—FAILURE NOT FRAUD.

Under an agreement to mature stock in a building and loan company in a certain time, where no fraud was practiced by the company, but in so agreeing, the company was simply too hopeful of the future and did not sufficiently consider the chances of financial depression and disaster, and where borrowers knew the circumstances under which the agreement was made, and the resources of the company, a failure does not operate as a fraud upon their rights.

6. PROMISE CANNOT BE SPECIFICALLY ENFORCED.

And such a promise to a member and borrower in a mutual loan and building association cannot be specifically enforced where the failure is not chargeable to the laches of the company, but was due to financial and business depression.

7. MEMBERS MUST SHARE LOSSES.

Members of a mutual building and loan association, whether as investors or borrowers, must share *pro rata* the losses of the concern.

APPEAL.

DAY, J.

The above named and that of Hannah L. Dillinger v. same, numbers 778 and 774 on this docket, are two cases precisely alike except in the names of the plaintiffs. In all other respects the facts are the same, so that the disposition of one disposes of both.

The petitions assert title and possession in plaintiffs of certain real estate described, situate in the city of Findlay, Ohio; that defendant claims some interest in such real estate adverse to the plaintiffs, asking that it be set up, and that it be held void as against plaintiffs, and that title be quieted in them. In obedience to the request that defendant set up its claim of interest in the real estate described in the petitions, the defendant company, in the form of a cross-petition, sets out as facts, constituting a defense and entitling it to affirmation relief: That the defendant is a Minnesota corporation, duly organized as a mutual building and

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loan association, first under the name of the National Building, Loan and Protective Union, and subsequently changed to the Pioneer Savings and Loan Company, under which name it has continued and is now known; that on November 1, 1890, plaintiffs became members of this corporation, each taking thirteen shares of its series "C" stock, which stock was subsequently, on about December 1, 1891, with the consent of plaintiffs, changed for seven shares of short time stock of said company, which shares of stock plaintiffs are still the owners and holders of, subject to a pledge thereof to the company, as collateral security for the payment of a loan of money made to them; that on about March, 1891, on application of plaintiffs, said company loaned each of them \$800. Each plaintiff executed a promissory note for the amount, payable seventy-three months after date, with interest at five per cent. and premium at five per cent. per annum, payable in monthly installments at the office of the company at Minneapolis, Minnesota; and at the same time, to secure the repayment of said loans, plaintiffs executed mortgages on the real estate described in the respective petitions, which mortgages were duly recorded in Hancock county records of mortgages. There was a condition in each of said mortgages that they were to become void upon the proper payment of said notes according to their terms, otherwise to remain in full force. On March 2, 1891, upon the change for short time stock, \$100 was paid on each of said notes and credited thereon. That plaintiffs paid the interest and premiums in said notes stipulated, up to December 1, 1896; since which time none has been paid; nor have the principal sums been paid in full, or to a greater extent than the aggregate amount of payments of dues made on the stock of said plaintiffs, which aggregate payments amounts in each case to \$420, and no more. That plaintiffs made default in paying dues, so that said stock has become forfeited to said company under the laws of Minnesota, and plaintiffs' membership has terminated by reason of their default; that after deducting charges, fines, etc., \$13.10, the defendant company has applied the sum of all payments on said stock to the payment of said loans; and there still remains due and unpaid thereof the sum of \$292.10, in each case, with interest and premium thereon after December 1, 1896; and therefore that the conditions of said mortgages have been broken. That on April 26, 1897, the corporation, under the laws of Minnesota, went into voluntary liquidation and is now winding up its affairs.

The prayer is for an accounting between plaintiffs and defendant; that the certificates of stock held by plaintiffs be cancelled; that plaintiff's equity of redemption be foreclosed, the premises sold and defendant company paid out of the proceeds, the amount found to be due it.

The answers to the cross-petitions do not deny the facts stated, but concede them, and say in avoidance: That the notes and mortgages and the stock, series "C," was made and entered into by plaintiffs and defendant in the city of Findlay, state of Ohio, and is one transaction, and a contract governed by the laws of Ohio; that the agreement to pay five per cent. interest and premium was not fixed by competitive bidding, was an agreement to pay ten per cent. interest per annum and therefore usurious and void. That defendant fraudulently made the contracts, and never at any time intended to comply with the terms of the stock, to mature it in six and one-half years; and fraudulently omitted and failed to mature said stock in said time; and treating the transactions as one,

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plaintiffs have paid all the legal interest on said loans together with the principal, and have each overpaid to the extent of \$65.27. That defendant has failed and omitted to make the deposit necessary to enable it to do business in Ohio, since May 1, 1891; and therefore has no right to make the contract changing the stock of plaintiffs as averred in the cross petition. Wherefore plaintiffs pray as in their petitions. A reply was filed putting in issue any substantive matter of defense in the answers to the cross-petitions.

It will be seen that the issues presented in each case arise on the cross-petition of defendant, and the answers thereto of the plaintiffs, and are mainly as to the legality and good faith of the transactions. It is conceded that plaintiffs were stockholders and members of the defendant corporation; that they borrowed the money and gave the notes and mortgages as set out in the cross-petition; that payments of dues on stock, and of premium and interest on the notes, were made at the times and in the amounts precisely as set out in the cross-petition. This is perhaps not formally admitted in the pleadings, but it is clearly made to appear by the testimony of plaintiffs and defendant, so it may be said to be conceded; and it may also be said the account of the payments made on account of stock and on the notes attached to the cross-petition is correct and shows all payments made by plaintiffs to the company; except some payments on account of abstracts of title, initiation fee paid the agent, or in preliminary matters, and which did not go to the company and with which the company is not chargeable. The parties do not differ seriously as to the facts, but are in agreement as to the material facts of the transactions, and perhaps the only dispute between the parties is as to the effect of the law when applied to the unquestioned facts.

It is said the contract was an Ohio one for the reason it was made in Ohio, and therefore the agreement to pay ten per cent. per annum was usurious and void. If the premises are right the propriety of the conclusion must be conceded. It is the law of Ohio that not more than eight per cent. can be properly charged for the use of money, and that sum can only properly be exacted upon an agreement in writing. No premium is allowed in Ohio, except to a building and loan association, and at the date of this transaction, December, 1890, that must be fixed by competitive bidding, which was not done in this case; so, if the Ohio statutes obtain and control, it is clear that nearly or quite one-half the payments on the notes as interest and premiums were usurious, and must be applied as payments on account of the principal debt. The suggestion therefore that the contract is an Ohio one is important. It is certain the defendant company is a corporation under the laws of Minnesota. It is also a mutual building and loan company, and by said laws was authorized to do business as such building and loan company. Its location and principal office and officers were in Minnesota. It did business through its agent with plaintiffs at Findlay, Ohio, where both plaintiffs reside; the contract then was between citizens of different states. The parties were at liberty and could with propriety contract with reference to the laws of either state; so that the contract when made, would be governed by the law of the state selected by the contracting parties. If the parties, as in this case, made no choice in express terms, then it becomes the duty of the court in which the contention is, to ascertain from the evidence and circumstances surrounding and attending the transaction, which of the states—which code of laws

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—was selected and intended by the parties to cover and govern and determine the rights of the parties to the contract. The evidence bearing on this proposition, in connection with the surrounding circumstances, we think abundantly establishes the contract as a Minnesota one, to be controlled by the laws of that state. The Minnesota law authorizes the reception of interest and premium by such company; the amount of premium is not required to be fixed by competitive bidding, and in that respect there is nothing of usury in the payment of five per cent. interest and five per cent. premium.

This business, the making of the contracts, subscribing for stock, obtaining the loans—the obligations on either side, all except the changing from one series of stock to another kind of stock, was transacted, and completed, before the law of Ohio requiring a deposit and certificate, to entitle a non-domestic corporation to do business in the state, became the law. The business, when done, was not unlawful, and the mere changing of the form of a certificate of stock it is not believed, would have the effect to invalidate any part of the transaction.

Neither do we think that the agreement to mature the stock in six and one-half years, and a failure to do so, was fraudulent or in any way operated as a fraud, on the rights of the plaintiffs. No fraud was practiced by the corporation in any respect. The company in agreeing to mature the stock in a short time, was perhaps too hopeful of the future, and did not sufficiently discount the chances of financial depression and disaster. The plaintiffs believed they understood the plan and purpose of the company, and did understand it, and voluntarily became members of it, and borrowed money of it and gave their notes and mortgages, and an assignment of the stock as collateral to secure the repayment. They expected their payments of dues on stock, with the profits and dividends earned by the business of the company, would mature their stock and make it available for the payment of their loans, in the time stipulated; and it is possible, maybe probable, these expectations would have been realized, had the times continued propitious. While this is true, it is also true that plaintiffs were aware that the only source of revenue possessed by the company, was in the payment of small sums by its members in the way of dues on stock, and profits arising from its business of loaning money to its members; and its ability to mature the stock, as per agreement, in six and one-half years, was based altogether on anticipated earnings and receipts from the sources I have indicated. Presumably plaintiffs were possessed of all this knowledge, and as rational persons they were chargeable with notice, that at that time, depression and disaster might come, and that too, without fault of either plaintiffs or defendant, and render abortive all effort to mature the stock, as per stipulation. The duly authorized agent of prosperity was not then at the helm and in control of the elements, and panic and widespread disaster did come and seriously affected the situation. The stock did not mature or come near maturing in six and one-half years. The coming of the calamity however, was not the fault of the defendant corporation in any sense, and its coming is not to be charged to the defendant company as in any way fraudulent, as between it and the plaintiffs.

The stock transaction, while apparently connected with the loan of \$800, and perhaps concurrent as to time, was in fact a separate and distinct transaction. Plaintiffs could not become borrowers until they first became members of the corporation. They were not required to

borrow because they were members and stockholders. They were entitled to a loan, upon becoming members, but were not compelled to apply for and receive a loan. Whether they would become borrowers or not was a subject matter for agreement after the fact of membership. Having made such contract, therefore, the loans must be regarded as distinct transactions, by which plaintiffs became indebted to the company with a right to have the value of the stock pledged as collateral security, applied in payment; and a liability to have judgment go against them for the balance, with interest.

The rate of interest stipulated in the note is five per cent. The premium provided for of five per cent. is not an agreement for interest but was a sum probably agreed to be paid for precedence in getting the loan, and would cease when the loan matured. In this view only five per cent. interest can be allowed after December 1, 1896.

We decline to allow \$8.40 liquidation fee and \$4.20 as fines, on plaintiffs' stock after December, 1896. The company should have gone into liquidation at that date. The company was in default then, and not the plaintiffs. Plaintiffs should not be fined for the default of the other party, and therefore we disallow the \$4.20 charged as fines.

We find the value of the stock at the date of the maturity of the notes, December 1, 1896, to be \$420.00. This is to be credited on the amount of each note at the same date, which is \$700; and it leaves the sum of \$280.00 due the company, with five per cent. interest from December 1, 1896, till the 1st day of this term, December 12, 1899, from each plaintiff. There may be a finding of the amount due in each case; also a decree of foreclosure, and if amount is not paid by February 1, 1900, a sale is ordered at costs to plaintiffs.

Judgment accordingly.

Jason Blackford & Bial, for plaintiffs.

W. F. Duncan, for defendant.

NEGLIGENCE.

[Hancock Circuit Court, June Term, 1896.]

Seney, Day and Price, JJ.

TOLEDO & OHIO CENTRAL RAILWAY CO. V. ZACCHEUS EATHERTON ET AL.

1. NEGLIGENCE—DUTY UPON APPROACHING RAILWAY.

It is the duty of the occupants as well as the driver of a wagon, in approaching a known railroad crossing, to look and listen for approaching trains; and where the evidence shows that the occupants as well as the driver failed to do so, the occupants are guilty of negligence which will defeat their recovery.

2. IMPUTED NEGLIGENCE—WHEN IT ARISES.

The doctrine of imputed negligence would not arise in such case unless the occupants of the wagon notified the driver of the approaching train in time to stop and the latter failed to do so; in such event the railway company would be liable to the occupants for injuries resulting from its negligence.

HEARD ON ERROR.

SENEY, J.

This was an action brought in the court below for personal injuries. The averments in the petition are, in effect, that the railroad company

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negligently operated and run its trains in this city, and failure to ring a bell or sound a whistle at the crossing of one of the streets, Allen avenue, in the city of Findlay, and it running at a greater rate of speed through the city than is provided by ordinance. The ordinance has provided probably eight miles an hour, and a speed is claimed in the petition of forty miles an hour, and plaintiff claims damages, the decedent being killed on account of this negligence.

The railroad company filed an answer, denying the negligence charged in the petition, and as another defense claims that the decedent was guilty of contributory negligence. The affirmative defense upon contributory negligence was denied by reply.

The action was submitted to the court and jury, and resulted in a verdict in favor of the administrator, against the railway company, in the sum of \$1,800.00.

Motion for a new trial was interposed, which was overruled, and exceptions taken, and judgment rendered on the verdict.

A petition in error is filed in this court to reverse the action of the court below, alleging that the court erred in the respects averred in the motion for a new trial.

We find no error in the record, and the only important question to notice is whether the court erred in overruling the motion for a new trial because the verdict was not supported by the evidence.

The legal questions involved are not new; they arise probably in every railroad case that is submitted to the circuit court for determination. The only question is, are the facts proven to support negligence on behalf of the railway company; and are the facts proven to support contributory negligence on behalf of the decedent.

It appears on the night in question, probably at seven or eight o'clock in the evening, the Toledo & Ohio Central Railway Company, in the operation of its train, was coming through Findlay, and crossed before it reached the depot at Findlay what is known as Allen avenue. The decedent's husband was driving the wagon; there were three seats in it, and there were five passengers beside himself. He was driving the wagon down Allen avenue at a rate of probably eight miles an hour. The driver gave no heed to the train, neither looked nor listened, nor any one else in the wagon looked or listened for the approach of the train at this railroad crossing, although the railroad crossing was known to all the parties in the wagon, until they nearly reached the railroad crossing, when it was too late. The first element of looking or using their senses to discover the arrival of the train was expressed by a young lady, in the bill of exceptions, who says that she was the first one that looked and listened for the approach of the train, and she was so near the train that she could nearly touch the headlight, and when she noticed that they were that close to the train, she called the attention of her aunt to it, who is the decedent in this case, and immediately the aunt called the attention of her husband to it who was the driver of the wagon, and immediately he tried to check the horses, but it was too late. His horses had probably got across the railroad track and his wagon on the track. As the result of this several parties were killed, and several injured.

With this state of facts, is the railroad company liable; can they be made liable?

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The evidence is conflicting as to the negligence of the railroad company, as to whether they rang the bell or as to whether they sounded the whistle, but the jury were justified in finding that the railroad company were negligent; they were justified in finding that the railroad company did not ring the bell and did not sound the whistle as they approached Allen avenue. The jury were justified in finding that the railroad company was running its train at a greater rate of speed than is provided by the city ordinance of the city; they were running from twenty-five to forty miles an hour, and the ordinance provides eight miles an hour.

So that under the conflict of testimony in the bill, the negligence of the railroad company could well be found by the jury; and the only remaining question is, did the decedent contribute to her injury. As I have stated the facts, there is no doubt but what the driver of the wagon contributed to his injury; there is no doubt but what it was the duty of the driver of the wagon in approaching a railroad crossing, known to be a railroad crossing, to not drive at the rate of eight miles an hour, and in the view of the railroad was obstructed for any length of distance, he should exercise that much more care in approaching the railroad crossing.

The evidence of the plaintiff himself in the court below is that the view of the railroad was plain for 101 feet before they reached the railroad crossing, and from that point you could see the railroad for a distance of at least five hundred feet; you could see the train approaching one hundred feet from the railroad, a distance of at least five hundred feet. That being so, it was the duty of the driver of the wagon in approaching this railroad track to use his senses of sight and hearing, and his duty to stop and look and listen before he attempted to drive across the track, and if he did that in this case there would have no accident happened. A second's warning previous to the warning that was given by the young girl would have the horse and wagon on the side of the track without an attempt to cross. While it was the duty of this driver, the question is, was it the duty of the occupants of the wagon also to look and listen. It is claimed that this is the doctrine of imputed negligence, but the doctrine of imputed negligence does not apply in Ohio, goes far from that; the doctrine of imputed negligence might arise in this case if, when the husband was driving the wagon and the wife had notified the husband in time to stop, and the husband notwithstanding that warning had failed to stop, and the wife was in no condition to save herself, no doubt, although in that case the driver would be negligent, the decedent in this case would hold the railroad company liable.

That is not the case here. No occupant of the wagon, no one until it was too late, attempted to use his senses, attempted to look or listen. It was as much the duty of the occupants of the wagon to look and listen in approaching a dangerous crossing as it was that of the driver that was driving the wagon across the crossing. It could not be otherwise, and not on the doctrine of imputing negligence, but on the doctrine of the right of self-preservation, to protect themselves.

Now it has been held by the Supreme Court of this state that a person approaching a railroad crossing must use his senses when he knows it to be a dangerous crossing; he must use his senses, look to see, listen to hear, and notwithstanding the railroad company may be guilty of negligence, notwithstanding the railroad company may be violating the

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law, yet a person cannot deliberately drive into one of their trains,—notwithstanding their negligence, and then expect to recover.

In the *Pennsylvania Co. v. Rathgeb*, 32 Ohio State, page 66, the court say :

“ Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train ; and the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed.”

That applies to everybody approaching a railroad crossing, known to be a railroad crossing. They must use their senses, their eyes and their ears in order to avoid the danger, and if they do not and danger befalls them on account of that, a railroad company is not liable, and could not be liable.

Now, in my judgment that applies to every one in the wagon. They must look and listen, and as I have said, if by looking and listening they could not have avoided the danger in this case, if the decedent could not have avoided the danger by the reckless carelessness of her husband, the railroad company would be liable; but in this case, the evidence shows, that on the first notice the husband thought he was not reckless and careless; that he stopped—attempted to stop, and from that, if the warning had come sooner, no doubt the same result may be presumed—that he would have stopped, and thus have avoided the danger. The precise question is settled in the state of New York, in 120 New York, 290.

“ The rule requiring a traveler on the highway on approaching a railroad crossing to have his senses alert to discover and avoid danger from an approaching train; is not relaxed in favor of one who is being carried in a vehicle owned and driven by another. It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it, if practicable.

“ Where, therefore, in an action to recover damages for an injury occasioned by a collision at a crossing, it appeared that plaintiff was riding in a buggy seated by the side of the driver, who had been hired to carry him; that an approaching train could be seen for some distance from the crossing, the location of which was well known to both, but that neither made any effort by looking or listening to discover such approach after they came within two hundred feet of the crossing, held, that plaintiff was properly non-suited.”

So in this case, it was the duty of Mrs. Roecker, although she was a passenger in this wagon that her husband was driving, it was her duty to look and listen for the approach of trains upon this railroad; and if she had looked and listened as it was her legal duty, a hundred feet away from the railroad crossing, she would not have been injured, and the fact that it was obscured—the railroad track was obscured from a point further than that should have warned them that much sooner; when they approached where they could see, they should have stopped to look and listen. They did not do that, and for failure to do that they did not exercise the care that an ordinarily prudent person would have exercised, and in failing to do that she contributed to her own injury, and

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contributing to her own injury notwithstanding the negligence of the railroad company, the railroad company is not liable.

The majority of this court think that the court below erred in overruling the motion for a new trial. The judgment of the lower court will be reversed, the verdict set aside, new trial granted with costs, execution awarded, and case remanded for execution and further proceedings in accordance with law.

DAY, J., dissents.

Doyle & Lewis and *H. F. Burket*, for plaintiff in error.

John Poe, for defendant in error.

JUDGMENTS.

[Putnam Circuit Court, March Term, 1900.]

Price, Norris and Day, JJ.

JOHN P. BAILEY V. KATIE YOUNG ET AL.

1. JUDGMENT ABSOLUTELY VOID.

C. and B. commenced an action against Y. and his wife to foreclose a chattel mortgage on a saw mill and appurtenances and prayed for an order of sale, but not for a personal judgment. Summons for Y. and his wife was issued on the plaintiff's petition, which was duly served. B. was made defendant to the action and after answer day had passed, he filed a cross petition against Y. and his wife, setting up a chattel mortgage in his favor executed by them on the same property, and asked an order of sale and a personal judgment against Y. and his wife; no summons was issued on this cross-petition and the wife of Y. did not answer or in any manner waive process or enter her appearance; B. took a personal judgment against her which he now seeks to enforce against real estate which she conveyed after the date of said judgment. *Held*: The judgment is absolutely void and not merely voidable and it did not become a lien on the real estate owned by Mrs. Y.

2. NOT NECESSARY IN ATTACKING TO SHOW DEFENSE.

The answer and the proofs showing that the court had no jurisdiction over the person of Mrs. Y in order to render a valid judgment, are sufficient without disclosing that there is any defense to the claim upon which such judgment was rendered.

APPEAL.

PRICE, C. J.

The plaintiff, Bailey, alleges that at the May term of the court of common pleas of Putnam county for the year 1897, he recovered a judgment against defendant Katie Young and her husband, W. N. Young, for the sum of \$752.00 debt and \$5.00, the costs of the action, which judgment is wholly unsatisfied, and that neither of the defendants to said judgment has any goods, chattels, lands or tenements whereon execution can be levied, except lot 154 in the village of Kalida; that on May 24, 1897, that being the first day of the term at which said judgment was rendered, Katie Young owned this lot, and that the judgment of plaintiff then became and has ever since continued to be a lien thereon.

It is further averred that defendant, Elizabeth Buchannan, claims to have an interest in the lot, by reason of which plaintiff is unable to sell the same on execution; and from the facts disclosed on the trial, it appears that on February 28, 1899, Mrs. Buchannan purchased this lot

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and received a conveyance therefor from Mrs. Young, and as such purchaser she claims the property.

The only interest set up by Bentler as clerk of the court, is a judgment for costs, which is not controverted. The plaintiff asks a decree marshaling liens and an order of sale of the premises to satisfy his judgment.

The answer of Mrs. Buchannan denies all the averments of the petition and sets out her ownership of the lot, which is the subject of controversy, since February 28, 1899.

The evidence shows that the judgment of the plaintiff was obtained on his cross-petition filed in the lower court in a suit there pending, wherein Cover and Bruon were plaintiffs and W. N. Young, Katie Young Jno. P. Bailey, the plaintiff here and other creditors of W. N. Young were defendants.

The substance of that case is, that Cover and Bruon held a chattel mortgage on a saw-mill, its fixtures and appurtenances, which mortgage had been executed to them by W. N. Young and Katie Young, to secure the payment of a certain sum due from them to Cover and Bruon, and an order of sale was asked but no personal judgment was prayed for. The lot in question was not mentioned or involved in that suit, which was commenced on January 30, 1897, and summons was issued on the petition of Cover and Bruon and it was served on W. N. and Katie Young and it required them to answer on or before February 27, 1897.

Katie Young did not answer or otherwise appear or defend. W. N. Young answered that his said wife was surety on the note to Cover and Bruon and had no interest in the mortgaged property. He made defense as to a portion of their claim.

On June 5, 1897, Bailey, the plaintiff in this case, filed his cross-petition setting up a note executed by W. N. and Katie Young to him, and that it was secured by a chattel mortgage on the same property covered by the chattel mortgage in favor of Cover and Bruon, and he prayed for a judgment on his note and sale of the mortgaged property. No summons on this cross-petition was issued for either Katie or W. N. Young, nor did Mrs. Young answer or in any way enter her appearance to the cross-petition at any stage of the case.

On June 26, 1897, Cover and Bruon took an order of sale of the mortgaged property, and at the same time Bailey took an order of sale on his cross-petition, and also the personal judgment against Katie Young which he now seeks to enforce against lot 154, which she then owned, but has since conveyed to Mrs. Buchannan:

Two questions arise on the foregoing undisputed facts.

1. Is the judgment in favor Bailey, taken without service of summons upon Katie Young and who did not enter appearance in that case, void, or merely voidable?

2. Can Mrs. Young or her grantee, Mrs. Buchannan, question or attack the validity of the judgment so obtained without setting up what, if any, defense existed against Bailey's claim, which was reduced to the judgment.

It is not necessary to repeat or dwell upon the merits of the old rule, that every party to a litigation or action in any degree affecting his rights, is entitled to his day in court. To afford this day in court, the law provides the means of giving notice of the pendency and purpose of the action, which must be followed, unless the party enters appearance which waives the service of the legal notice.

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When Cover and Bruon filed their suit, they caused summons to issue and be served on W. H. and Katie Young, which required each of them to answer the petition on or before February 27, 1897, or it would be taken as true and judgment rendered accordingly. Mrs. Young was not apprised that any one else was asking any relief against her, and she did not desire to resist the claim of Cover and Bruon and made no defense thereto, and when answer day fixed by her summons, had come, if she searched the files of the case and the appearance docket, she would not have found any answer and cross-petition of Bailey on file, because it was not filed until June 5, 1897, and under such circumstances, she would be content to allow Cover and Bruon to have the relief they demanded, without contest on her part. She was no longer in court except as to the parties who brought her in, and the doors of the court were not open to any and all who might become cross-petitioners, to file their pleadings, and without process or appearance, take personal judgments against her. The subject matter of that action was the mortgaged personal property, and while Mrs. Young was in court as to any relief sought by the plaintiffs and as to any subsequent orders as to the amounts and priority of liens and an order of sale of the property, she was not in court as to a demand for personal judgment made in a cross-petition upon which no summons was issued and to which no appearance had been entered.

We think this position too plain to need further notice.

Bailey had no right to the judgment, and now is it void or merely voidable? If voidable only, then it is good against collateral attack, until reversed or modified, and it cannot be evaded by Mrs. Buchannan, who purchased the lot after the judgment had been rendered. But if the judgment is absolutely void it is of no force or effect, and may be so treated wherever it is met.

We do not hesitate to pronounce the Bailey judgment against Mrs. Young absolutely void, and if so, it never became a lien on lot 164 then owned by her, and, as a matter of course, is no lien now and cannot be enforced against Mrs. Buchannan, the present owner. The court of common pleas acquired no jurisdiction over Mrs. Young on the cross-petition of Bailey, and its judgment thereon was without jurisdiction and is a nullity; and it can be impeached and defeated whenever and wherever it is sought to be enforced.

The jurisdiction over defendants Young was acquired on the petition of Cover and Bruon, asking foreclosure of their chattel mortgage, and was limited to matters pertaining to the sale of the mortgaged property. The rights of Bailey could be no greater, as no service was made on his cross-petition, and to warrant a personal judgment, personal service must be had as the statute prescribes in actions for the recovery of money only.

See Wood and Pond v. Stanberry, 21 Ohio St., 142. In that case the court held: "In an action to foreclose a mortgage, a personal judgment against a non-resident defendant who has been served only by publication under sec. 70 of the code (S. & C., 964), upon a showing that the action was brought for the sale of real estate under a mortgage and that the defendant was a non-resident of the state, is absolutely void for want of jurisdiction over the person of the defendant; and a levy, under an execution issued thereon, upon the goods and chattels of such defendant, is wholly invalid as against a lien under a subsequent levy of an attachment in favor of other creditors of such judgment debtor."

The fact that publication was made for the non-resident party accomplished nothing, and could not be considered an attempt to obtain legal service. The judgment would have been just as good without as with the publication.

See also *Spier v. Corll*, 88 Ohio St., 236. The Supreme Court there held that:

"1. The jurisdiction of a court or tribunal entering a judgment in any particular case, may also be inquired into when such judgment is made the foundation of an action, either in a court of the state in which it was rendered, or of any other state.

"2. A personal judgment, rendered against one over whom the court has no jurisdiction, is wholly invalid."

And in *Kingsborough v. Tousley*, 56 Ohio St., 450, the same court held:

"1. In an action on a personal judgment, whether rendered by a court of this state or elsewhere, it is competent to plead and prove in defense, though it be in contradiction of the record, that the defendant was not served with process, nor jurisdiction of his person otherwise obtained by the court rendering the judgment."

"2. Such a defense is not within the rule which forbids the collateral impeachment of judgments, but is in the nature of a direct attack upon the judgment."

A party defendant to such judgment is not remitted to proceedings under secs. 5354 to 5360, Rev. Stat., inclusive, to open up, modify or vacate the judgment. *Kingsborough v. Tousley*, *supra*.

Hence, as has been done in this case, the party against whom a judgment has been pleaded as a lien on his real estate, may show in defense that the judgment is void for want of jurisdiction in the court rendering it.

Nor is the defendant in such case required to show that the judgment defendant had a defense to the claim upon which it was rendered. If Mrs. Young still owned the lot, she need not disclose such defense, and her grantee is not now required to do so. See *Kingsborough v. Tousley*, 56 Ohio St., 450, where this rule is laid down: "An answer in such case is not defective because it fails to state a defense to the cause of action on which the judgment is founded."

The same holding has been made by the same court in *Green v. Street Railroad Co.*, 62 Ohio St., 67.

The judgment of Bailey being void, it is not a lien on lot 154 and his petition is dismissed at his costs.

John P. Bailey, for plaintiff.

Watts & Moore, for defendant.

OFFICES AND OFFICERS.

[Belmont Circuit Court, December Term, 1899.]

Frazier, Burrows and Laubie, JJ.

STATE EX REL. PROSECUTING ATTORNEY V. WILLIAM KINNEY.*1. SECTION 1717, REV. STAT., RESTRICTED TO MUNICIPAL OFFICE.**

The legislature, by amended sec. 69 of the Municipal Code of 1869, codified and now sec. 1717, Rev. Stat., providing that "no member of council shall be eligible to any other office or to any board provided for in this chapter or created by any law or ordinance of council * * *" intended to render councilmen ineligible to the same class of offices as those contemplated by sec. 93 of the act of 1869 which provided that no person should be eligible as a member of the council who at the same time held any municipal office or was an employe under the government of the corporation. In other words, the prohibition of sec. 1717, Rev. Stat., must be restricted to offices under municipal government.

2. COUNCILMEN ELIGIBLE TO SCHOOL BOARD.

Under the foregoing interpretation, an elector, residing within the limits of an incorporated village which, with other territory, composes a special school district, may, during the term for which he was elected and while acting as a member of the village council, be elected to and exercise the office of member of the school board for such district.

QUO WARRANTO.**FRAZIER, J.**

The two actions, the above entitled and same v. H. H. Kildow, were submitted together.

The petition against William Kinney is as follows: "Capell L. Weems, prosecuting attorney of Belmont county, Ohio, comes here into court and gives the court to understand and be informed that the defendant, William Kinney, has usurped and unlawfully holds and exercises the office of member of the school board of the special school district of Belmont in said county, and as such officer assumes to do and perform all and singular the duties pertaining to such office; and he being an elector and resident of the village of Belmont, which is included in the territory of the said special school district of Belmont, there being other territory outside of said village in said school district, and being an elector of said special school district, was elected by the qualified electors of said special school district on the second Monday of April, 1899, as a member of said board of education, and thereupon assumed to qualify and act as such member; that at the time of his election and ever since and for several years prior thereto, he had been a duly qualified, elected and acting member of the council of the said village of Belmont, said village of Belmont being a municipal corporation organ.

* NOTE—By the Court: Since the decision of this case, there has been published the case of State ex rel. v. Wagar, 10 Circ. Dec., 160, decided by the circuit court of Cuyahoga county, which may appear to be in conflict with this decision. The question decided was that a trustee of a hamlet, is not by sec. 1717, Rev. Stat., made ineligible as a member of a board of education. In the syllabus it is said: "A member of a village council is not eligible as a member of the board of education of a school district which is located within the municipal boundaries." And in the opinion referring to State ex rel. v. McMillan, 8 Circ. Dec., 380, it is said: "We are inclined to think that that holding is right." Whether a councilman is ineligible to the office of member of a board of education was not necessary to a decision of the case then before them.

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ized and incorporated under the laws of the state of Ohio; that he was last elected as a member of said council on the first Monday of April, 1899, and proceeded to qualify as a member of the council and has ever since been acting as a member of said council and assuming to perform all the powers of said office; that when so last elected as a member of said council, he was at the time a member thereto having been theretofore, to-wit, on the first Monday of April, 1897, duly elected thereto and having immediately thereafter duly qualified and having served continuously from said time until the present time as a member of said council; that said William Kinney is ineligible to be a member as aforesaid of said board of education.

"Whereupon the relator prays that the defendant be required to answer by what warrant he claims to have used, to exercise and enjoy said office as member of the school board of the special school district of Belmont, and that he be adjudged not entitled to and the judgment of ouster therefrom may be pronounced against him and for all proper relief in the premises."

The petition against H. H. Kildow is a copy of that against Kinney except names and dates. The decision of one case determines the other. To each petition a general demurrer is interposed.

The proceedings are instituted for the purpose of ousting the defendants from the position of members of the school board of the special school district of Belmont.

The defendants are residents of the incorporated village of Belmont which is within and is a part of the territory of the special school district; there being other territory outside of the village in the special school district.

The question presented by the demurrer involves the construction of sec. 1717, Rev. Stat. The clause relied on by the relator, reads, "And no member of council shall be eligible to any other office, or to any position on any board provided for in this title, or created by law, or ordinance of council, except as provided in the seventh division of this title."

For the defendants, it is claimed that sec. 1717, Rev. Stat., being a part of Title 12, Part 1, Rev. Stat., the provision therein that "no member of council shall be eligible to any other office or to any position on any board," means an officer or board of or for the government of cities and villages.

The actions are important as they involve the right to hold offices to which the defendants have been elected and which they are entitled to hold, unless they are prohibited by the statute in question. The section reads:

"Section 1717. The emoluments of an officer whose election or appointment is provided for in this title, shall in no case be increased or diminished during the term for which he may be elected or appointed; nor shall any change in compensation affect any officer, whose office is or may be created under authority of this title, during his term, unless the office is abolished; and a person who resigns or vacates an office shall not be eligible to the same, during the time for which he was elected or appointed, when during the time the emoluments are increased; and no member of council shall be eligible to any other office, or to a position on any board provided for in this title, or created by law, or ordinance of council, except as provided for in the seventh division of this title."

The statute in force prior to the revision of 1880, and which was codified, as sec. 1717, Rev. Stat., was sec. 69 of the municipal code, passed May 7, 1869, as amended April 18, 1870, 67 O. L., 69; which reads:

"Section 69. The emoluments of no officer, whose election, or appointment is required by this act, shall be increased or diminished during the term for which he may have been elected or appointed; nor shall any change of compensation affect any officer whose office shall be created under authority of this act, during his existing term, unless the office be abolished; and no person who shall have resigned or vacated any office shall be eligible to the same, during the time for which he was elected or appointed to serve, when during the same time the emoluments have been increased. No member of council shall be eligible to any other office, or to any position on any board provided for in this chapter, or created by any law or ordinance of council, save as provided in chapter forty-six of this act."

The paragraph now under consideration was first introduced into the municipal code of 1869 by the above amendment, as follows: "No member of council shall be eligible to any other office, or to any position on any board provided for in this chapter, or created by any law or ordinance of council, save as provided in chapter forty-six of this act."

Section 69, as thus amended became a part of the municipal code of 1869, and the whole act must be construed as though the amended section was introduced in the place of the original section and passed at the same time.

"An amended section of a statute takes the place of the original section, and must be construed with reference to the other sections, and they with reference to it; the whole statute after the amendment, has the same effect as if re-enacted with the amendment." *State ex rel. v. Cincinnati*, 52 Ohio St., 419; *McKibben v. Lester*, 9 Ohio St., 627; *Job v. Harlan*, 13 Ohio St., 485, 488; *Bowers v. Pomeroy*, 21 Ohio St., 184, 190; *Taylor v. Thorn*, 29 Ohio St., 569, 575.

Revised Statutes or a revision of all on a particular subject, presumably have the same construction as the original although the language has been changed.

A section of the Revised Statutes must be confined in its construction as if it were still a part of the original act from which it was taken. *Ebersole v. Schiller*, 50 Ohio St., 701.

"It is a well settled rule, that in the revision of statutes neither an alteration in phraseology, nor the omission or addition of words, in the latter statute, shall be held necessarily to alter the construction of the former act. And the court is only warranted in holding the construction of a statute when revised, to be changed, where the intent of the legislature to make such change is clear or the language used in the new act plainly requires such change of construction." *Conger v. Barker*, 11 Ohio St., 1, 13; *Ash v. Ash*, 9 Ohio St., 383, 387.

"Neither an alteration in phraseology nor the omission or addition of words in the latter statute, necessarily require a change in construction. *Conger v. Barker*, 11 Ohio St., 1; *Sedw. on Stat. and Const. Law*, 299, 365; *Williams v. State*, 35 Ohio St., 175. The intent to give the new act a different effect from the old, should be clearly manifested." *State ex rel. v. Commissioners*, 36 Ohio St., 326, 330; and to the same effect, *Allen v. Russell*, 39 Ohio St., 386, 337; *State ex rel. v. Auditor*, 43 Ohio St., 311, 315; *State ex rel. v. Stockley*, 45 Ohio St., 304, 308-9; *Tyler's*

Executors v. Winslow, 15 Ohio St., 364, 368; Hamilton v. Steamboat, 16 Ohio St., 429, 442; Boley v. O. L. Ins. & Trust Co., 12 Ohio St., 139, 144; Dutoit v. Doyle, 16 Ohio St., 400, 405; Brower v. Hunt, 18 Ohio St., 312, 338.

Changes in form or phraseology made by the commission to revise the statutes do not carry the weight of presumption that a change in construction was intended as would a change by the legislature.

City of Warren v. Davis, 43 Ohio St., 447, decides, "The words 'damages arising from any cause,' as used in sec. 2326, Rev. Stat., have the same meaning that the word 'damages' has in the original section, 66 O. L., 247, sec. 575; and both expressions apply only to the same causes of action, and are limited to the damages of the subject matter, and they do not include damages for personal injuries."

Section 2326, is in part, title 12, Rev. Stat., and reads: "No person who claims damages, arising from any cause, shall commence suit therefor against the corporation until he files a claim for the same with the clerk of the corporation, and sixty days elapse thereafter, to enable the corporation to take such steps as it may deem proper to settle and adjust the claim; but this provision shall not apply to an application for an injunction, or other proceeding to which it may be necessary for such applicant to resort in case of urgent necessity."

The section before revision was section 575, of the municipal code of 1869, and is a part of chapter 49 providing for, "damages and assessments for public improvements," and was as follows:

"No claimant for damages shall commence any suit until he shall have filed a claim therefor with the clerk of the corporation, and sixty days shall have elapsed thereafter, to enable such corporation to appoint assessors to assess such damages, return the same to the proper officers, and sufficient further time shall have elapsed, not exceeding twenty days after the return of the appraisal, to enable the corporation to pay the assessment."

In City of Warren v. Davis, *supra*, Follett, J., on page 449, says: "The statute providing for that revision (72 O. L., 87) gave the commissioners power only to revise and consolidate the general statute laws of the state, which may be in force at the time such commission shall make their report."

In State v. Stout, 49 Ohio St., 270, Bradbury, J., in construing sec. 6821, Rev. Stat., page 284, says: "The law as originally enacted, employed the word 'murder,' instead of the word 'kill.' The act reading, 'that if any person shall assault another with intent to commit murder' * * * Section 17, S. & S., 262. When the statutes of the state were revised, under and pursuant to the act of March 27, 1875, (72 O. L., 87) the commissioners adopted the word 'kill' in the place of 'murder,' in describing the offense under consideration.

"Malice is a necessary ingredient of either grade of murder under the statutes of this state; and therefore an assault with intent to commit 'murder' necessarily involved malice. If the legislature itself had amended the section in that particular only by deliberately discarding the word murder and substituting for it the word kill, the inference might have been irresistible, that their purpose was to eliminate the element of malice from the offence; for as it could produce no other effect, that must be held to have been intended, or the amendment would have produced no result whatever. It was not the province, however, of the commissioners to amend the statutes so as to change their meaning, but to

reduce them into a concise and comprehensive form. Changes of phraseology, therefore, thus introduced, do not carry the weight to which they would be entitled had it been a direct act of the legislature itself."

If a statute, making criminal the act of the officers of particular institutions is in the revision put into the general crimes act, and in terms made to embrace all officers, the intent to change the former construction is clear. *Doll v. State*, 45 Ohio St., 445, 448.

Under the rule which I think should be applied in the construction of the Revised Statutes, the result in the case under consideration would result in the same construction whether it is construed as it stood at the time the commissioners made their report, as a part of, and in connection with the municipal code of 1869, or as a part of the Revised Statutes, and in connection with its other provisions.

The great difficulty is in ascertaining the meaning of the legislature in the use of language so destitute of exactness and precision, in the amendment of April 18, 1870, and subsequently carried into the Revised Statutes, and which creates the necessity for a construction.

Bearing in mind, but not here repeating the recognized maxims and rules for the interpretation of statutes, we should endeavor to ascertain the meaning of the legislature in the use of the words employed.

"All words whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person." Bacon, Max. 10; Broom Leg. Max., 275.

"In construing a statute the meaning or intention of the law may be gathered from its words, its object, scope and end, the form of its remedy, and the evils which led to its adoption, that it may be interpreted to work its due effect." *State ex rel., v. Buchanan*, Wright, 233.

"The intention of the law-makers may be collected from the cause or necessity of the act, and statutes are sometimes construed contrary to the literal meaning of the words. It has been decided that a thing within the letter was not within the statute, unless within the intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. 4 Bac., title Statute, J. S., 38, 45, 50." *Burgett v. Burgett*, 1 Ohio, 469, 481. To the same effect are the following cases: *Tracy v. Card*, 2 Ohio St., 431, 441; *Slater v. Cave*, 3 Ohio St., 80, 85; *State v. Harmon*, 31 Ohio St., 250, 264; *Brigel v. Starbuck*, 34 Ohio St., 280, 285; *Johnson v. State*, 42 Ohio St., 207, 210; *Board of Education v. Board of Education*, 46 Ohio St., 595, 600, 601.

"In gathering the meaning of an act of legislation, the whole act must be taken together. The object to be attained must be considered, and, if necessary to give force to it according to the true spirit and intention of the law-giver, words having a general and more limited signification may be enlarged or limited so as to meet the general object of the law." *Horton v. Horner*, 16 Ohio, 145, 147.

A construction producing an inconsistent result, should not be adopted if any other is practicable. Statutes should receive a construction which will give effect to the manifest intention of the legislature. It is said in *Henry v. Trustees*, 48 Ohio St., 671, 675, 676, "We are 'bound not to stick in the mere letter of law, but rather seek for its reason and spirit, in the mischief that required a remedy and the general scope of the legislation designed to effect it.' *Tracy v. Card*, 2 Ohio St., 431. We are, it is true, to gather the intent from the language,

though this may require a departure from the literal meaning of the words. 'A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although by a technical interpretation it is not within its letter.' *People v. Lacombe*, 99 N. Y., 49. The true meaning is to be arrived at by taking a view of the whole act, so as to understand its real object. If the apparent meaning of the words at first blush, would lead to a manifest contradiction of the purposes of the enactment, it is the duty of the court to seek some other meaning which will be in accord with that purpose. It is said by Brinkerhoff, J., in *Terrill v. Auchauer*, 14 Ohio St., 80, 87: 'If the statute be fairly susceptible of two different constructions, we are at liberty to choose that one which, while it remedies the mischief aimed at, avoids the absurd or unjust consequences which would flow from the other.'

"The rule that general words used in a statute should be limited to the objects to which it is apparent the legislature intended to apply them, is established upon the authority of the text books and of almost innumerable adjudicated cases. Hardcastle, in an ably written and recent treatise on the construction of statutes, reviews the English cases on the subject from a very early period, and on page 75 says: 'The question whether, when the legislature have used general words in a statute * * * those words are to receive any (and, if so what) limitation, is one which may sometimes be answered by considering whether the intention of the legislature on this point can be gathered by other parts of the statute.' And he cites *Stradling v. Morgan*, Plowden, 204, the following language with approval: 'The judges of the law, in all times past, have so far pursued the intent of the makers of statutes, that they have expounded acts which are *general in words* to be but particular where the intent was particular, * * * and those statutes which comprehend all things in the letter they have expounded to extend but to *some things*.'" *Board of Education v. Board of Ed.*, 46 Ohio St., 595, 599, 600.

Bradbury, J., cites, in support of the foregoing, from *Burgett v. Burgett*, 1 Ohio, 469; *Whitney v. Webb*, 10 Ohio, 518; *Slater v. Cave*, 3 Ohio St., 80, and says: "It is unnecessary to refer to all the cases in this state in support of this principle of construction. There is, however, one other case to which I desire to refer; it is that of *Sawyer v. State ex rel.*, 45 Ohio St., 343. In that case the court was required to construe the statute (84 O. L., 240) creating a new judicial circuit and providing for three additional circuit judges, which it provided should be elected 'on the first Tuesday of November next.' The court upon a consideration of the whole statute, in connection with the general election law of the state, rejected the language quoted and held that the legislature must have intended the election to be held on the 'first Tuesday after the first Monday of November.' It was contended in that case that the language was too plain to admit of such construction, but an examination of the opinion of Owen, C. J., will show the holding of the court to be in line with the best considered cases."

"That which is plainly implied in the language of a statute is as much a part of it as that which is expressed." *Doyle v. Doyle*, 50 Ohio St., 330.

The title to an act may be considered to explain its object and solve what is doubtful, but will not limit its scope if intended otherwise; but cannot be ignored as an index of intent, and explanatory of the object;

but cannot be resorted to when the act is clear and positive, but only to remove ambiguities where the intent is not plain. It may be resorted to to limit the construction of language.

The following extracts are from the published opinions of our Supreme Court as found in the reports: "In giving a construction of any statute, the court must consider its policy, and give it such an interpretation as may appear best calculated to advance its object, by effecting the design of the legislature. The great object of the statute in question is clearly expressed in the title prefixed to it. It is for the prevention of frauds and perjuries." *Wilber v. Paine*, 1 Ohio, 251, 256.

"The object of our statute appears, from its title, to be the prevention of frauds and perjuries, and although it is said, that the title forms no part of the act (1 *Ld. Raym.*, 77), yet the reason of this *dictum* seems to be the practice of parliament, by which the title is prefixed to the statute, at the discretion of the clerk of the house, in which the bill originated, but such is not the practice with us. The title is framed in the same manner as the bill, and is sanctioned by the vote of both branches of the legislature; we may, therefore, consider it as explanatory of the object of the law." *Burgett v. Burgett*, 1 Ohio, 469, 481; cited and approved in *State v. Pugh*, 43 Ohio St., 98, 118.

"Although the title to a statute constitutes no part of the law, yet it may well be considered in its construction as furnishing an index by which doubtful matters in the body of a statute may be settled. Especially is this proper where, as in this state, the title is prefixed by a solemn vote of the legislature passing the law." *Steamboat Monarch v. Finley*, 10 Ohio, 384, 387.

"True, the title to an act does not constitute any part of the act; but it may be referred to, in order to explain what is doubtful in the act itself. And well may it be referred to in this case, where, without the title, it would be impossible to conjecture what object the legislature could have had in view." *State v. Granville Alexandrian Society*, 11 Ohio, 1, 11.

The rule that the title may be looked to in ascertaining the meaning of a statute, instead of the rule as it prevailed at common law in England, was announced by our Supreme Court in our earliest reported cases and as early as 1824. If that rule then prevailed, I think it should have more force in construing statutes, under the constitution of 1851. Section 16, article 2, provides: "No bill shall contain more than one subject, which shall be clearly expressed in its title."

The municipal code, passed May 7, 1869, is entitled, "An act to provide for the organization and government of municipal corporations," and divided into forty-one chapters each with a sub-title or heading. Section 69, as it stood before the revision, was part of chapter six, entitled, "Officers of Municipal Corporations."

The Revised Statutes, in pursuance of a general scheme to systematize our laws, are divided into four parts; each part into titles; titles into divisions; divisions into chapters, each with appropriate sub-titles or headings to designate the subject of legislation.

Section 1717, Rev. Stat., is in part first, "Political;" title 12, "Municipal Corporations;" fourth division, "Executive Officers;" chapter two, "Officers of Cities and Villages."

Section 93 of the act of 1869, read: "No person shall be eligible as a member of the council, who at the same time, holds any municipal

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office, or is an employee under the government of the corporation." And is in chapter nine, title, "Council of the Corporations."

Section 1681, Rev. Stat., reads: "No person shall be eligible as a member of the council who holds any municipal office, or is an employee under the government of the corporation." And is in part 1, title 12, third division, "Legislative Department;" chapter 2, "Council and Boards of Aldermen."

In *Board of Education v. Board of Ed.*, *supra*, the first proposition of the syllabus is, "General words used in one section of a statute may be restrained to particular subjects, where the letter of the words would make it impracticable to accomplish a special object authorized by another section of the same statute."

Did the legislature by the use of the words: "No member of council shall be eligible to any other office created by law," use them in their general, or in a limited sense, as applicable to officers of municipal corporations; the subject about which they were legislating?

Taking the municipal code of 1869 as it stood at the time of the revision, the object, as stated in the title and designated by sub-titles, or headings of chapters; the provisions of other sections of the act; the other parts of amended section 69, in which is used the words "no officer whose election or appointment is required by this act;" and "any officer whose office shall be created under authority of this act;" and in the same paragraph that is claimed to render defendants ineligible; and in connection with the claimed disqualifying words are used the words "on any board provided for in this chapter, or created by any law or ordinance of council save as provided for in chapter forty-six of this act;" the boards saved by this section and in sec. 1717, Rev. Stat., concerns boards of improvements, boards of control, and the like, and are only authorized and provided for in the control and management of municipal corporations. We submit the legislature, by the use of the words, "created by law," in conjunction with, "ordinance of council," intended to designate the same character of office, whether created by law or by ordinance of council. The latter could only create offices of or for the government of the municipal corporation.

"Where the same word or phrase is used more than once in the same act in relation to the same subject matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former, unless there is something in the connection in which it is employed plainly calling for a different construction." *Rhodes v. Weldy*, 46 Ohio St., 234.

We have not been cited to, nor have we discovered any other word or phrase in the municipal code as it was before the codification, or in title twelve, Revised Statutes, that will aid the relator in his claimed construction.

We hold that the legislature by amended sec. 69 and sec. 1717, Rev. Stat., intended to render councilmen ineligible to the same offices, as sec. 93 of the act of 1869; and sec. 1681, Rev. Stat., make the person holding them ineligible to the office of member of the council. That is, no member of council shall at the same time hold and exercise any other office, created by law or ordinance for the government of the corporation.

State ex rel. v. Kinney.

Moore v. Given, 39 Ohio St., 661, hold: "It is the duty of courts in the interpretation of statutes, unless restrained by the letter, to adopt that view which will avoid absurd consequences, injustice or great inconvenience, as none of these can be presumed to have been within the legislative intent."

Keeping in mind the rules of construction sanctioned by the reported decisions of the Supreme Court and looking to the object of the statute and the mischief it was intended to guard against, we conclude the intention was to prohibit a councilman from at the same time holding any other office, or placing himself in a position where, by reason of such office, he might have duties to perform, or a motive to act inconsistent with his duty to the corporation.

The offices of member of council and of the board of education are not incompatible and may be held by the same person. The office of member of the board of education is created and the duties of the office prescribed in the revised statutes, part second, political; title third, "Schools." The object is to provide in that title a harmonious system of public schools; with the authority to create, maintain and control the same, free from the participation or interference of any officer of a municipal corporation.

The policy of the law as indicated by secs. 18, 1020, 1160 and 1268, Rev. Stat., that no person may hold more than one of certain offices, is limited to offices, the duties of which are or may be incompatible.

A construction which would deprive the defendants of an office, to which they would otherwise be entitled, would be manifestly unjust, and one that would hold a member of council to be ineligible to every other office or position would be opposed to the general policy of our laws and its effect and application absurd. The only authority cited and relied on by the relator in support of the construction claimed is *State ex rel. v. McMillan*, (8 Circ. Dec., 380) decided by the circuit court of the second circuit in which it is held, "A councilman, during his term of office, is ineligible to the office of member of a board of education."

We regret to decide contrary to the decision of another circuit court. In this case we do so with less reluctance, as it does not appear from the report that the reason, and authorities upon which we base our judgment, were considered by or called to the attention of that court. Usually courts decide the questions presented, without going outside to search for questions not made in the record, or suggested in argument.

The demurrers are sustained and petitions dismissed.

Capell L. Weems, Prosecuting Attorney, for relator.

N. K. Kennon, for defendants.

Hancock Circuit Court.

PRINCIPAL AND AGENT.

[Hancock Circuit Court, May Term, 1900.]

Price, Norris and Day, JJ.

DEERING HARVESTER CO. V. JESSE E. KEIFER, ADMR.**1. PRINCIPAL AND AGENT—TRUST FUNDS.**

Where an agent sells the goods of his principal on commission under a contract that he will keep the entire proceeds of sales for the principal as a special deposit until fully settled for, and, in violation of the contract, uses the money in purchase of goods for his own store and in its running expenses, a court of equity may declare a trust in such stock of goods for the sum so converted and used, and order the same paid as a preferred claim out of the proceeds of sale of said stock, and for this purpose the court of common pleas has jurisdiction.

2. COURT MAY ORDER ADMINISTRATOR TO PAY.

In such case, if the agent dies insolvent, leaving the amount due his principal unpaid, the stock of goods into which the trust funds can be traced passes to his administrator impressed with the trust, and the court may order the administrator to allow and pay, as a preferred claim, the debt so due the principal from the proceeds of the sale of said stock, upon the principle, among others, that the agent by the wrongful use and investment of the trust funds, increased his own estate to that extent.

3. COMMON PLEAS AND PROBATE COURTS—EQUITY JURISDICTION.

If the legislature has so enlarged the jurisdiction of the probate court (a question not decided) that it may determine questions of the character of those involved in preceding paragraphs, it has not withdrawn jurisdiction in such cases from the court of common pleas; the jurisdiction of the probate court is, therefore, simply concurrent with that of the court of common pleas, which has general equity jurisdiction; the remedy in one is cumulative with the right to the remedy in the other.

APPEAL.**PRICE, C. J.**

The now deceased Samuel Hartrauft, for the year 1898, entered into a written contract of agency with the plaintiff, the Deering Harvester Company, whereby he was employed and authorized to sell for the company in the vicinity of Findlay, binders, reapers, mowers, hay rakes and other agricultural implements, for which sales he was to receive a stipulated commission. The contract strictly provides that the title to all such articles should remain in the company until sold and settled for by cash or notes of the purchasers, and that the proceeds of sales, whether notes or cash, should be the property of the company.

To further restrict the agent, Hartrauft, the following stipulation is found in the contract: "To hold all goods shipped or received, until sold and delivered, and the entire proceeds of all sales as the sole property of said Deering Harvester Company, and as a special deposit for it, until it shall be fully settled for."

The deceased operated under this contract, which contained many other provisions not important here, during the year 1898, until late in the fall season of that year. In addition to his business as agent for this company, he was the owner of a hardware store and other supplies suitable for a trade with the farmers in the neighborhood, and was engaged in operating said store while making sales for the company on commission.

Harvester Co. v. Keifer.

On November 10, 1898, Hartrauft and the company, through its traveling agent, Robinson, came to a settlement of his dealings on commission sales, and a settlement sheet was prepared stating all sales, to whom and the amount for which they were made, and the amount received by the amount in cash and in notes, which sheet also showed his credits, and when the account was balanced, there was the sum of \$4,153.85 due from Hartrauft to the company. He then signed the settlement sheet wherein he acknowledged that sum in his hands as "representing the unaccounted for net proceeds of sales of personal property belonging to the company," and above his signature are these words: "I agree to deliver said sum to said company without discount, off-set or counterclaim."

After signing the above settlement sheet, Hartrauft turned over to the company, for credit, notes arising from commission sales to the amount of \$2,171.50, and after other proper credits had been made, there was due a balance of \$899.94 which has never been paid or accounted for. This agent was not prepared to deliver or pay to the company the ascertained balance, and being asked by Robinson, agent for the plaintiff, why he could not do so, Hartrauft stated that he had used the money in his store business, buying goods, paying its bills and expenses of its operation. This is uncontradicted, and is the only account or explanation made as to his use and disposition of the money.

Hartrauft died intestate and insolvent on January 2, 1899, without having paid any further amount on this claim, and defendant became the administrator of his estate, which consists of about \$40 in money and a stock of merchandise referred to, which brought at administrator's sale \$6,576.56. The administrator also realized from sale of real estate \$2,387.90, and from notes and accounts due for merchandise sold \$1,015.98.

The plaintiff presented its claim for \$899.94, duly verified, to the administrator of Hartrauft's estate for allowance as a preferred claim against the proceeds of sale of stock in the store, on the ground that the trust fund in hands of deceased to that amount had been used in the store business and that the stock, and afterwards its proceeds became impressed with a trust relation. The administrator denied the right to preference, and this action was brought in the lower court to have the trust declared and for an order that defendant allow and pay said claim as preferred out of proceeds of sale of the stock of goods; and the petition states the facts substantially as we have found them, and the case is before us on appeal from the decree of that court.

Two points are relied upon by the defendant to defeat the right of plaintiff to relief prayed for.

First—That the probate court had exclusive jurisdiction to hear and determine the question as to preference, and that the court of common pleas was without jurisdiction to entertain plaintiff's suit, and if so, this court has no jurisdiction on the appeal.

We are aware that our statutes confer very great authority on probate courts in the settlement of estates of deceased persons, and that such authority has been broadened by legislative enactment at almost every session of our general assembly. But those courts have no equity jurisdiction except where it is clearly conferred by statute, and we are not bled to find on our examination of the statutes, that probate courts have been given exclusive jurisdiction over such questions as are raised in

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this case. The least that can be said for the powers of those courts in this respect, is, that they are concurrent with the powers of the court of common pleas, and the remedy in one, cumulative with a right to the remedy in the other. If the legislature has so enlarged the jurisdiction of the probate court, that it may entertain and determine such questions, it has not taken it away from the court of common pleas which has general equity jurisdiction. So we decide the question of jurisdiction in favor of the plaintiff. See *Jones v. Kilbreth*, 49 Ohio St., 401.

Second—The defendant claims that the facts do not establish a trust relation between the amount due plaintiff and the stock of merchandise, so as to justify the court in charging the proceeds of the sale of goods with said sum as a preferred or equitable lien; and further, that plaintiff in its pursuit of its money, is confined to the amount of cash in possession of the agent at his decease.

The purpose of the parties to the contract of agency referred to, is quite apparent; especially that clause which has been quoted, to-wit: "To hold all goods shipped or received, until sold and delivered, and the entire proceeds of all sales as the sold property of said Deering Harvester Company, and as a special deposit for it, until it shall be fully settled." The principle, sought by this clear stipulation, to restrict the agent from using its money in promotion of his other business, and from mingling his with his principal funds. To the contrary, he was required to keep the proceeds of sales on commission as the sole property of the principal and as a special deposit for it until fully settled for, so that whenever called upon by the company, the money so belonging to it could at once be realized. That both parties so understood the contract further appears in the language used in the settlement sheet of November 10, 1898, wherein, Hartrauft acknowledged the amount then due and agreed "to deliver the same to the company without discount, off-set or counter-claim."

But in violation of duty assumed under his contract, he used the money of his principal to the extent of \$899.94 in his store to pay its running expenses, bills of goods purchased and put in his stock, and which remained so used and applied until his death, so that the use of plaintiff's money which he was to hold as a special deposit, went into his other business, and to that extent increased his other estate. If he bought good and paid for them out of this fund, he increased his stock of goods that passed to his estate. If he paid other bills due against the store, he increased his funds to that extent, which, otherwise, he would have paid out of his business. So that by any use which a prudent man would make of the money, in discharging his obligations, it lifted that much of a burden from his business, and but for which more sales of his goods and their proceeds would be necessary to meet his obligations.

That this agent so used the money of his principal in his private business, is shown by his own statement to Robinson, which is not contradicted. What is its effect upon the property into which the money passed? The defendant urges that plaintiff can look alone to the \$40 cash on hand when Hartrauft died. We see no good reason for this position. Why a distinction should be made between cash on hand, even if it represented sales of goods, and the remaining goods, we are not informed, and we are not able to appreciate any such distinction. A trust could be wholly defeated by the trustee if such distinction could exist. The more completely he could commingle the trust funds with

others, or lose the trust funds as to identification by investing them in goods, the more successfully has he evaded the obligations of his trust and cut off a remedy.

We cannot adopt this means of defense against the claim of the plaintiff. It has not been at fault in the transaction and is seeking only its own, and has traced its money into the stock of goods on the statement of its unfaithful agent, and we believe equity will charge the stock and its proceeds with the fund so used. The authorities uphold this view of the case, some of which we cite.

In *Jones v. Kilbreth*, 49 Ohio St., 401, *supra*, a draft had been drawn by Samuel Fosdick on Dows and Company, and sent to Ohio Life Insurance and Trust Company for collection, and collection was made and amount placed to the credit of Fosdick. The Trust company was insolvent and made an assignment, and Fosdick claimed that the proceeds of draft were trust funds and should be paid first and in full out of the assets of the Trust company, and our Supreme Court so held. On page 410 of the opinion, Dickman, J., says: "If the Trust company, as an agent of the owner, received from him the draft for collection only, with an obligation to account for and pay over the proceeds to him, a fiduciary relation with the owner was thereby established, and if his representatives trace the proceeds into the hands of the Trust company, and seek to impress upon the property in its substituted form a trust character, the court of common pleas would not be without jurisdiction to afford equitable relief by declaring and enforcing the trust."

Again, on pages 412-413, the same judge says: "The paper was impressed with a trust when received for collection, and its proceeds, bearing the same impress, are traceable and identifiable as having been used by the Trust company, in place of its own assets to pay a specific creditor." Then he quotes with approval the following from *Thomson v. City Savings Institution*. In 8th Atl. Rep., 97:

"Where the rightful owner is in pursuit of trust funds he need not point out the very goods or bills or coin. He does all the law requires if he shows that the goods, or bills, or coin, came to the hands of the defendant impressed with a trust of his knowledge. In every such case the holder must respond either in the article taken or its value."

See also *Harrison v. Smith*, 53 Am. Report, 571. Also *National Bank v. Insurance Co.*, 104 U. S., 54, where the court held "that as long as trust property can be traced and followed, the property into which it has been converted, remains subject to the trust, and if a man mixes trust funds with his own money, the whole will be treated as trust property except so far as he may be able to distinguish what is his."

Like doctrine is laid down in *Story Eq.*, sec. 468, where it is said: "An agent is bound to keep the property of the principal separate from his own. If he mixes it up with his own the whole will be taken, both at law and in equity, to be the property of the principal, until the agent puts the subject matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part * * *."

There are very many other authorities equally as pointed and clear, and from the facts of this case and the light of authorities, we are of opinion that the stock of goods in which Hartrauft mingled and used the money in dispute, became charged with the sum as a trust fund, and

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that the trust followed the stock into the hands of the defendant as administrator of Hartrauft's estate. Our decree is that the defendant allow and pay to plaintiff the full sum of \$899.94 so traced, as a preferred claim from the proceeds of sale of the stock, and that he allow and pay the interest on said sum from November 10, 1898, as a general claim against the estate, and that defendant pay all costs, and the cause is remanded for execution.

H. F. Burket, for plaintiff.

Blackford & Sons, for defendant.

STREETS—TELEPHONE COMPANIES.

[Crawford Circuit Court, January Term, 1900.]

Price, Norris and Day, JJ.

LEWIS MANTELL V. BUCYRUS TELEPHONE CO.**1. ABUTTING OWNER'S RIGHTS IN PUBLIC STREET.**

An abutting property owner on a public street has, as an appurtenant of his property, rights in the street of which he can not be deprived without his consent, or upon full compensation and by due process of law.

2. GRANT TO TELEPHONE COMPANY SUBJECT TO OWNER'S RIGHTS.

While the council of a city may grant to a telephone company the use of streets, under the limitations of sec. 3461, Rev. Stat., and other sections of that chapter, the use must be such as not to substantially interfere with the rights of an abutting owner.

3. INTERFERING WITH RIGHTS OF ABUTTING OWNERS—INJUNCTION.

When a telephone company, by the use of a street, substantially deprives an abutting owner of property rights, such owner is not driven to his action at law, but may pursue the remedy which repairs the wrong by removing the cause of it. And his right to this remedy is not measured by the extent of the injury, nor by the necessity or convenience of the company to whom the use is granted.

HEARD ON ERROR.

NORRIS, J.

The plaintiff in error, Lewis Mantell, who was plaintiff below, is the owner in fee simple of a part of lot No. 212 in this city. The property is business property located on east side of Main street. The property as a business property is very valuable, and the structure thereon, a small frame building, is used as a grocery store by plaintiff's tenant. The plaintiff says he purchased this property shortly before the injuries of which he complains, with the intention and for the purpose of very soon thereafter erecting thereon a new and commodious business building. He says in his original petition, that defendant, without his knowledge or consent, for the purpose of its business, placed in front of said premises and inside of the curb, and occupying a part of the pavement in front of said premises, a telephone pole, of diameter of about two feet, and of height of about fifty feet. Upon this pole and from thence to others of its poles, defendant threatens to string wires with intent to permanently use this pole at this place as a part of its telephone plant in this city.

That this pole as thus placed is an injury to his said property; that it occupies the pavement and obstructs the view, and remaining there

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deprives him of the use of that portion of the pavement and street; and that the stringing of wires and the use of said pole for the purposes intended will be a continuous aggravation of his injuries, and will usurp his rights, render useless his easement, and to that degree will destroy his property and its value, and that the injury is irreparable. Plaintiff asks that defendant be enjoined from stringing said wires and from using said pole for the purpose for which it was there placed. Upon this petition a temporary injunction was allowed, on April 8, 1898, by the probate court of this county. On April 25, 1898, plaintiff filed an amendment to his petition in which he alleges that defendant acted under a franchise which it claimed was granted to it by the city council of this city about March 15, 1898, in ordinance No. 166. This ordinance, defendant claims, was an extension of the privileges granted to it by a former ordinance; that this ordinance 166, which purports to extend the time for performance by defendant under the original ordinance giving the franchise, is of no validity because of failure to comply with sec. 1694, Rev. Stat. of this state; that its rights had expired, and that its acts of which he complains were without license or authority. He further says that at the time and when defendant was in the act of erecting said pole, upon his objection, defendant pretended to desist and to abandon the purpose of placing said pole at the place where it now stands, and afterward, and in his absence and without his consent or knowledge, by stealth placed said pole in its position; and that he never did consent in writing or give his verbal permission to place the pole in its position. And he prays that defendant be enjoined from using said pole in said place, and from stringing wires thereon and prays that this court by its mandatory injunction order its removal. .

Defendant answers and admits that it put the pole in the place and for the use recited in the petition, but it denies that the same is an injury to plaintiff's premises as claimed in his petition and the amendment thereto. It says, that Main street, or Sandusky avenue as sometimes called, is a dedicated street, but says it is a part of the Columbus and Sandusky turnpike, and that defendant has equal rights with plaintiff in its reasonable use. It denies that its rights under its franchise had expired by lapse of time and by non-compliance with the term of its grant, and it says that plaintiff has an adequate remedy at law.

The reply is in substance a denial of the allegation of the answer. On May 10, 1898, upon motion of defendant, the court of common pleas dissolved the temporary injunction which had been granted by the probate court. On May 11, upon the application of plaintiff, the order dissolving the temporary injunction was suspended by the consideration of this court in chambers.

Afterward, on May 8, 1899, the issues tendered by the pleadings with the evidence were submitted to the court of common pleas of this county without the intervention of a jury. Upon that hearing the trial court made its finding for the defendant. Plaintiff's motion for new trial was overruled, and the trial court gave judgment upon its finding for the defendant, dismissed plaintiff's petition, and adjudged the costs against him.

The plaintiff prosecutes error to the proceedings and judgment of the common pleas. The errors assigned are:

First: That the trial court overruled plaintiff's motion for new trial.

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Second: Error in vacating the injunction and in deciding said cause in favor of the defendant.

Third: Error in the admission of evidence offered by the defendant.

Fourth: Error in rejecting evidence offered by the plaintiff.

Fifth: Error in refusing to assess damages in favor of the plaintiff.

Sixth: That the facts set forth in the answer are not a defense to plaintiff's action.

Seventh: That the decision of the court is contrary to law, and is not sustained by the weight of the evidence.

It is claimed by the defendant in error, that the pole was up and a part of the wires were in place before the commencement of this action. That defendant had invested its money in a business which was of necessity to the public and for the convenience of the public, and that to remove this pole, would be to the defendant a damage and disaster; and that hence the plaintiff comes too late with his complaint, and that intervening rights preclude the remedy here sought for the alleged injury.

It is conceded that the pole stands where plaintiff says it stands, in front of his premises inside the curb. That it occupies a part of the pavement in front of his property. It is conceded that upon it and the arms fastened to it are strung one hundred and sixty wires, all necessary to carry on the business of the defendant. It is there permanently, to be used permanently for the purpose intended by the defendant.

The fact is not controverted that it was placed there without plaintiff's consent, either written or verbal. He was not consulted about it. His rights, if he had any, were not taken into account; his wishes were not regarded. That he owned property there, or existed at all, was only considered in the light of what he might do, to retard defendant in occupying the street at that point. It appears by the evidence that no part of the work was done, to complete the present condition of defendant's plant at that place, while he was there to protest against it, but the work was done at times when it was known he was not there or likely to be there.

It does not appear, however, that he slept upon his rights, every moment of time since he had knowledge of the acts of defendant, appears to have been spent by him in an effort to obtain legal redress for his alleged injury, and to prevent its consummation and perpetuation and continuance. The defendant was just as industrious in thwarting him and in taking possession and retaining it. So it does not come with favor from the defendant that the wrong, if it was a wrong, has been done, and that to undo the wrong will injure the perpetrator of it.

Corporations of the character of defendant, have legal rights, which the courts have not been slow to recognize and enforce. They may acquire rights to use public ways, which the law does not deem inconsistent; but all this is subservient to the paramount object for which roads and streets are laid out and dedicated. Such use must not incommode the public in the use of the same. Every use is subservient to public travel, and all rights acquired for any other purpose are postponed and subject to this paramount right of the public. The right to use a street for the purposes for which defendant uses this street is limited so far as mode and manner of the use is concerned, by agreement made with the municipal authorities, or under the direction of the probate court. But aside from all this. The owner of abutting property has an

appurtenant of his property, a part of it and belonging to it, rights in a public street, which the city council cannot give away; and of which he may not be dispossessed without his consent, but only by due process of law, and upon full compensation. By no use to which the street can be legally or illegally put, can his rights pass from him without making him whole. That some private individual or corporation may be inconvenienced, or that the public may be prevented from enjoying a luxury, is not the plea which takes from a man his property rights without compensation, and gives them to another or to the public.

In the case at bar it is conceded that the defendant put this pole in the place where it stands without Mantell's consent. The evidence does clearly show that the pole and the wires and the arms upon the pole affect his property as he claims; perhaps not to the extent he claims, but in the manner and to a degree, it interferes with and usurps and dispossesses him of his property rights.

While the city council may grant the use of the streets to a telephone company, it cannot grant the use of plaintiff's property to a telephone company. Nor can the telephone company so use it against his will and without his consent and without compensation. The use here is without his consent and without compensation.

That defendant with a strong hand placed its pole and strung its wires is a fact as feeble as the breath of a child, when confronted with the rights which this plaintiff here seeks to enforce. That the city council granted it the privilege to use the street, as against his rights, goes for naught. That his injury is not to the extent of complete confiscation of his estate is not to be considered. That the community will not be benefited or that the defendant will be injured if justice be done him, is no defense.

The ordinance if it is valid as extended is not an agreement fixing the mode of the use of the street and public grounds. It is not an agreement between the city council and defendant. It appears to be an unqualified surrender of the rights of the municipality in its public places so far as it was able to do so. It speaks of purposes, restrictions and rules which the city authorities have never fixed or prescribed.

So that if an agreement of the city council could in any event bind this plaintiff, no such agreement appears to have been made, either by the ordinance, or its extension, or in compliance with them.

We are therefore of the opinion that the finding and judgment of the common pleas is against the weight of the evidence and against the law of the case. We find error in overruling the motion for new trial. No other error appears in the record. Giving judgment on the undisputed material facts of the case which the trial court should have given we make the injunction perpetual, and make the mandatory order, that the defendant within sixty days from the rising of this court, remove said pole and wires, and adjudge the costs against the defendant in error.

L. C. Feighner, for plaintiff.

Harris & Sears, for defendant.

PARTIES—JUDGMENTS—APPEAL.

[Cuyahoga Circuit Court, September Term, 1895.]

Caldwell, Marvin and Hale, JJ.

JANE MULROONEY V. CHARLES LEDERER & SON.**DISMISSAL OF A DEFENDANT NOT VACATED BY APPEAL.**

A judgment of a justice of the peace, in an action against two defendants, dismissing one defendant as not properly before the court, is not vacated by an appeal by the other defendant, against whom the suit proceeded, from a judgment subsequently rendered against him, nor is the defendant so dismissed brought into the appellate court by such appeal, particularly where there was not that necessary connection between defendants but that the rights of one could be determined without affecting the rights of the other.

HEARD ON ERROR.**MARVIN, J.**

In this case suit was brought by Lederer & Son before a justice of the peace of Cleveland township in this county against Jane Mulrooney and George A. Groot. Summons was issued for George A. Groot, at one time attorney for the other party defendant, and the case continued to a later date. The parties finally appeared before the justice on November 18, 1893. The case was then dismissed as to Jane Mulrooney and proceeded to trial. Judgment was rendered against George A. Groot. Groot appealed his case and gave bond, and brought the case into the court of common pleas. A petition was then filed by Lederer & Son in that court against both Mulrooney and Groot. Thereupon Mrs. Mulrooney filed a motion to have the case dismissed as to her on the ground that she was not properly in court, because the case had been dismissed as to her before the justice. That motion was overruled, and Mrs. Mulrooney filed an answer denying everything contained in the petition. When the case came to trial, she objected to any evidence being introduced as against her, but the court overruled her objection. The case was tried without a jury. Evidence was taken. The result was that in the court of common pleas judgment was had against Mrs. Mulrooney and in favor of Groot. Mrs. Mulrooney made a motion for a new trial, which was overruled. Exception was taken and she filed her petition in error in this court to reverse the judgment of the court of common pleas.

The question really presented is, whether she was a proper party in the court of common pleas?

As has already been said, the case was dismissed as against her by the justice of the peace. The record does not show upon what ground it was dismissed, but that would seem to be immaterial. It was dismissed, as against her. She had no reason to complain of the action of the justice and nothing to appeal from. She was entirely satisfied. Whether Lederer & Son were satisfied or not, they did not appeal the case. They acquiesced in that judgment. But Groot, against whom judgment was entered, being dissatisfied with the judgment, appealed and gave bond. Did that bring Mrs. Mulrooney into the court of common pleas so that she was bound to answer there? It would seem a strange thing that she being entirely content with the action of the justice, and the plaintiffs being so well content with that action that they did not care to appeal,

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that she should be brought into the court of common pleas because the other defendant was dissatisfied and appealed.

The suit was upon a bill of particulars for goods and merchandise furnished originally to the defendant, Mulrooney. The bill was made to read that it was furnished to the defendants.

We are not without what seems to be applicable as authority in this case in the state of Ohio. In *Glass v. Greathouse*, 20 Ohio, 503, the syllabus reads as follows :

"In a case in chancery where there are two defendants, and the bill is dismissed as to one and a decree against the other, an appeal by the latter does not vacate the decree as to the former; more especially where there is not that necessary connection between the defendants but that the rights of one can be determined without affecting the rights of the other."

So far as appears here, there is no such connection between these two defendants, that the rights of one can not be determined without the presence of the other. Indeed, both courts that tried the case found their rights to be distinct and separate, although one court found against one defendant and the other court against the other.

In the opinion in the case cited, on page 518, this language is used :

"But in the case now before us there was a decree against but one of the two defendants, and he appealed. From what? Unquestionably from the decree against himself, not from the decree in favor of his co-defendant. There is no necessary connection between these defendants, so that the right of one can not be determined without deciding upon the rights of the other. We are of opinion that *Thomas Greathouse* is not before this court."

It seems to us that that reason and that principle apply in this case. *Groot* appeals from what? Not from the judgment in favor of *Mrs. Mulrooney*, but simply from the judgment against himself. And that being the only thing that was appealed from, what should have been tried in the court of common pleas was whether *Groot* was indebted to *Lederer & Son*.

Entertaining these views, we reverse the action of the court of common pleas, and remand the case for further proceedings.

Hessenmueller & Bemis, for plaintiff in error.

Riley & McQuigg, for defendants in error.

EXECUTORS AND ADMINISTRATORS.

[*Hancock Circuit Court, May Term, 1900.*]

Price, Norris and Day, JJ.

JOHN H. CHENEY v. ISAIAH A. POWELL ET AL.

1. DEMAND AGAINST EXECUTOR BECOMES MONEY.

A demand existing in favor of testator against one who becomes the executor of his last will, if undischarged, is transmuted into money in the hands of such executor by virtue of sec. 6069, Rev. Stat. And no act of the executor, or of the debtor, can turn it again into a mere demand or obligation.

2. CANNOT BE CLASSED AS UNCOLLECTIBLE OR DESPERATE.

- Such a claim, being transmuted into money in the executor's hands, cannot be classed as an uncollectible or desperate claim, by reason of the insolvency of the executor.

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3. EFFECT OF SALE AS DESPERATE CLAIM.

Section 6077, Rev. Stat., confers no jurisdiction on the probate court to order the sale of such an asset as a desperate claim. And a sale thus made carries to the purchaser no liability that subsisted between the estate and the executor and the sureties on the executor's bonds.

4. NO ACTION LIES ON EXECUTOR'S BOND IN SUCH CASE.

Predicated upon the title passing to the purchaser by a sale so made, no action will lie against such executor and sureties on his bond.

HEARD ON ERROR.

NORRIS, J.

The plaintiff in error commenced this action in the court of common pleas, claiming right of recovery upon the following facts, which he sets up in his petition.

On November 25, 1893, Jacob Powell died testate in this county, and by his last will appointed Isaiah Powell and Albert C. Powell his executors, who duly qualified and gave bond conditioned according to law and entered upon the duties of executing said will.

During the progress of the administration of said estate by said executors, said estate was the owner of a certain judgment rendered in a case wherein one Susan Abrams was plaintiff and Paul Kemerer and said Jacob Powell and Isaiah Powell were defendants. Kemerer and Isaiah Powell, said executor, were the principal debtors, and Jacob Powell, the testator, was their surety, and in the judgment he was certified as such surety. These executors, during the progress of settling his estate, out of the moneys of said estate, paid said judgment to Susan Abrams and had said judgment assigned to them as such executors, and held the same as an asset of said estate against said principal debtors, whose duty it was to pay said judgment to said executors. Paul Kemerer and Isaiah Powell, the principal debtors, were wholly insolvent and refused to pay the same. About June 15, 1895, Isaiah Powell resigned as executor, made his final report to the probate court of his doings as such executor, still failing to pay the judgment, never charged himself as such executor or otherwise with said judgment, but held the same at the time of his resignation, as a claim of doubtful collectibility, and the judgment has never been paid.

From and after February 8, 1896, Albert C. Powell has been the sole executor of said estate. On August 12, 1898, Albert C. Powell, as such sole executor, filed his application in the probate court of this country, setting forth, in substance, that said judgment so held and owned by said estate was a desperate claim for the reason that said principal debtors were both insolvent, and such proceedings were had in said probate court, under sec. 6077, Rev. Stat.; that on September 6, 1898, said Albert Powell as such executor was duly ordered by said court to sell said judgment as a desperate claim to the highest and best bidder. On October 4, 1898, said judgment was sold at public auction to the plaintiff, John Cheney, who was the highest bidder therefor. Said sale was reported by said executor to the probate court and was duly approved and confirmed by that court. By all this the plaintiff claims that he has succeeded to all the ownership and title as fully as the same had before the sale vested in said executors, or in the sole executor of said estate, and has succeeded to all the remedies about the collection of the claim that before its purchase by him vested in said executors, or either of them, or in said estate.

The petition recites further that on November 11, 1898, plaintiff caused an execution to issue on said judgment against the defendants therein named; that no goods or chattels, lands or tenements were found by the sheriff upon which to levy and the execution was returned unsatisfied.

The plaintiff, since the sale and transfer of said judgment to him, had demanded payment thereof from defendants, which was refused, and the executors of said Jacob Powell have made final settlement of said estate and made no provisions for the payment of the judgment, in whole or in part, and he says that he is wholly without remedy except upon said executor's bond. That more than eighteen months have elapsed since the giving of said bond and that said estate is solvent.

He says that by reason of the facts so stated, defendants have broken the conditions of said bond and are now liable to him for the full amount of said judgment, \$532.21, with interest and costs, which he seeks to recover.

To this petition of the plaintiff, of which I have given the substance, the defendants each file a demurrer, the ground of which is that the petition does not state facts sufficient to constitute a cause of action against said defendant jointly, or against any of them or either of them. These demurrers the court sustained, and the plaintiff not desiring to amend his petition or to plead further, the trial court entered judgment upon said demurrers against the plaintiff for costs and awarded execution therefor. To the action of the court sustaining said demurrers and entering said judgment, the plaintiff prosecutes error to this court and assigns the same as his ground for reversal.

By his action plaintiff seeks to treat this judgment as a claim or demand against the executors of the estate and of the character contemplated in sec. 6069, Rev. Stat., which reads as follows: "The naming of any person executor in a will, shall not operate as a discharge or bequest of any just claim which the testator had against such executor; but such claim shall be included among the credits and effects of the deceased in the inventory; and the executor shall be liable for the same, as for so much money in his hands at the time such debt or demand becomes due; and he shall apply and distribute the same in the payment of debts and legacies, and among the next of kin, as part of the personal estate of the deceased." And that it being a claim against the executor, Isaiah Powell, and plaintiff having taking title to it and become the owner of it by his purchase at the sale ordered by the probate court in the disposition of the desperate claims of said estate, under sec. 6077, Rev. Stat., he is subrogated not only to the rights of the estate, but to whatever remedy the law afforded the estate or the executors in the settlement of their trust.

Isaiah Powell was executor of this estate; he was the principal debtor, or one of them. His testator, Jacob Powell, was the surety, and out of the estate of the testator the debt was paid, and the judgment reached the hands of the executors by assignment, and was so held until sold by order of the probate court. And so it is urged, that it being a demand against Isaiah Powell, it was his duty, coming within the bond which stands for the faithful performance of his trust, to make good his liability upon said judgment, as for so much money in his hands, and that the liability which then existed to the estate, was carried by the sale and was kept vital in favor of plaintiff as the purchaser. This judgment was taken in the lifetime of the testator, Jacob Powell; he was

certified as surety in the judgment. It was paid after his death by the executors out of the assets of his estate.

As the case is presented to us by the petition, we are of the opinion that the demurrers were properly sustained. If it was a demand due from the executor to the testator at the time of the death of the testator; if the relation of debtor and creditor arose at the time of the undertaking in suretyship, or if not then, the relation of debtor and creditor arose by virtue of the higher liability culminating in the judgment and the certificate of suretyship fixing the relation of the parties in their contribution to its discharge and payment, then the demand was money in the hands of the executor; it was transmuted into money by force of sec. 6069, Rev. Stat., in the hands of the executor. As said in *McGaughey v. Jacoby*, 54 Ohio St., 487, 501, and as held in *Hall v. Pratt*, 5 Ohio, 73, no act of the parties could turn it back to the character of a mere claim or demand or obligation, and as said in *McGaughey v. Jacoby*, "they cannot be classed with uncollectible nor uncollected debts," as an uncollectible or desperate claim. It was money; it was a balance in the hands of the executor. As well say that the balance found in his hands for distribution upon final settlement of the estate, held for the estate and secured by his bond, could be called a desperate claim, or a claim at all.

Now, the probate court ordered this claim sold as a desperate claim, that is the character in which it reached the hands of the plaintiff by that sale. He took it as a desperate claim, not as a balance of money in the hands of the executor. He took it as a desperate claim against the two insolvent principal debtors; that is all he took of it; he took the desperate part of it, if he took it at all.

Section 6077, Rev. Stat., confers no jurisdiction upon the probate court to sell money in the hands of the executor, the property of the estate, no more than it does to hold an auction and sell the balance found from the executor and in his hands upon final settlement; and without jurisdiction the act of the probate court binds nobody anywhere, and may be attacked, as outside of the law, and void by any person at any time or place.

Sections 6069 and 6077, Rev. Stat., can only be invoked in favor of the estate and for its benefit, and not against it. By the application of sec. 6069, and under the harsh construction which courts have put upon it, and the cold and merciless weapon which that section and the law that it but re-enacts, affords, desperate claims are transmuted into money, not money into desperate claims.

The money which is thus placed in the hands of the executor by that section is to be applied and distributed in payment of debts and legacies and to the next of kin, says the section, and not sold as a desperate claim. So that we are of the opinion that he took, if he took anything by his purchase, a claim against Kemerer and Isaiah Powell as principal debtors and as individuals, and not against Isaiah as executor; and that the character and remedy contemplated by sec. 6069, Rev. Stat., is not within reach of the plaintiff. And in the event that the debt did not arise and exist in the lifetime of the testator, but arose after his death and was made a demand against Isaiah by reason of the judgment having been paid out of the proceeds of the estate, then surely sec. 6069 would not be applicable to it, nor a remedy which the demand contemplated by that section would warrant.

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So that in no event would this purchaser of a desperate claim have recourse to the executor's bond to make it good.

We find no error in the record to the prejudice of the plaintiff in error, and affirm the judgment of the court to the cost of the plaintiff in error, and remand the case for execution.

M. C. Shafer and Geo. F. Pendleton, for plaintiff.

John Sheridan, Nickerson & Bright, for defendants.

CONTRIBUTORY NEGLIGENCE.

[Wood Circuit Court, March Term, 1900.]

Haynea, Parker and Hull, JJ.

HENRY E. KOESTER V. TOLEDO & OHIO CENTRAL RAILWAY CO.

1. RULE AS TO SUBMITTING QUESTIONS TO JURY.

In cases where the testimony is such that the minds of reasonable men might differ as to whether a party has been guilty of negligence or not, the question should be submitted to the jury and it is improper for the court to interfere.

2. RULE AS TO LOOKING AND LISTENING AT CROSSINGS.

Unless circumstances are such as to excuse a person of ordinary care and prudence from looking and listening, it is negligence as a matter of law to approach and cross a known railroad crossing without looking and listening for approaching trains.

3. NEGLIGENCE—NOTWITHSTANDING SUCH TESTIMONY.

Although a party may testify that he looked and listened, upon approaching a known railroad crossing, if the circumstances were such that by looking and listening, in the exercise of ordinary care, he must have seen an approaching train, such party will be held guilty, as a matter of law, of contributory negligence, notwithstanding his testimony that he looked and listened.

4. RULES APPLIED.

Where it appeared that plaintiff approached, about dusk, but while there was sufficient light to enable him to see, a railroad crossing, well known to him, and at a point where at a distance of 185 feet from the crossing, a person could see down the track, in the direction from which the train came, a distance of 820 feet, and 65 feet from the crossing could see down the track nearly half a mile, and that plaintiff, driving in a top buggy, with side curtains down, and at an ordinary gate, was struck and injured by a freight train which approached at ordinary speed, at the crossing, the court held that if he had looked he must have seen the train or if he had listened he must have heard it, and that if he did look and listen, he must be deemed to have been so careless and negligent as to constitute contributory negligence which will defeat his recovery; and that the trial court properly directed a verdict for the defendant.

James & Beverstock, counsel for plaintiff.

James O. Troup, counsel for defendant.

HEARD ON ERROR.

HULL, J. (orally.)

This action comes into this court upon a petition in error, to reverse the judgment of the court of common pleas.

The action was brought by the plaintiff against the railroad company to recover damages for injuries which he claims he received on account of the negligence of the railroad company. The court, at the

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conclusion of the plaintiff's testimony, upon motion of the defendant, directed a verdict for the defendant, to which the plaintiff excepted, and thereafter judgment was entered upon the verdict in favor of the defendant.

The plaintiff claims in his petition that in the afternoon of January 22, 1899, between five and six o'clock, he was driving in his buggy along Main street in the village of Woodside in this county, and that he was struck by a freight train running over the defendant's track, as he crossed the tracks at Main street in said village, and he claims the negligence of the defendant was that no signal was given by the trainmen, either by whistling or ringing the bell as required by the statute; that his buggy was injured and he suffered personal injuries for which he asks damages.

The answer of the defendant is substantially a general denial; and alleges, by way of defense, that the plaintiff was guilty of contributory negligence, and that whatever injury he suffered, if any, was caused by his own carelessness and negligence.

But one question is made in the case, and that is, that the court erred in directing a verdict for the defendant at the close of the plaintiff's testimony; so that the question here is rather a question of fact, to be decided, however, in the light of the law as it has been laid down by the courts and especially by the Supreme Court of our own state.

The claim of the defendant is that the plaintiff was guilty of negligence, in that he did not look and listen as he approached the railroad crossing, as he was required to do by the law of the land. The general rule of law governing such cases is well known and thoroughly established by the courts, not only in this state but perhaps all the states, and that is: That when one who is in the full possession of his faculties, is approaching a railroad crossing, he is bound to look and listen for approaching trains unless the circumstances are such as would excuse a person of ordinary care and prudence from so looking; and unless there are such circumstances as would excuse a person of ordinary care and prudence from looking and listening, it is negligence as a matter of law to approach and cross a known railroad crossing without both looking and listening for approaching trains.

The consideration of this case involves an examination to some extent of the testimony, a brief examination of it so far as is necessary to determine whether the court erred in directing a verdict for the defendant.

There is another rule of law, and that is, if the testimony is such that the minds of reasonable men might differ as to whether a party had been guilty of negligence or not, then it is improper for the court to interfere, but the question should be submitted to the jury; and so where it is a question that reasonable minds might differ upon as to whether an ordinarily prudent man would be excused from looking and listening, that question should be submitted to the jury and should not be determined by the court.

If there are no circumstances which would excuse a person of ordinary care and prudence from looking and listening, then, if it appears that he did not look and listen, if it was practicable to do so, his negligence becomes a matter of law under the authorities of this state.

The plaintiff, according to his own testimony, had been out some distance from the village of Woodside on this Sunday, and along towards evening, when it was growing perhaps a little dusk, reached the village

of Woodside. There is an allegation in the petition which might be material; that the headlight on the engine was not of sufficient strength to show a light as far ahead as it should have been shown, but nothing seems to have been made of it on the trial of the case nor here. That there was a headlight on the engine does not seem to be disputed, and it was light enough at this time to see a train of cars without a light, for a number of witnesses were called who were about there and no one testified that it had grown so dark but what a train of cars could be seen readily.

Plaintiff had been out in the afternoon looking after his oil wells and was returning home. He was thoroughly familiar with this crossing, as his own testimony shows. He had crossed it for a year prior to the accident every day or every alternate day and was perfectly aware of the fact that he was approaching a railroad crossing. There is an allegation in the petition that there was no warning sign at this crossing, but nothing seems to have been made of that, and that would not be material in any event as plaintiff was fully aware of the fact that he was approaching this crossing.

It was about five o'clock; he came from the west and was driving east and the train which struck him came from the north. He was driving along the main street of the village of Woodside upon which there were some houses, and some photographs were introduced in evidence to show that the houses were not built closely together but were some distance apart. There was also a store on this street, about two hundred and fifty feet from the railroad crossing, and plaintiff was asked this question: "State whether you stopped along that street anywhere," and he answered that he did, about two hundred and fifty feet from the crossing. He says he stopped for the purpose of fixing a tug on his harness, that had become unfastened. Somewhere in the record, it is shown that he stopped about in front of the store. After he had repaired his harness he got into the buggy and drove across the track. He was asked to state what he did at the time he got out of the buggy, and he says: "I listened, but I did not hear any train; I could not see anything on account of them houses; I looked so far as I could see."

That is to say he could not see where he was at that time two hundred and fifty feet from the track, on account of these houses. He could not see the train if he was looking, with a house between him and the railroad track. The photographs show that there was a considerable space between the houses. The undisputed testimony discloses that for a distance of one hundred and eighty five feet there were no houses; between the last house and the railroad crossing it was one hundred and eighty-five feet; there was in this space a stave shed, about eighteen feet wide and a hundred and thirty feet long and it had at that time, at the end toward the crossing, about a carload of staves that obscured the view for a very short distance; that is the staves did; the stave shed was entirely open from the ground to the roof, leaving a space to see the cars through. At the time he got into the buggy, he says: "I listened, but I did not hear any train." That is, he listened at a point two hundred and fifty feet from the crossing and he could not see anything on account of the houses: He says: "I looked as far as I could see."

Q. Did you hear anything? A. No.

Q. You may state what if anything happened after that? A. Why, I drove on towards the track and as my horse came close to the

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track of course I seen the engine, and my horse commenced jumping and I could not hold him and he went up and down and my buggy got struck by the engine.

Q. How long a time was it from the time your horse got scared until you were injured? A. I don't know. Not any time at all.

Q. And you may state as to where you were after the injury?

And he said he was picked up about thirty feet from the track, and sustained personal injuries to some extent but recovered sufficiently to be out after a time.

Now it will be observed by this testimony of the plaintiff, in the examination in chief, he is asked: "State what you did at the time you got out of the buggy and at any time up to the time you crossed the railroad track?" and he says "I listened, but I could not hear any train, but I could not see anything on account of them houses. I looked so far as I could see."

So it would appear from his answer that he did not look after he had got beyond the houses, for he says he could not see anything on account of the houses. On his cross-examination he testifies that he was familiar with this crossing and that he had crossed it every day or so, and on page seven of the record he is asked:

Q. You stopped and got out of the buggy to fix this tug about two hundred and fifty feet west of the crossing? A. Just about.

Q. And when you were two hundred and fifty feet west of the crossing, the houses down on these lots were in your way so you could not see? A. I can not say that.

Q. And you looked as far as you could through those houses and then you got in your buggy and drove on, supposing there was nothing coming? A. My horse, as I got in the buggy—my horse went on a trot about four or five miles an hour and as I passed on I looked.

Q. You trotted up to the crossing on a slow trot? A. Yes four or five miles an hour. As I got about—well, past the store, looked out the buggy and I did not see no train. It was getting dusk and it was cloudy, and as I drove on towards the track you know, I don't know how many feet I was, there came the train, and then my horse commenced jumping and getting scared with the steam and I could not hold him.

He says his horse was not a spirited horse.

Q. Where you stopped was in front of the store? A. A little bit further back to the west.

Q. Then when you got in your buggy your horse started without your telling him to start and you went on a trot of four or five miles an hour right along? A. Yes, I started the horse up again when I got in the buggy.

He was riding in a top buggy with curtains on the sides, and, as appears from his testimony, after he got in the buggy his horse started on a trot, at the rate of four or five miles an hour. This testimony is susceptible of an interpretation and construction that he did not look after he got beyond the last house. One or two of his answers however would indicate that he might have done so, but his testimony on that point is somewhat indefinite; but it would be fair to conclude that he meant to have it understood that after he got out from behind the houses he looked and did not see the train.

There is another principle of law which has been laid down by our Supreme Court, and that is, that although a party testifies that he looked and listened, if the circumstances are such that by looking and listening

in the exercise of ordinary care he must have seen an approaching train, he will be held guilty, as a matter of law, notwithstanding his testimony that he looked and listened.

It does not avail a man to testify that he looked and listened for an approaching train when it is clear that if he had looked and listened and exercised ordinary care, he must have seen the train or heard it approaching, and if the undisputed facts show that if a party had looked and listened with ordinary care he must have become aware of the approaching train, it will be held that if he did look and listen, he did it so negligently that he himself was guilty of contributory negligence which contributed to his own injury and therefore cannot recover.

A witness by the name of Marks, an engineer of the railroad company was put upon the stand by the plaintiff to testify to a plat offered in evidence, and he testified that he made the plat and the accompanying measurements correctly, and on cross-examination was asked some questions in regard to the distances that one might see up the track to the north, while approaching it on Main street, as the plaintiff was at the time of the accident, and these distances are indicated on the plat by figures and red lines. It is best to read from his testimony, so as to get it exactly as the witness testifies:

Q. You took all the measurements? A. Yes, sir.

Q. Do these figures on the dotted red lines indicate the distances of the point of view from the crossing? A. Yes, sir.

This further point of view west of the crossing is 185 feet is it? Q. A. Yes, sir.

Q. And the next one, as you approach, is 160 feet? A. Yes, sir.

Q. And the next one is fifty-two feet? A. Yes, sir.

Q. And the next one is thirty-six feet? A. Yes, sir.

Q. And the next one is twenty-five feet? A. Yes, sir.

Q. Now the red line which is drawn from the point 185 feet west of the crossing northward passes in front of all buildings, does it not? A. Yes, sir.

Q. It is west of the stave shed and stock pens? A. Yes, sir.

Q. But it passes between all of the houses and the railroad track, does it not? A. Yes, sir.

Q. Take the next point of view which is sixty-five feet west of the crossing, and you can see down the track from that point north; how far? A. You can see to a point two thousand feet.

So that at one hundred and eighty-five feet from the crossing the plat shows you can see down the track eight hundred and twenty feet. At sixty-five feet from the crossing, according to the undisputed testimony in the case (this testimony was not contradicted or disputed by anyone), you can see down the track nearly a half mile. There were no houses between that point and the railroad track, except this stave shed, and there only a carload of staves at one end which obstructed the view for ten or twelve feet. There was a fence, but it was not of such a height as to obstruct the view of one sitting in a buggy.

These questions then were asked:

Q. You can see down the track then 2,000 feet? A. Yes, sir.

Q. And that line passes in front of all the houses, does it not? A. Yes, sir.

Q. So that there is absolutely nothing to obstruct the view along that line? A. Nothing.

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Q. Neither is there anything to obstruct the view on the first line, commencing 185 feet from the crossing? A. No, sir.

Then this question was asked:

Q. Now we will come down to the point fifty-two feet from the crossing. Is it not true that you can see from that point two miles down the railroad track? A. It is true with the exception of the staves that are now piled there.

Q. I am not asking you about now. From that point you can see down the track two miles? A. Yes, sir.

Q. With absolutely nothing to obstruct the view? A. Nothing.

Q. It clears the stave shed on the west? A. Yes, sir.

Q. And about the stock pens—where the line crosses the stock pens is an ordinary fence? A. Yes, sir.

Q. About the same height of the fence along the right of way? A. Yes, sir.

Q. So that you can look over the top of it if you were merely standing there? A. Yes, sir.

Q. And from a buggy you could see clear over? A. Yes, sir.

Q. Now coming to the point of view thirty-six feet west of the crossing, is it not true that you could see 282 feet down the railroad track without any obstruction? A. Yes, sir.

Q. That line passes east of the stock pens and east of the stave shed? A. Yes, sir.

Q. So that there is absolutely nothing in the way for 282 feet down the railroad track? A. Yes, sir.

Q. And when you get on the side track, which is still twenty-five feet away from the crossing, you can see without any obstruction clear down two miles north? A. The side track is not twenty-five feet away, but when you get twenty-five feet away from the center of the crossing of the main track you can see down the track two miles. It is not immediately on the side track, but to the west of the side track.

Q. Just west of the side track you can see two miles? A. Yes.

Q. And you can see free of all buildings, sheds and everything? A. Yes, sir.

Q. Now state if it is not true that a man walking along here on foot can see the smoke stack of the engine if he were looking and the engine were coming, over the top of that shed? A. Yes, I believe he could.

Q. And riding in a buggy, is there any doubt about his being able to see the smoke stack of the engine over the top of that shed? A. No sir, not to my mind.

On page 12 this question is asked him: "I thought you did not understand me. So that it is true from the point 185 feet west of the crossing up to the crossing, there is only a space of about ten feet where a man could not see an engine coming down the track if he were looking?" and he answered "I think that is the fact of the case."

This then, was the uncontradicted testimony as to the conditions surrounding that crossing and the ability of a person to see a train as it approached from the north as he approached the crossing from the west, as the plaintiff did. So that it appears from this testimony that for the full distance of one hundred and eighty-five feet there was an unobstructed view of this track for the distance of 820 feet a distance far enough to enable one to see the train and stop with safety. Now it was not dark at this time. The freight train was running at an ordinary rate

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of speed; it is not claimed that it was going faster than freight trains usually do; probably going twelve or fifteen miles an hour. It was making the noise that trains of that character usually make. It was heard by many people, some of whom were called as witnesses by the plaintiff. There were some witnesses who lived and were in the vicinity of this crossing, called to testify in regard to the signals. They testify that they did not hear the signals given. Several testify that the signals were not given. The plaintiff testified he neither saw nor heard the train. These nine witnesses to whom I have referred all heard the train. Some of them saw it. Some of them were in the houses around and about, and heard this train. Another was in his house lying on a lounge and heard the train as it went by. His wife and daughter also heard it. So that all the people near that crossing who were called by the plaintiff, nine in number, heard this train as it approached the crossing and testified they did not hear any signal given. The plaintiff, according to his own testimony was going along in a top buggy with the curtains down. He was not in a position to hear an approaching train, perhaps, with himself surrounded by the top of the buggy and curtains. He was trotting along at a four or five mile gait. So far as the evidence shows, he did not slacken the speed of his horse until his buggy was finally struck by the train. Can it be held that the plaintiff might have looked and listened with ordinary care for this approaching train and not see or hear it? He had this full one hundred and eighty-five feet to look for the approach of this train. At sixty-five feet from the crossing he could see down the track two thousand feet, and at a hundred and eighty-five feet he could see eight hundred and twenty feet. Twenty-five feet from the crossing he could see two miles and with this unobstructed view he testified that he did not see the train, and although all these persons who were called by him as witnesses testified they heard the train, he testified that he did not hear it.

It seems to us that from this testimony, under the authorities in this state, this plaintiff, as a matter of law, must be held to have been guilty of contributory negligence; that if he had looked he must have seen the train, or if he had listened, with ordinary care, he must have heard it. He had abundant opportunity to see it and hear it, and therefore if he did look and listen, and did not see it or hear it, he must have looked and listened in a manner so negligent as to be guilty of contributory negligence. If he did not look and listen, then he was clearly guilty, under the law, of contributory negligence, and can not recover.

The cases in which this doctrine is laid down are so familiar and well known to the profession that it is hardly worth while to cite them. In connection with this testimony two or three cases may be referred to, however, which are in point. One is *Cleveland, Columbus & Cincinnati Railroad Co. v. Crawford*, Admr., 24 Ohio St., 631, the first paragraph of the syllabus of which reads as follows:

"Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train, and the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed."

It might be excused if the circumstances were such that it would be reasonably excusable not to look and listen; the Supreme Court say

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that might excuse his failure to look and listen, but in this case there is absolutely nothing to excuse the plaintiff from looking and listening. He knew he was approaching a railroad crossing; he was perfectly familiar with it and thought of it, and at the time he had an unobstructed view for 185 feet from the crossing. There appears to be absolutely nothing to excuse him from complying with the rule laid down by this case and the other authorities in this state.

In *C., C. & I. R. R. Co. v. Elliott*, 28 Ohio St., 340, the second paragraph of the syllabus reads: "The omission to ring the bell or sound the whistle at public crossings is not of itself sufficient ground to authorize a recovery, if the party, notwithstanding such omission, might by the exercise of ordinary care have avoided the accident."

And the last paragraph of the syllabus reads: "It is the duty of a traveller upon the highway, when approaching a railroad crossing, to make use of his senses to ascertain if there is a train in the vicinity; and if, when in full possession of his faculties, he fails to see or hear anything, when a prudent man, exercising his eyes and ears, with ordinary care, would have discovered a train in close proximity, and he is thereby injured, he is guilty of such negligence as will prevent a recovery."

The language of that paragraph of the syllabus will be noticed: "If, when in full possession of his faculties, he fails to see or hear anything, when a prudent man, exercising his eyes and ears, with ordinary care, would have discovered a train in close proximity, and he is thereby injured, he is guilty of negligence." Although he says he did look and listen. In *Pennsylvania Co. v. Rathgeb*, 32 Ohio St., 66, this rule is laid down again, and the Supreme Court say, on page 72 of the opinion: "We think the law must now be considered as well settled, that the traveler approaching a crossing must be upon the lookout for danger. Ordinary care requires that he must look and listen to see if a train is in the vicinity, and if he fails in this, it is not merely evidence of negligence to be considered by the jury, it is itself such negligence as will prevent a recovery."

And on page 73 in the opinion, the court say: "Being able to see, herefore, and the opportunity of seeing being presented, his failure to discover or to be aware of the approaching cars, we think, was not only evidence of negligence, but negligence itself, and sufficient to justify a verdict against him."

To hold that the plaintiff in this case was entitled to have this question submitted to the jury under the undisputed facts, it seems to us would be to hold directly contrary to the law as laid down by the Supreme Court in this state.

The court, in our judgment, under this testimony, was required by the law in this state to do what was done—direct a verdict for the defendant.

The evidence was clear and undisputed that the plaintiff might have seen this train in time to avoid injury. The fact that he testified he looked from time to time as he does testify in rather an indefinite way, is not sufficient under the law of this state to require a submission of the question to the jury. The evidence is uncontroverted and clear that he had abundant opportunity to see and hear this train. If he had

looked with proper care he must have seen it, or, if he had listened he must have heard it, and the conclusion as a matter of law is, that he either did not look or listen and therefore cannot recover, or, if he did look and listen, he was so careless and negligent that he must be deemed guilty of contributory negligence as a matter of law.

For these reasons the judgment of the court of common pleas will be affirmed.

WILLS.

[Warren Circuit Court, April Term, 1900.]

Smith, Swing and Cox, JJ.

ELIZA WALKER V. DAVID WALKER ET AL.

1. DEVISE OF FEE WITH DEVISE OVER—CONSTRUCTION.

The doctrine that, where real estate is devised in terms denoting an intention that the primary devisee shall take a fee simple on the death of the testator, followed by a devise over in case of his death without issue, the latter words refer to a death in the lifetime of the testator, is not the law of this state; under the decisions of the Supreme Court such words, or words of similar import, are to be interpreted according to their popular and natural meaning, and as referring to the time of the death of the first taker, unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purpose.

2. DEVISE IN FEE—PAYMENTS IMPOSED—RULE AS TO UNDEFINED ESTATES.

A will by one provision giving testator's children land in fee simple, and by other provisions imposing upon devisees the burden of making large payments of money to his executors, to be used in the payment of legacies to other children, and for the payment of the debts of the testator, will not be considered as indicating an intention of the testator to give a fee simple title to the land devised subject only to the charges imposed. This rule only applies to cases where the devise is so indefinite that the intention of the testator can not easily be ascertained, and not where the estate is by appropriate language devised in fee simple, with the further provision that if he shall die without issue, or leaving no issue, that it shall pass to other persons.

3. WORD "HEIRS" CONSTRUED TO MEAN "CHILDREN."

Where in a will the word "children" is used in all the devises and bequests, and it is then provided that if any of them "die without issue or leave no surviving heirs," then that such bequest to him shall "pass to my other surviving heirs," the word "heirs" must be construed to mean "children" also, and therefore, on the death of one of the children without issue, the land devised to him goes to the children then living, exclusive of the issue of children who have died before.

HEARD ON ERROR.

SMITH, J.

This case involves the construction of the will of Samuel B. Walker, late of Warren county O., deceased, executed February 4, 1843, and admitted to probate shortly after his death, which took place December 6, 1845. The question to be considered is, what estate was given to Thomas D. Walker, one of the sons of the testator, in the lands devised to him under item 5 of the will by the terms thereof and other provisions made by the testator in his will, and who are the present owners thereof. So far as it is necessary to state the provisions of the will, they are as follows:

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Item 2, directs his debts and funeral expenses to be paid, and his personal estate to be sold by his executors, after setting off to his wife certain specific articles.

By item 5, he provides as follows: "To my son Thomas Walker I give and bequeath about seventy-seven acres of land (describing it, and certain articles of personal property mentioned therein), he to remain in possession of said premises and pay to his mother, my widow, one-third part of all proceeds of said premises, during her life."

By substantially similar provisions, he gave to his sons, Jackson Walker, William Walker, George Walker, James Walker, and to his daughter Margaret J. Walker, each a tract of land, except that James and the daughter were not required to pay any part of the proceeds of their land to their mother during her life. Then follow certain provisions that some of the children to whom these devises of land were made, should at the expiration of five years from his death pay a sum named to his executors, and ten years later pay another sum to the executors. So far as Thomas was concerned it read thus:

"Item 12. And that my son Thomas at the same periods as in the last item pay to my executors three hundred and fifty-nine dollars, and three hundred and fifty-nine dollars more making \$718.00."

Item 14, provided that if the personal property should prove insufficient to pay his debts, then certain of his children to whom he had devised land, of whom Thomas was one, were to contribute and pay to his executors the amount of the deficiency in proportion to the amounts directed by them to be paid before to the executors, which sums were to be a credit on the first payment required to be made, and all of the pay ments required to be made by Thomas were paid. And by item 15, he then provides as to the payment by the executors (doubtless from the sums so to be paid to them by the devisees), of certain pecuniary legacies to other children of the testator.

Item 16, provides as follows: "I further will and direct that in case any of my heirs aforesaid die without issue or leave no surviving issue, that the bequest or bequests hereinbefore made shall pass to my other surviving heirs."

Samuel B. Walker died leaving all of his children surviving him. There were seven sons and two daughters. Thomas Walker died May 18, 1890, leaving no issue. Four of his brothers and his two sisters died before he did, viz., William, George, Samuel and James, and his two sisters, Margaret and Mrs. Shields, all six of whom died leaving children surviving them. The original action was one for the partition of the real estate so devised to Thomas Walker, and was brought by the plaintiff, a grandson of Samuel Walker, son of the testator, his father Luther, one of the children of said Samuel, being dead. Two of the children of Samuel B. Walker, the testator, died after the death of Thomas D. Walker, viz., A. J. Walker and John S. Walker. A. J. Walker died leaving children, and John S. died leaving no surviving issue.

Thomas D. Walker in his lifetime undertook to convey to others in fee simple a part of the land so devised to him by his father, and by his will undertook to devise the residue thereof in fee simple to his wife. A. J. Walker had contemplated to convey his interest in the land in question to others in fee simple, and John S. Walker, who was the survivor of all of his brothers and sister, either conveyed or devised all of his interest therein in fee simple. All of the children and heirs at law,

or devisees or grantees of the children of Samuel D. Walker, the testator, are before the court, and the question, as has been said, is who are the owners of the said real estate.

It is urged by the counsel for the plaintiff in error, Mrs. Walker, the widow, and devisee of Thomas D. Walker, that the devise of the land to her late husband, was of a perfect fee simple title, and for these reasons: First, that the language of item 5 of the will of his father, if it stood alone, is sufficient to give an absolute title to the land, subject only to the payment to his mother of one-third of the proceeds thereof for her life, and such undoubtedly is the case; and that item 16, of the will, does not operate to limit such estate, for the reason that the true meaning and construction to be placed on the language used therein, that "in case any of my heirs aforesaid die without issue, or leave no surviving issue, that the bequest or bequests hereinbefore made shall pass to my other surviving heirs," is this, that if such an heir should die without issue, or leave no surviving issue, in the life time of the testator, then it shall pass to his other surviving heirs.

But it seems to us entirely clear, that whatever may have been the adjudications as to this or similar provisions in wills by the English or other courts, sustaining this view, that it is not an open question in this state. That the decisions of the Supreme Court of this state in *Parish's Heirs v. Ferris*, 6 Ohio St., 563; *Niles v. Gray*, 12 Ohio St., 329, and *Piatt v. Sinton*, 37 Ohio St., 353, distinctly hold that the claim made on behalf of the plaintiff in error, that "where real estate is devised in terms denoting an intention that the primary devisee shall take a fee simple on the death of the testator, followed by a devise over in case of his death without issue, the latter words refer to a death in the lifetime of the testator," is not the law of this state, and that such words or words of similar import are to be interpreted according to their popular and natural meaning, and as referring to the time of the death of the first taker, unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purposes.

The second reason urged by counsel for the plaintiff in error in support of the claim that looking at the whole will the intention of the testator appears to have been, that his son Thomas, and his other children to whom land was given, should have a fee simple title thereto, is this: that by the other provisions of the will, the burden was imposed upon them of making large payments of money to his executors, to be used in the payment of pecuniary legacies to certain of his children to whom land was not given, and for the payment of the debts of the testator. Thus, item 12 provides, in substance, that Thomas in five years after the death of the testator should pay to the executor of the will, the sum of \$357, and a like sum seven years after his death, in all \$714, and that if it be doubtful whether the estate devised to him was a fee, that this provision ought to be sufficient to solve the doubt and convince the court that it was the intention of the testator to give a fee simple title to the land so devised, subject only to the charges imposed upon him by the will in favor of the mother and of the executors of the will, on the ground that it is unreasonable to suppose that a father desiring to benefit a son, would devise land to him by such a title as might, if he paid the burden imposed upon him by the will, be greatly injured instead of benefited. And great reliance is placed on the language used in 3 Jarman on Wills, 5 Am. from 4th London Ed., page 21, paragraph 2, as follows:

"It has long been settled that where a devisee whose estate is undefined, is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee, on the ground that if he took an estate for life only, he might be damnified by the determination of his interest before reimbursement of his expenditure; and the fact that actual loss is rendered highly improbable by the disparity in the amount of the sum charged, relating to the value of the land, does not prevent the enlargement of the estate."

But we are of the opinion that this doctrine of the law is not pertinent or applicable to the case before us. There certainly are cases where the devise to the first taker is so indefinite that the intention of the testator as to what estate he may have sought to give him, cannot be easily ascertained. In such cases, the court called upon to decide what estate was really devised, and to do this by finding from the will itself, viewed in the light of the surrounding circumstances, so as that a burden of the kind indicated is laid upon the first taker, which, if shouldered by him, might be greatly to his prejudice, instead of being for his benefit, might in some cases consider it as strong evidence, or raising the presumption at least that such was not the purpose of the testator, and that he intended to confer upon him the full title to the property. The difficulty, however, in the application of the rule in question to this case is, that in our opinion, the estate given by this will to Thomas D. Walker is not undefined. The will devises to the son by apt and appropriate language an estate in fee in the land; but by a subsequent item provides that if he shall die without issue, or leave no surviving issue, that it should pass to other persons, and such language standing by itself, as we have said, has a distinct and definite meaning in our state.

The next question presented is this: On the death of Thomas D. Walker in 1890, without issue, or leaving no issue, to whom did the land so devised to him pass? The will says that in this event it should pass to the other surviving heirs. Who were they?

As hereinbefore stated, four brothers and two sisters of Thomas D. Walker died before him. All of these brothers and sisters left issue surviving him. Two brothers survived him. One of these died leaving issue surviving him, the other subsequently died leaving no issue surviving him. On the death of Thomas, did any part of his real estate devised to him by his father, pass to the children or heirs at law of the four brothers and two sisters who died before him, or did it all pass to the two brothers who survived him? With reluctance we have come to the conclusion that the two brothers who survived took the estate. In this provision of the will, as in the others which have been under consideration, we have been required to reach conclusions based on the language used by the testator, which it is very probable were never contemplated by him; but if language is used by a testator, the plain and obvious meaning of which cannot be questioned, it must have such construction, though the court called upon to act may be of the opinion that such could hardly have been the meaning of the testator, and that he may not have comprehended the true meaning of the words used. Thus it would seem most natural and reasonable that in making a disposition of the estate which he had given to one of his children on his death, leaving no issue, that he would have provided that it should pass to the surviving brothers and sisters and the children of those who had died before leaving children. But the language of item 16, which provides

for such contingency, certainly does not do this expressly, nor as we think by implication. He says, "that in case any of my heirs aforesaid die without issue or leave no surviving issue, that the bequest or bequests hereinbefore made, should pass to my other surviving heirs."

The word "heirs" appears only in this section 16. All of the devises and bequests made by him in his will (except as to the provision made for his wife), were to his children—his sons and his daughters. Evidently then when he speaks in item 16 of "any of his heirs aforesaid dying without issue," he refers to the children before named, to whom, he says, bequests had been made, and follows it with the provision that if any of them "die without issue or leave no surviving issue," then that such bequest to him "shall pass to my other surviving heirs."

The 18th of Jarman's General Rules of Construction, which are considered as of great authority, reads as follows: "That words occurring more than once in a will shall be presumed to be used always in the same sense, unless a contrary intention appears by context, or unless the words be applied to a different subject. And on the same principle, where a testator uses an additional word or phrase, it must be presumed to have an additional meaning."

The testator in this will having used in this item and where it first appears in the will, the word "heirs," obviously in the sense of his children, his sons and daughters, to whom he had made bequests or devises, it must be held that when he uses it again in the same item, and in relation to the same subject, he uses it in the same sense, and means children there, and when he says it shall pass to his "other surviving heirs," he means his other surviving children. These were A. J. Walker and John S. Walker, and we hold that the real estate devised by the will to Thomas Walker passed on his death to them.

Some suggestion is made by counsel as to what became of the title to the said land on the death of A. J. Walker and John S. Walker respectively. A. J. Walker at the time of the death of Thomas and at his own death had living children. He was, therefore, at the time of his death the owner in fee of the one undivided half thereof, unless before that time he had conveyed the same to other parties, as in fact he had, and his grantees are therefore now the owners of the equal undivided half thereof. John S. Walker was the owner of the other equal undivided half, and as he was the survivor of said children and there was no provision in the will as to the passing of the property on the death of the survivor of the children, we hold that he owned his half thereof in fee, and that the same passed to his devisee.

Such being the holding of the court of common pleas, as we understand, we see no error in the judgment, and it will be affirmed.

There is one suggestion, however, which we make in regard to the costs in these cases. It was practically an action to construe this will, which must have been brought in some shape and in a manner that would probably have entailed more costs in the way of counsel fees, which would probably be payable from the estate. We think therefore the costs and expenses of the suits should be paid from the proceeds of the estate in litigation. We suggest this to counsel that there may be an agreement as to this. Of course, we might revise the judgment as to costs and affirm as to the residue, and then adjudge the costs in the error case as we thought right. But we prefer that counsel agree as to this.

JUDGMENTS.

[Hamilton Circuit Court, January Term, 1900.]

Smith, Swing and Giffen, JJ.

MICHAEL HICKS v. C. C. ARCHER.

SECTION 907b, REV. STAT.—RECORDS DESTROYED BY FIRE—JUDGMENTS.

Section 907b, Rev. Stat., providing that no judgment, the record whereof has been destroyed by fire, etc., shall be held binding and in force against the judgment debtor, or be executed "unless the action or proceeding to establish the existence of such judgment prior to the destruction of the record thereof, shall begin within five years from the passage of this act," does not apply to a judgment recovered before a justice of the peace, a transcript of which was filed with the clerk of the court of common pleas for execution against real estate of the debtor, and part of the judgment collected by the sale of such real estate under the execution issued from the court of common pleas, where the records of the latter court were afterwards destroyed by fire; such judgment was not recovered in the court of common pleas, but before a justice of the peace.

W. A. Hicks, for plaintiff in error.

C. C. Archer, for defendant in error.

HEARD ON ERROR.

SMITH, J.

The question in this case arises as to the construction of the provisions of sec. 907b, Rev. Stat.

The conceded facts are these: That on September 2, 1871, Archer recovered a judgment against Hicks, by the consideration of a justice of the peace of this county for \$170 and costs of suit. That in 1872 a transcript of the docket in such case was filed in the office of the clerk of the court of common pleas of this county for execution. That an execution was issued thereon in July, 1872, and a levy made on that estate of Hicks, which was sold by the sheriff, and the sum of \$102 realized therein, which was applied towards the payment of said judgment, leaving a balance due thereon on July 31, 1872, of \$68.00. That in 1884 the records of the court of common pleas of said county of Hamilton were destroyed by fire; that search was made in the office of the clerk and sheriff of said county for some record as to the issue of said execution, and the return thereon, but owing to the destruction of the records of said office by fire in March, 1884, no such record can be found. On June 24, 1897, this suit was brought before Ganzert, J. P., to recover the amount claimed to be due on the original judgment after the payment of \$102, and judgment was rendered for the balance.

Section 907b, Rev. Stat., provides:

"Nor shall any judgment, the record whereof has been destroyed as aforesaid, be held binding and in force against the judgment debtor, or be executed, unless the action or proceeding to establish the existence of such judgment prior to the destruction of the record thereof, shall be begun within five years from the passage of this act." April 12, 1884.

There was nothing shown tending to prove that any such proceeding was ever commenced to establish the existence of any judgment in favor of Archer v. Hicks in the common pleas court. And the claim is

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that under this provision of the statute no right to recover on this claim exists; that Hicks is not now liable thereon, though the original judgment on the magistrate's docket was never destroyed, and was offered in evidence on the trial.

We are of the opinion that this claim is not well founded. There never was a judgment rendered on this claim in the court of common pleas. It was rendered by the justice of the peace, and the record of it never was destroyed. It is true that under the provisions of our statute a transcript of this judgment was filed in the office of the clerk of the court of common pleas, and entered upon the execution docket, and an execution issued thereon, but this was simply to execute the judgment of the justice of the peace, and there was no record of the judgment of the court of common pleas finding an amount due from Hicks to Archer which had to be restored. It does not come within the letter of sec. 907b or its spirit, and the judgment of the common pleas affirming the judgment of the justice will be affirmed.

JUDGMENTS.

[Hamilton Circuit Court, January Term, 1900.]

Smith, Swing and Giffen, JJ.

RYAN ET AL. V. ROTH ET AL.

MOTION TO VACATE FOR IRREGULARITY—INSUFFICIENT EVIDENCE.

Where the circuit court of another circuit sitting in Hamilton county had heard a case there, and after the return of the judges of such circuit court to their homes, the presiding judge thereof sent a judgment entry to the clerk of Hamilton county to be entered, which was done, such judgment entry will not be vacated as erroneously or improperly made on the affidavit of the attorney of the unsuccessful party, averring that the judgment entry was only the individual act of the presiding judge of that court, not approved by his associates, which appears to be a mere conclusion, based on the fact that the papers were sent to the presiding judge and that the other judges did not live in the same city, without stating facts sustaining averment.

ON MOTION to vacate judgment entry.

SMITH, J.

A motion was filed in this court December 30, 1899, asking that an entry appearing on the journal of the court as of July 23, 1898, purporting to be a finding of fact in the above entitled cause, and a final judgment of dismissal of the action, and one of the same date overruling the motion of the plaintiffs to set aside said finding and judgment entry and to grant them a new trial, be vacated. The motion was filed under the provisions of sec. 5354, Rev. Stat., and *post*, which provide for the vacation or modification by courts of their own orders or judgments after the term at which they were made.

The grounds alleged in the motion are, first, that said entries were made by the clerk of this court, on its journal, by mistake; and second, that there was irregularity in obtaining the same, in this, to-wit: that while said cause having been heard by these judges duly and legally assigned to hold circuit court in this county, which such findings and judgments purport by said entries to have been made by such court, such entries, findings and judgments were in fact made by the presiding judge thereof, against the protest of said plaintiff.

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It clearly appears from the evidence which has been submitted to us, that the case here in question was duly tried by a visiting court assigned to hold court in this county, before July 22, 1898, and that on said day the case was decided by the court, a written opinion being handed down, finding the law and equity to be with the defendants and dismissing the action of plaintiffs at their costs. To this decision the attorney for the plaintiffs at once excepted and applied to the court for a separate finding of facts and conclusions of law, under the provision of the statute, and on the next morning, which was the last day of the session of said judges in this county, a form of such finding and judgment was submitted to the court, but the counsel for the defendants being absent from the city, as we understand, it was arranged by the court and the counsel for the plaintiffs, that if the counsel for defendants was satisfied with the entry so prepared, it was to be entered; and if not, the entries of the different parties were to be sent to the presiding judge, and the court was to approve and return an entry which, with an entry overruling a motion for a new trial, was to be placed on the journal of that court.

Afterwards the two findings of facts prepared by the defendants' counsel, and the entry overruling the motion for a new trial prepared by counsel for plaintiffs, were forwarded to the presiding judge at his home, who shortly before August 21, 1898, approved the entry finding the facts and conclusions of law and the judgment prepared by the counsel for the defendants, and sent them to the clerk of this court with directions to enter them upon the journal as of July 23, 1898, which was the last day of the session of the court or that branch of it in this county, which was done, and they now appear as the action of the court on that day.

As has been stated, the sole grounds urged why those entries should be set aside now, are these: That they were entered by mistake by the clerk, and that they are not the act of the court. Evidently there was no mistake on the part of the clerk, for he did just what the presiding judge directed him to do. And the only foundation for the claim that the judgments were irregularly entered, is the assumption that the court itself never rendered the said judgments, or at least did not pass on the form of the entries submitted and concur in the action of the presiding judge in ordering them to be entered upon the journal. There is no claim whatever but that the judgment of the court as announced was in favor of the defendants, dismissing the petition of plaintiffs at their costs, or that the court in fact directed the motion for a new trial to be overruled. The grievance of the plaintiffs' counsel is, that the finding of facts as entered was wrong or defective, and that the one selected and ordered by the presiding judge to be entered was not approved by his associates who heard the case with him. And the only support of this claim is the statement in the affidavit of the plaintiffs' counsel, that it was done by the presiding judge individually, and without the intervention or action of the other judges who sat in the case.

In answer to this it may be said, first, that it was not necessary or essential that both of said judges should have acted with the presiding judge in passing upon these entries. The action of two of the three members of the court, if they agreed, was sufficient. In the second place we may say that we think the evidence offered was wholly insufficient to support the allegation of the motion. The affidavit of counsel,

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which is the only evidence on this point, states no fact showing that it was true, and it must evidently be considered as a mere opinion or conclusion that such was the fact, based so far as we can see, only on the fact that the papers were sent to the presiding judge at his home, and that the other judges did not live in the same city, and that the orders and judgments were indorsed by the presiding judge and sent by him to the clerk at Cincinnati for entry. This conclusion we think is entirely unwarranted. For all that appears the three judges may have personally or by correspondence agreed on the entries exactly as they appear upon the journal. The idea that the judgment of a court, a record which in many respects imports absolute verity and can not be impeached by parol evidence, is to be set aside on such showing, can not be tolerated. Our knowledge of the manner in which these things are done by courts, in connection with all the facts shown in the case, convinces us that the entries were properly made and should not be interfered with by us. The motion is therefore overruled.

GARFIELD LAW—CONGRESSMEN.

[Cuyahoga Circuit Court, October 27, 1900.]

Caldwell, Marvin and Laubie, JJ.

* STATE OF OHIO V. L. A. RUSSELL.

1. RULE AS TO STATE ELECTION LAWS AFFECTING CONGRESSMEN.

While the state may make wholesome laws for the purity of elections, and for that purpose curtail the amount of money which may be paid out by and for persons who run for office, and attach a penalty, in the nature of a fine, for the violation thereof, it has no power to say that a congressman shall not, on account of the violation of such a law, enter congress or forfeit his election.

2. GARFIELD LAW—UNCONSTITUTIONAL IN PART.

In so far as the act of April 8, 1896, 92 O. L., 123, known as the Garfield Law, and entitled "an act to prevent corrupt practices at elections," declaring that the election of a person who does not comply with the provisions of the act shall be void, applies to congressmen, it is unconstitutional.

3. WHOLE LAW NOT RENDERED INVALID.

Inasmuch as the law in question, in sub-division 7, clearly exempts any right on the part of the state to interfere with congressmen after they have received certificates and entered upon their duties, and inasmuch as so far as the statute extends to fines it is constitutional, the whole law is not rendered invalid by the unconstitutionality of portions referred to in preceding paragraphs.

Harvey Keeler, prosecuting attorney, for plaintiff.
Frank F. Gentsch, for defendant.

HEARD ON ERROR.

CALDWELL, J.

The case of the state of Ohio against L. A. Russell. L. A. Russell was a candidate, having received the nomination of a political party for the office of congressman. He was the candidate upon the ticket but was defeated, and sometime thereafter this action was brought, he having refused to make a return of his expenses under what is known as the

* For decision of the court of common pleas, see 10 Dec., 255.

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Garfield law. This action was brought under that law to recover from him the amount or an amount not exceeding one thousand dollars as provided in that law, that amount to be determined by a jury. He filed a demurrer to the petition. The demurrer was sustained and judgment for defendant to go hence. The case is brought here by the state on a petition-in-error and we are asked to consider whether the court below erred in sustaining that demurrer and in the judgment that it rendered thereon. It is claimed that the statute in question violates the provisions of the constitution of the United States so far as pertains to congressmen, and that being true, that the statute is unconstitutional under those constitutional provisions and can not be enforced, and this action therefore must fail.

The particular portions of the constitution of the United States to which we are referred are as follows:

Section 1. "All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

Sec. 2. "The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

"No person shall be a representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

It is claimed that what is known as the Garfield law adds another requisite to that, and in that it is unconstitutional.

We are referred also to secs. 4 and 5 of the constitution. Section 4 is as follows:

"The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to places of choosing senators."

It is claimed on behalf of the state that the law amounts to nothing more than the *manner* and, on the other side, that it goes further and prescribes a *condition precedent* to holding the office.

Then sec. 5 of the same article says:

"Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day and may be authorized to compel the attendance of the absent members, in such manner, and under such penalties as each house may provide." * * *

That is enough to read of that section.

The provisions of the statute are found in sec. 3022. There are a number of sub-divisions of that section. It is not necessary to refer to *all* of them.

The first section provides:

"No candidate for representative in the congress of the United States, or for any public office created by the constitution or laws of this state to be filled by popular election, shall, by himself or by or through any agent or agents, committee or organization, or person or persons whatsoever, in the aggregate, pay out, give, contribute," etc.

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And it provides a scale within which he shall keep his expenses. And the section a little further on, near the end, provides:

"Any payment, contribution, or expenditure, or agreement or offer to pay, contribute or expend any money or thing of value, in excess of the limit prescribed by this act, for any or all such objects and purposes, is hereby declared to be unlawful, and to make void the election of the person making it."

That is, to make void the election.

The second sub-division is as to the ascertainment of the number of voters, how that is to be determined; and the third section of the act is the statement that the candidate is to make upon his nomination and the affidavit he is to attach and subscribe. There is nothing in that provision that prohibits, however, that he be placed upon the ticket and voted for, providing he fails to make that statement of his expenses, providing he seeks the nomination; and that is no question in this case, because Russell did make this statement. And that is followed by section three, setting forth all expenses of his own or of any one for him or in his behalf or against another, and the form of the affidavit therein.

Then comes the penalty (Sec. 5): "Any person failing to comply with the provisions of the third section or of the fourth section of this act, shall be liable to a fine not exceeding one thousand dollars, to be recovered with costs, in an action brought in the name of the state by the attorney-general or by the prosecuting attorney of the county of the candidate's residence, the amount of said fine to be fixed within such limit by the jury, and to be paid into the school fund of said county."

That is as far as the law undertakes to fix any penalty upon the party who runs for the office and is defeated and who fails to make a return of his expenses.

Section 6, however, provides:

"No board, officer or officers authorized by law to issue commissions or certificates of election shall issue a commission or certificate of election to any person required by the third or fourth section hereof to file a statement or statements until such statement or statements shall have been so made, verified and filed by such person with such board, officer or officers. No person required by the foregoing sections of this act to file a statement or statements shall enter upon the duties of any office to which he may be elected until he shall have filed all statements and duplicates provided for by the foregoing sections of this act, nor shall he receive any salary or emolument for any period prior to the filing of the same."

Then there is a provision in the very next section, subdivision seven, that if a person thus chosen enters upon the duties of his office, and it becomes known to any one who voted for him or who voted in the election, that he failed in this regard, or that his affidavit or return was false, then proceedings may be had and at the end of those proceedings the court may oust the party from the office. Now that proceeding I only mention it because of the beginning, which is:

"At any time during the term of office of any occupant of an office created by the constitution or laws of this state to be filled by popular election and hereafter filled by such election, pursuant to the constitution or laws of this state (other than the office of member of either house of the general assembly or of the congress of the United States)." * * *

So that those persons are exempt from prosecution if they have entered upon their office; and the provisions in sec. 6 to withhold the certificate and to deny the party a right to enter upon the duties of his office and receive any pay, have no exception whatever either of a member of congress or of a legislator.

And then sec. 1 provides as to all persons whether members of congress or persons elected to an office within the state, that his election is to be unlawful and the election is void and he gets no right under it.

Now, the first question for consideration is, does this statute undertake to add to the constitutional qualification of a person who may become a member of congress, an additional qualification? The qualifications will be well remembered,—one pertains to his age, and the other to his residence, the state in which he resides, and the other as to how long he has been a citizen of the United States. It has been held as to a great number of conditions that have been added by the different states from time to time, that they have been to add qualifications; for instance, that he should reside within his district has been held to add a qualification; that he must be of a certain age, of a certain belief, or that he must be of a certain wealth or anything of that kind, all these were added qualifications) undoubtedly, but here we have something that is called a qualification, on one side and contended on the other that it is a mere regulation of the election. And the question is, what is it? Is it not a qualification? This is certain, it is something that disqualifies a person from accepting the office. It removes him entirely from becoming a congressman under that regulation. And it is hard to see how a person can be disqualified by anything unless that thing disqualifies him and adds something when it clearly does not come under that qualifications required by the United States.

We have looked in various dictionaries to see what the word "qualification" means. Does it mean some inherent quality in the individual? Some particular characteristic of the person, such as age or as to place of residence, or may it mean something outside? The dictionaries all seem to agree that it is an enabling quality, that is, it is an enabling quality in the person, or a circumstance. To our minds, this law adds a *circumstance*; that is, the person who is elected, must have it to appear. The circumstance must exist that he has not violated this law, and in that sense which seems to be a generally accepted sense, not only general by the people, but in a legal sense as well, we think that the qualifications called for by sec. 6 of this act is an unlawful one. It might as well prescribe that he should not have violated some other law and required him to make an affidavit that he had never stolen a horse, and never been a thief, never been convicted of a crime; he might be called upon to show by affidavit before he should be allowed to become a member of congress. It is perfectly apparent that in a matter of that kind or one that inheres in his character would be adding to the constitutional requirements.

And that being true, that part of the act would clearly be unconstitutional. But those provisions that we find to be unconstitutional pertain only to those that deprive him of the office. That a person might be fined for violation of the law of the state, need not exempt a member of congress or member of the state legislature, but if the person has received the requisite number of votes, then for the state to step in and say whether that person should be a member of congress, would entirely

supersede the rights of that party under the United States constitution. Perhaps we are not called upon to determine that, and the same might be said in regard to the legislature. So we do not undertake to say but that the state may make wholesome laws for the purity of elections and may undertake for the purpose of curtailing the amount of money that may be paid out for persons who run for office, and may attach to the violation of such law a penalty such as a fine, but may *not* in the case of a congressman say he shall not enter congress after his election. Then the question arises at once in regard to this statute. How much of this statute, therefore, is unconstitutional? So far as the consideration of this case is concerned, no part of it do we find unconstitutional, except that part that pertains to refusing a person elected to congress, a certificate and a seat, and that refusal by the state of Ohio and the state from which he is elected.

The provision in sec. 1 that says if he does not comply with the provisions of the act, that his seat shall be vacated and his election void, is, as far as congressmen are concerned, against the policy of the constitution of the United States, and so far as saying that he shall not receive a certificate of election nor enter (sec. 6) upon the duties of that office, is simply declaring the same thing that sec. 1 does in another form, and those provisions are unconstitutional, but no other part of it do we find unconstitutional. And this question in this case goes no further than I have gone.

Then the question remaining and the only question, this portion of the act being constitutional, would the legislature have passed the other portions, or one portion being unconstitutional, is the whole act so far as it pertains to the election of congressmen, unconstitutional. And the rule in this state is that before the whole act will be declared unconstitutional, where a part of it is clearly so, it must appear to be unreasonable and improbable; that the legislature would have passed the constitutional portion without the unconstitutional portion, and this rule applies to different parts of the statute. This is the rule laid down in *State v. Sinks*, 42 Ohio St., 845. Before we can, therefore, declare this law unconstitutional so far as it pertains to a congressman of the United States, we must find that it is unreasonable and improbable that the legislature would have passed the remaining part of the statute, the part imposing a fine upon a congressman merely, that we must find that that fact exists.

Now in examining this statute we do not say that it so appears. The legislature certainly did not intend to interfere with the rights of congress, for in sub-division seven, it clearly exempts any right on the part of the state to interfere with congressmen after they have received a certificate and entered upon their office. And if the attention of the legislature had been called to this section, it would have arranged it; it would have said that the representatives in the United States Congress should be fined. It would have provided only for a fine for the violation of this law, and so far as the statute extends to fines, we think the statute constitutional. That being true, the court below erred in sustaining the demurrer to the petition. Remanded.

NEGOTIABLE INSTRUMENTS.

[Cuyahoga Circuit Court, October 29, 1900.]

Caldwell, Marvin and Laubie, JJ.

H. P. ELLS V. ANDREW F. SHEA, ETC.**1. DRAFTS—OFFICER OF CORPORATION—INDIVIDUALLY LIABLE.**

One who endorses a draft, drawn by a corporation, as agent or treasurer (no distinction exists between the two terms or between "Treasurer" and "Treas.") without naming his principal or the company for whom he acts, binds himself individually and cannot show, in a suit upon the draft, the relation existing between himself and his principal or himself and the company, or obtain a reformation of the instrument to show such relation.

WHEN RULE OF ELECTION DOES NOT APPLY IN FAVOR OF OFFICER.

Unless it conclusively appears that an action against the company was upon the endorsement or acceptance by such officer, who signed the draft as "Treas.," and not against the company as maker, the rule that plaintiff, having elected to sue the company upon the acceptance cannot afterwards sue the officer individually, does not apply; and plaintiff, having failed to recover of the company as maker has a right to sue the officer who endorsed the draft, in the manner stated, as acceptor.

2. JUDGMENT NOT A BAR TO SUIT AGAINST OFFICER.

A judgment in an action against the company as maker of the draft in question, of "settled, no record; the defendant to pay the costs and judgment for costs entered upon the suit," which would bar another action between the same parties, is not a bar to a subsequent action against the officer individually, as acceptor. Therefore, where such judgment is called in question collaterally, in a suit against such officer individually, it is competent to show the agreement involved in such settlement.

4. NO ESTOPPEL ON GROUND OF LACHES.

Under the circumstances stated, and where it appeared that the officer in question had funds of the company in his possession which he should have used to pay the draft, and that he failed to do so, and the company then became insolvent, the court held that a delay of two years, in bringing suit against such officer individually, after settlement of the suit against the company, created no estoppel on the ground of laches.

Hoyt, Dustin & Kelley, for plaintiff in error.

E. Sewers, for defendant in error.

HILARD ON ERROR.

CALDWELL, J.

Andrew F. Shea brought this action in the court of common pleas to recover against H. P. Ells as the acceptor of a draft. The draft was drawn by a company of which Ells was the treasurer and given to him, said to be given to him for the purpose of transferring funds into the banks of Cleveland where the company really had its place of business, although its factory, etc., was at another point. This draft was to H. P. Ells, treasurer, and, when he endorsed the draft, he endorsed it "H. P. Ells, Treas.," that being an abbreviation for treasurer.

Shea sued the company upon the draft, that is, he sued the makers of the draft. It is claimed that he sued them as acceptors of the draft. At the same time he brought that suit he brought another action on account. The company counterclaimed a large amount, some \$5,000, as against the liability in these two actions. Those suits were afterwards settled, marked: "Settled; no record; the defendant to pay the costs, and judgment for costs entered upon the suit."

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Something near two years after that, or over a year, suit was brought against H. P. Eells as acceptor of that draft upon his obligation.

It is claimed now, that the acceptance of H. P. Eells was that of the company itself; and, in addition to that, it is claimed that having sued the company, the plaintiff, or the defendant-in-error, could not afterwards turn around and sue Eells as the acceptor of the draft. And it is claimed that the settlement merged the entire draft and all the obligations upon it, into that judgment, and that the company cannot prosecute this action.

It is claimed that the court erred in not holding that the plaintiff below was estopped from prosecuting this action against Eells, and Eells prayed for a reformation of this instrument. It is claimed that the court erred in not reforming the instrument. And there was a claim made, upon the hearing, that the court had not before it sufficient evidence to render the judgment that it did. These propositions were urged as grounds of error against this judgment.

Shea recovered a judgment against Eells, not for the full amount of the draft, but for the amount of the draft less the amount that was evidently allowed in the court below as a deduction from the amount due Mr. Shea on the settlement of the suit there.

Now as to this acceptance by H. P. Eells, treasurer, or "Treas.," we think the law in regard to this is settled in the case referred to repeatedly upon hearing, the case of *Robinson v. Kanawha Valley Bank*, 44 Ohio St., 441, which settles the law that an instrument of this kind, signed by the party "Agent" or "Agt.," that the party cannot show upon the hearing the relation existing between him and his principal, and that he binds himself by signing in that way. It is claimed, however, that there is a distinction to be made between treasurer and agent. But, in the *Cook* case, formerly decided by the Supreme Court, the word "Treasurer" was attached to the signature of Cook; and the court there decided it as though he was agent to be shown and referred to the annexed treasurer as though it was agent. But this court will not undertake to assume that the Supreme Court did not know how that draft was signed. The cases generally refer to "Agent," and the Supreme Court, simply in announcing the doctrine, we apprehend, undertook to say that there was no difference between agent and treasurer, and, therefore, treated it as though it had been signed "Agent." And we see no reason for any distinction and we believe none exists between the person signing his name "Treasurer" or "Treas.," or treasurer in full.

The draft, therefore, on its face, as we hold, did not reveal the fact so clearly that the court should have said so to the jury, that that acceptance by Eells was the acceptance of the company; or, in other words, that "H. P. Eells, Treas.," means H. P. Eells, treasurer of this company. That being true, there is no ground for reversal on that point.

The next proposition contended for by plaintiff in error, is, that the proceedings taken by Shea in suing upon this draft, was a suit against the company as acceptors of the draft, treating H. P. Eells simply as the treasurer of the company, and his acceptance being simply that of the company; and having elected thus to sue, it cannot afterwards turn around and sue Eells. In other words, upon an instrument where the principal is liable and also the agent, that if the party with whom the dealing is had, sees fit to sue the principal, he cannot, thereafter, sue

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the agent, and *vice versa*; and if he sees fit to sue the agent as having made the contract with him, he cannot sue the principal as having made the same contract.

In the petition that is filed in that case, there is some language that might tend to show that the suit was brought upon the acceptance; but nothing is conclusive at all to our minds, and we do not hold that that suit was against the company as acceptors of the draft, but was against them as the makers of the draft. That being true, if they failed to recover of the maker, they could sue the acceptor afterwards. And the grounds of election set forth, do not obtain in the case.

And as to the third point made, that, having elected to look to the corporation, they are now estopped to looking to Eells, it is, in a sense, a repetition of the former point, and, so far as it is, it is not good.

It is sought to carry this point a little further, however, in this: That if the suit was not against the corporation as such on its making the draft, or upon its acceptance of the draft, but was against it as makers of the draft, at the same time Mr. Shea knew that H. P. Eells was treasurer and meant to bind himself only as such, and having sued the makers with that knowledge and after the settlement by which he did not get his pay in full as agreed upon on the settlement, that if he meant to prosecute Eells, that he should have been diligent in so doing, for, by his delay, he has allowed Mr. Eells to believe that he did not intend to prosecute further, and thus misled him so that he is without funds with which to pay the draft.

We have examined the evidence closely upon this to see how Mr. Eells was situated. The company went into the hands of the court very soon after this settlement was made below and after that time Mr. Eells handled no funds with which he would be entitled to exonerate himself from liability upon this obligation; and prior to that, he was having a large amount of funds pass through his hands, which, it is fair to presume, as we think, were there for the purpose of paying the obligations of the company, which he might have so used and should have so used to free himself from this obligation. So that we see no grounds for estoppel here.

It was claimed on the arguments, that the settlement of the case below merged this whole instrument into that judgment and that the instrument, therefore, as an obligation against any one, no longer exists, but that the whole thing is merged, and merged for this reason, not because if the party had sued Shea and recovered only a part, that he might not recover all from the endorser or the person who accepted for the balance, but that the judgment below purports and is, so far as this trial is concerned, a full settlement of all obligations of the company upon that settlement, and that, therefore, there is no obligation against the person who accepted it.

The suit below was entered, as I have already stated. There was no judgment entered against the company in that suit, for anything, only for costs; and we believe it to be the law that a suit entered in that way, as a rule settles all controversy between the parties. So that in any future litigation in regard to the same matter, it may be pleaded as a full settlement of everything between the parties. In other words, the courts seem to hold that a judgment of that kind says in effect, that the plaintiff has no claim and that whatever he gets upon that is a matter that does not enter into the consideration of that judgment. In other words, it satisfies him as to that claim.

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But, in this action, it is not between the same parties; as we have already shown, the word "Treas." after Mr. Eells' name does not relieve him from being the third party, entirely a stranger to this company. It is simply a description of his person and does not make him the same as the company.

Now, this being true, this is not between the same persons that were parties to the former litigation and between others. And that places the matter in this light: That that judgment cannot be a bar, or cannot be a complete settlement of the matter except as between the parties who were parties to the suit in which the judgment was rendered. The company, therefore, would not be estopped from setting up just exactly what occurred when that judgment was entered; and thereafter the company did set up that there was an agreement between it and Mr. Shea that Mr. Shea was to receive fifty per cent. of his claim, counting interest. That can be done, we think, where the judgment is called in question, collaterally where the parties are not the same to both suits.

It is said that there was no evidence, and that there is no evidence in the bill of exceptions, as to the terms of that settlement, except it is found in a question that was asked, an intimation that it was on the basis of fifty cents on the dollar of the plaintiff's claim. But we find, in examining the pleadings, that the company set up fully the terms of that settlement in its amended answer, and the reply admits it as true. So, of course, nothing would be found in the testimony upon that point, it being an admitted point.

It is claimed that the court erred in not reforming that instrument. Now, if what I have said already is true, that Mr. Eells could not rely upon the trial that he was merely the treasurer of the company and that what he did the company did, and he did not bind himself personally, if that is the law of the case, then of course, the court should not have reformed the instrument, for, in undertaking to reform it, it would necessarily violate that rule of law. It would have to set out, the evidence would have to show that Mr. Eells did not intend to bind himself; that Shea knew that fact, and that when he accepted this instrument from the person who endorsed it over, he knew it was not the endorsement of Eells personally but the endorsement of the company. And all that was barred out under *Robinson v. Kanawha Valley Bank, supra*; and, in the light of that, we think no error occurred in the court refusing to affirm the judgment.

The cause is remanded.

WRONGFUL DEATH—EVIDENCE—VERDICTS.

[Ashtabula Circuit Court, October Term, 1900.]

Frazier, Lanbie and Hale, JJ.

ASHTABULA RAPID TRANSIT CO. v. MAX DAGENBACH, ADMR.

EVIDENCE OF NON-EXPERTS AS TO SPEED OF TRAIN.

In an action for wrongful death, the admission of testimony of men accustomed to riding on cars, though not railroad men, as experts, who stated that they were competent to give an opinion as to the speed of a street railway car, was not prejudicial error.

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2. OPINIONS AS TO STREET CAR LIFE SAVING APPLIANCES.

Witnesses who testify that they are acquainted with street railroads in various cities, and with the character of life guards generally used on cars, are competent to testify from observation and experience that those in general use are adapted to the purpose, and that they are beneficial in the way of saving and protecting life; and also to testify as to the character of the guard used on a particular car and that it had no tendency whatever to preserve or save life.

3. SPECIAL REQUESTS NEED NOT BE GIVEN VERBATIM.

It is not necessary, where special requests are presented which are proper, to give such requests *verbatim*; it is sufficient if the propositions contained therein are covered by instructions which embody, in different language, the same instructions.

4. VERDICT NOT EXCESSIVE.

A verdict of \$1,000, in an action for the wrongful death of a boy five years of age, does not clearly indicate passion or prejudice, and is not manifestly excessive within the meaning of the law, especially where evidence tending to prove probable pecuniary loss was erroneously excluded.

HEARD ON ERROR.**LAUBIE, J.**

The case of the Ashtabula Rapid Transit Company v. Max Dagenbach, as administrator of the estate of Arthur M. Dagenbach, deceased, is here on error to reverse the judgment of the court below, in an action brought against the Ashtabula Rapid Transit Company, to recover damages for the killing of the decedent, on the line of the road of the company, in the city of Ashtabula.

The decedent was a boy a little over five years of age, and Max Dagenbach, his father, brings the suit as administrator to recover for his wrongful killing.

Objection was made to the admission of certain evidence by the court below in the case.

It seems this boy, with one other boy, was hanging on to a delivery wagon as it left his father's yard; that it passed out to, and crossed the track of the defendant's road, and ahead of another team, which was going in the same direction, and as it proceeded down the street, the little boys dropped off, and the evidence is somewhat conflicting, as to which of the boys went on to the railroad track first. The father of the other boy, who worked in the cigar shop of Max Dagenbach at this point, and who was interested in watching the performance, says that the first boy off was the boy that was killed; that he stepped upon the railroad track, and stood there looking back, to see if his comrade was following, or going to follow, as he supposed, and while there the car came along, and ran over the deceased and killed him.

Other witnesses testified that the boy that was killed was not the first one that passed on to the track; that another one went across and stood over by the curb on the side of the street; but all say there was nothing in the way at all to interfere with the motorman seeing the boys as the car came down the street. It was on a descending grade, and the car, as the motorman testified, was allowed to drift down.

The testimony of those who might not be called experts, was introduced for the purpose of showing the speed of the car as it passed down the grade. One or more of these were not railroad men, but men who had observed the car and the accident, and they stated that they had been in the habit of riding on such cars, and observing somewhat their speed, and were competent to give an opinion as to the

speed of the car, and they were under the objection of the defendant below, allowed to give their opinion, and generally they stated it was going at the rate of about twenty miles an hour.

We are not prepared to say that the court erred in the admission of that testimony.

It is also alleged as error that the plaintiff below was permitted to show, by those who knew, that life guards were in use generally upon railroads of this character, in front of the motor, for the purpose of endeavoring at least to protect life, where persons were caught upon the track; and they stated that they were acquainted with railroads of this character in the various cities of the state, and knew the character and form of the life guards that were used generally, and knew the character of the life guard that was on this car, or rather that there was none. They were permitted to describe the character of the guards that were used on the roads generally, and the character of the front of this motor-car, and in addition thereto, to testify from their observation and experience that those in general use were available for the purpose, and were beneficial in the way of saving and protecting life, while that which was upon this motor-car had no tendency whatever to preserve or save life as a life guard. They described it as a "V" shaped wooden projection, that stood out a short distance beyond the motor; that it was not really intended as a life guard, and was not and did not operate as such. We cannot say that the court erred in the admission of this testimony. That there was no life-guard was alleged in the petition as a ground for recovery, and we see no reason why the evidence was not admissible.

We pass by all other of the exceptions to evidence that are in this record, without further notice; that we see nothing in the rulings that were erroneous or prejudicial to the defendant below.

There is an exception to the refusal to give request number nine of the defendant below in regard to the measure of damages, which reads as follows: "Nothing in this case can be allowed on account of bereavement, mental suffering or punitive damages; the money value of the decedent to his parents and next of kin is the limit of recovery in this case, if you should reach that question, and the amount must be determined by you from the evidence and not by guess, and in order to recover in this case, it must be shown by the evidence that defendant was guilty of negligence; that that negligence was the direct, proximate and sole cause of the injury, and that the beneficiary or beneficiaries would have received financial aid from the deceased if he had lived, and if no pecuniary loss is proven your verdict must be for defendant."

It is claimed that the court erred in refusing to give this part of it, "and the amount must be determined by you from the evidence and not by guess." The court was not obliged to give this charge in the very language used. All that it was required to do was to give it in substance and effect, and that we are satisfied the court did do.

entitled to recover. It should be no greater amount because the defendant is a corporation than it would be if this action were between two individuals, and it should be in such an amount as in your judgment and good sense will fairly and reasonably compensate the parents and next of kin for the financial injury that they have sustained, by reason of the negligence of the defendant, not exceeding the sum of five thousand dollars. It should be a fair, reasonable and just compensation, proportionate to the pecuniary injury resulting to the parents and next of kin of the decedent from his death, and in determining this, the reasonable

expectation of what pecuniary aid the beneficiaries might have received from the decedent had he lived, is a proper subject for your consideration, so far as it is shown by the evidence in the case; but no damages can be given on account of the bereavement and mental suffering or as a solace to the parents and next of kin on account of his death, or as punitive damages. This compensation can be considered by you only as a hard cash transaction.

"You may take into consideration, in determining the amount which he is entitled to recover, the age, sex, health and intelligence of the decedent; the reasonable expectations of pecuniary aid, which the father, mother, brother and sisters might have received from him had he lived, taking into consideration their ages and the uncertainty of life, so far as it is shown by the evidence in the case; unless, gentlemen, you should find that some one, either his parents or the child was guilty as we have suggested to you before, of contributory negligence in the case, which contributed directly and proximately to the injury caused to this decedent. If so, then the amount that you think that one should recover, should be deducted."

We think the court in its general charge covered the whole law of the case, and gave in effect every proposition that was asked in request nine, language that was appropriate to the case.

The jury returned a verdict of a thousand dollars, and this is said to be against the evidence and excessive, this boy, while a healthy boy, having been but a few weeks over five years of age.

It appears from the evidence that the father was a cigar maker, and plaintiff offered to show that boys of ten years of age and upwards were employed in the business. That he expected to use this boy, if he should reach that age, in the business, and this the court excluded upon the objection of the defendant. We think that was a proper matter for the consideration of the jury, as bearing upon the question of whether or not the parent might, in the natural course of events, receive aid from this son and compensation over and above his expenses to his father; but the court excluded it, and generally we think the action of the court in its rulings was more beneficial to the defendant below than prejudicial.

While we might have been better satisfied with a less verdict, we are not prepared to say that it was a verdict that was rendered under prejudice or passion, or that it was clearly excessive within the meaning of the law, which allows a party to take advantage of such a question. We cannot say that this verdict was manifestly wrong, and on the whole the case will have to be affirmed.

TAXATION—PENALTY.

[Butler Circuit Court, October Term, 1899.]

Smith, Swing and Giffen, JJ.

MARTHA J. STEWART v. FRANK X. DUERR ET AL.

1. WIFE TAKING PROPERTY OF DECEASED HUSBAND AND ASSUMING HIS CONTRACTS.

Where a wife, there being no children, on the death of her husband, takes all of his property, which is liable for his contractual obligations, and assuming and agreeing to carry out such contracts, her agreements to that effect are based on a good consideration, and she is liable thereon.

2. DEBTS NOT DEDUCTIBLE FROM MONEY IN BANK.

Debts cannot be deducted from money in bank subject to check, although the liabilities of the owner are largely in excess of his deposit in the bank.

3. PENALTY SHOULD NOT BE IMPOSED UNLESS RETURN IS FALSE.

Where a person acts in good faith, believing that he has no money or credits which should be returned for taxation, the penalty of fifty per cent. should not be imposed.

Stephen Crane, for plaintiff.

Warren Gard, Prosecuting Attorney, for defendants.

APPEAL from the court of common pleas of Butler county.

SMITH, J.

This is an action brought by the plaintiff against the auditor and treasurer of Butler county, seeking to enjoin them from taking any steps to enforce the collection of taxes for the years 1893-4, 5, 6 and 7, which had been placed by such auditor on the county duplicate for those years as taxes on property and credits of the plaintiff which, it was claimed by the auditor, the plaintiff had in those years failed to return for taxation, and where the auditor, acting or assuming to act under the provisions of sec. 2381, Rev. Stat., had attempted to place the true amount of the personal property which she should have returned for those years, upon the duplicate with a penalty of fifty per centum thereon, and to charge her with the taxes thereon for such years, the whole amounting to the sum of \$1,292.80.

In the first place we may say that there was no return of property for taxation made by this plaintiff for any one of those years. It appears from the evidence that her husband died in February, 1893. Shortly before his death he had organized a corporation, known as the F. P. Stewart Granite Co. Before this he had carried on the same business, but had become involved in debt, and was much embarrassed financially. He appealed to his friends to assist him in his time of need, and induced them to take stock in this company. This was done by quite a number of persons, and it seems clear that it was done under this arrangement: That they were to pay the cash for the stock so taken by them, and Mr. Stewart agreed to repay the amount to them respectively, and do this as soon as he was able, and when done, the holders of such stock were to transfer it to him. In one case he gave his notes for \$600, the par value of the stock taken by three persons, and their stock was transferred to him, but in the other cases the contracts were verbal. The amount of the stock so subscribed and paid for by other persons was \$5,900, and Mr. Stewart himself owned and held the remainder of the stock, probably a little over \$6,000. The corporation was the owner of the shops situate on a leasehold, but it does not appear that it had any personal property of any considerable value, or that Stewart himself had, other than his stock in the corporation.

Mr. Stewart left a will which was duly admitted to probate, by which he provided that all of his debts be first paid, and all the rest and residue of his estate he gave to his wife, and appointed her the executrix of his will. At the time of his death Stewart held insurance policies to the amount of \$8,000, payable to his wife, the plaintiff, and this amount was paid to her in the spring and summer of 1893. Of this she appropriated about \$1,000 (and there were other claims against her), to the payment of her husband's debts, funeral expenses, etc., etc., and it is conceded that on the day preceding the second Monday of April, she should not

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have returned for taxation more than \$6,100, and that was the amount charged against her for taxation by the auditor for the year 1893.

Very soon after the death of her husband in February, 1893, there was a meeting of the stockholders of the corporation, at which Mrs. Stewart agreed with such of the stockholders present, who had made the arrangement before referred to with her husband, that she would herself carry out that arrangement with them. This was concurred in and agreed to by all present, and the evidence is that those who were not present, afterwards were seen by Mrs. Stewart, and like agreements were made between them. These were in our judgment valid and binding contracts. They were made on a good consideration. In the first place, there were obligations on the part of the husband to purchase this stock at a certain price, and as she took all of his property, it was liable first for his debts, and she had a right to bind herself as she did to purchase this stock at a certain price, and she did so. We think it clear then, that Mrs. Stewart was in 1893 liable to pay \$5,900, and that this sum she would have been entitled to deduct from her credits in 1893 in addition to any other *bona fide* debts which she owed. But on the day before the second Monday of April, 1893, she had on deposit in a Hamilton bank \$3,074.36, which she was entitled to withdraw on demand, and which, under the provisions of the statute, is to be considered as "money," and therefore not as "credits" from which she was authorized to deduct her debts. It is clear then, that the auditor was entitled to place upon the duplicate for 1893, said sum of \$3,074.36 for taxation, and to charge her with the proper taxes thereon. But as she was then owing on the stock contracts \$5,900, it would seem clear that as to the balance due her for insurance money, she was not bound to return it for taxation, and there is no evidence whatever tending to show that for that year, she had any other personal property or credits, which she was bound to return for taxation.

We may say here that the evidence shows that very soon after the death of her husband the plaintiff, in pursuance of her promise and obligation to do so, commenced and has until this time continued to pay to said stockholders, the amounts due to them on her contracts to purchase the same, and up to this time has paid \$3,100 on the same, including the \$600 due on the notes given by her husband, and that she is still liable thereon for the balance of \$2,900. These payments have been made from the sums realized by her on the life insurance policies, and the residue thereof not used in the payment of the other debts of her husband, and what she has expended for her living, has been loaned by her on mortgage security, and of course, should have been regularly returned for taxation in 1894, 1895, 1896 and 1897, unless her *bona fide* debts were sufficient, in whole, or in part, to equal her said credits.

The amounts charged to her by the auditor for the several years were as follows:

For 1894	\$6,500 00
" 1895	6,100 00
" 1896.....	6,000 00
" 1897.....	5,400 00

The amount of credits charged to her in 1894, as before stated, was: Her only credits that year were as follows, she having invested the residue of her life insurance money in mortgage securities, viz.: Sophia

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Sanber, \$100; Jacob Miller, \$1,200; W. H. Sorber, \$2,000; Wm. Murphy, \$2,100 and B. H. Smalley, \$700. In all.....	\$6,100 00
From this, as we have held, should be deducted her liabilities for stock before mentioned	5,900 00
Leaving but.....	\$ 200 00

But the evidence clearly shows that the mortgage claim held by her against her brother, W. H. Sorber, being a second mortgage, was never worth more than \$1,500, and after she allowed another mortgage executed by him on the property to have priority over his (the exact time of which was not shown, but it was during one of those years), her claim was not worth more than \$1,000. So that the \$500 being deducted from the amount, it appears that she had no credits to be listed for the year 1894. In addition to this, however, the evidence shows that in February, 1893, Mrs. Stewart entered into a contract with her sister to pay her for services rendered \$3.00 per week, and that this arrangement was in force during all of these years, and that no payments had been made thereon, and that in April, 1894, she owed her sister thereon for her services for fourteen months about \$180.00. In 1895, \$336; in 1896, \$402, and April, 1897, \$548. These sums due from her she was entitled to deduct from the credits held by her in those years respectively.

By a similar calculation it will appear that in neither of the years named after 1894, was the plaintiff the owner of any credits which she was bound to list for taxation, her *bona fide* indebtedness being greater than the amount of her credits.

We think it clear, also from the evidence in view of the provisions of sec. 2781, Rev. Stat., and the construction placed upon it by the Supreme Court, that no penalty is to be charged against her over the sum of \$3,074.36 which we have found should be listed against her for the year 1893. No "false return" was made by her, and she did not, in the meaning of the law, "evade" the making of a return for that year. We are satisfied that she acted in good faith, believing that she had no money or credits that she was bound to return, and it is only where there has been bad faith in these matters, or what is equivalent to it, that the section warrants the imposition of the fifty per cent. penalty.

Decree for plaintiff accordingly. Costs adjudged against defendants.

APPEAL BONDS—MANDAMUS.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ

STATE EX REL. RIGGS, TRUSTEE, V. SPIEGEL, JUDGE.

1. ONE WITHOUT INTEREST CANNOT INTERFERE WITH JUDGMENT.

One who has no interest in a judgment or order of court is not entitled to interfere therewith. Thus an application for a writ of mandamus to compel a judge to accept a surety on an appeal bond in an action against the "Hygeia Medical College," made by one named as "trustee of the Hygeia Medical College," without averments showing that he, as such trustee, has any interest in the litigation, cannot be sustained.

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2. SURETY ON APPEAL, SHOULD APPEAR AS RESIDENT OF STATE.

Under sec. 4953, Rev. Stat., it should be made to appear, in the qualification of a surety on an appeal bond, that the person so offered is a resident of Ohio. An allegation to that effect, or that the surety offered "is a resident" of the county in a subsequent application for a writ of mandamus to compel the judge to show cause why he should not be compelled to accept said surety, does not supply the qualification nor render the order refusing to accept the surety improper.

3. DISCRETION OF JUDGE CANNOT BE INTERFERED WITH.

A court being called upon to exercise a judicial discretion as to whether the appeal and surety are sufficient, having heard testimony and having exercised such discretion, cannot be interfered with by a writ of mandamus. Section 6742, Rev. Stat. If the court erred in the exercise of his discretion, the remedy is by proceedings in error.

4. PROPER PRACTICE IN OFFERING NEW BOND.

The proper practice in offering an appeal bond is to tender it to the clerk with proof of the sufficiency. And this should be followed though the surety offered is the same as the one once rejected. Merely requesting the court to accept such surety is not sufficient.

John C. Rogers, for the relator.

Daniel T. Wright, for Judge Spiegel.

MANDAMUS.

SMITH, J.

In this case a demurrer to the petition has been filed by the defendant, Judge Spiegel.

The caption of the petition is, "The state of Ohio ex rel. Alphonso Riggs, Trustee of the Hygeia Medical College, a corporation under the laws of Ohio v. Frederick Spiegel, Common Pleas Court Judge, Hamilton county, Ohio," and the averments of the petition are substantially these: That in September, 1900, Orin Cady obtained a judgment against the Hygeia Medical College before Esquire Kushman, a justice of the peace of Cincinnati township, for \$377, and in due time an appeal bond was given in the magistrate's court with George C. Kolb as surety, in double the amount of the judgment, which was approved by the said magistrate, and in due time the case was taken to the court of common pleas on appeal, and upon a motion before Judge Spiegel, one of the judges of said court, additional security was prayed for by said Cady. Thereupon the testimony of said Kolb, the surety on said appeal bond, was given in open court, said surety testifying under oath that he was worth \$4,500 over and above his liabilities, in proof of which he offered the deeds of five parcels of real estate in this county, and which deeds had been duly recorded: That security further testifying that in addition he owned real estate in this county which was worth more than the amount of said appeal bond, and that all of said property was owned by him in fee simple.

That thereupon the court, without hearing further testimony, refused to accept or approve the said appeal bond, or to accept or approve the said Kolb as said surety, all of which has resulted in great injury to the relator.

The relator further says that said surety, Kolb, is a *bona fide* resident of Hamilton county, Ohio, and is the owner in fee simple of real estate in said county of the value of \$4,500, over and above all incumbrances thereon, and said George C. Kolb was worth over all his indebtedness the sum of \$4,500.

Wherefore the relator prays that a writ of mandamus issue, requiring the defendant to show cause why he should not be compelled to accept Kolb as a good and sufficient surety.

The claim of the counsel for the defendant demurring to the petition is, first, that the relator has no right to bring this action as he has done, he not being a party to the other action, and having no legal interest therein.

It will be noticed that the action below was against the college, a corporation, if we are at liberty to look to the caption of the petition in this case, where only that averment is made, and that the relator is a trustee of such college. There is no averment that, as such trustee, he had any interest in the litigation between Cady and the college, the only defendant, or that he was in any way a party thereto, and we are not able to see any reason why he should interfere with any order or judgment of the court made therein, or seek to require the court, in this case, to take some action as to a matter in which he has no interest whatever. That such an interest is necessary in a case like this, see High on Extraordinary Remedies, sec. 33: "To warrant a recovery in any action, the petition must show a cause of action in the plaintiff." *Buckingham v. Buckingham*, 36 Ohio St., 68. On this ground the demurrer should be sustained.

But there are other reasons which lead to the same conclusion. It appears from the allegations of the petition, that on the rendition of the judgment by the justice of the peace against the college, Kolb became surety on the appeal bond, and that during the pendency of the appeal in the court of common pleas, and (presumably) under the provisions of sec. 6595, Rev. Stat., the plaintiff filed a motion in said court for additional security on the appeal bond on the ground, doubtless, that the surety on the undertaking was insufficient, though this does not appear from the petition. It was heard on the motion, the evidence of the surety being taken in open court before Judge Spiegel. Kolb testified that he was worth \$4,500 over and above his liabilities, and offered five deeds for parcels of real estate in this county, duly recorded (but there is nothing averred to show the nature or character of such deeds), and further testified that he had other real estate in the county worth more than the amount of the appeal bond, and that all of his property was owned by him in fee simple. The petition then states that the court, without further testimony, refused to accept or approve the said appeal bond or to accept or approve Kolb as said surety.

Section 4953, Rev. Stat., provides for the qualifications of sureties on bonds of this character as follows: "Sureties must be residents of this state, and worth, in the aggregate, double the sum to be secured, beyond the amount of their debts, and have property liable to execution in this state equal to the sum to be secured."

So far as appears there was no evidence whatever presented to the court that the surety, Kolb, was a resident of this state. It may have been admitted that he was not. If he was not, he should not have been received, and the court was fully justified in holding that the bond given was insufficient. It is true that the petition in this case alleges that Kolb was then (at the time it was filed) a resident of Hamilton county; but he may have become such after the hearing before the court. If the foundation of the claim of the relator is, as it seems to be from all the allegations of the petition, that the court was wrong in refusing at that hearing to hold the original bond sufficient, it is enough

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to say that the evidence offered, according to the allegations made, did not show that Kolb was a qualified surety under sec. 4953, Rev. Stat.

But there is another reason why the petition does not make a good cause of action. The court was called upon to exercise a judicial discretion as to whether the appeal bond and the surety was insufficient, and having heard testimony and exercised his judicial discretion, it can not be interfered with by a writ of mandamus. Section 6742, Rev. Stat. If he erred, his order might be reversed by proceedings in error.

It was claimed by counsel for the relator, that in fact the action of the court complained of is that after holding the first bond insufficient, the court then refused to accept Kolb as surety. We think this does not appear from the petition. It is said by counsel, and not disputed, that after hearing evidence on the motion to require the college to give additional security, the court granted the motion and required this to be done in five days, and that he then asked the court to accept Kolb as surety. But if he did, he should have tendered the bond to the clerk and made proper proof to him if required. But if it was proper at all to apply to the court to receive it, the new bond should have been tendered and proof offered to the court as to its sufficiency. It is conceded that this was not done, and we see no ground upon which this proceeding can be maintained, and the writ will be refused at the costs of the relator.

LARCENY—ROBBERY.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

HARRY BRENNAN V. STATE OF OHIO.

CONVICTION OF LESSER OFFENSE—ACCUSED NOT PREJUDICED.

A person is not prejudiced by being tried and convicted for larceny when he might have been tried and convicted of robbery, an aggravated larceny, for the same offense.

Shay & Cogan, for plaintiff in error.

Schwartz, Darby & Ratliff, for the state.

HEARD ON ERROR.

SWING, J.

The plaintiff in error, Henry Brennan, was tried and convicted on an indictment charging him with larceny. The proof tends to show that he was also guilty of robbery or picking pockets. It is claimed that a conviction can not be had for larceny when the proof also tends to show that robbery was committed. 2 Bishop's New Criminal Law, sec. 1156, defines robbery as follows:

"Robbery is larceny committed by violence from the person of one put in fear."

And at section 1159, says:

"The indictment for robbery charges larceny together with the aggravating matter which makes it in the particular instance robbery. For example, the property is described the same as in larceny. The ownership is in the same way set out, and so of the rest. Then, if what

aggravates the larceny to robbery is not proved at the trial, the defendant may be convicted of the simple larceny."

The following authorities support this statement of Mr. Bishop: 36 Mo., 372; 23 Ind., 21; 17 Wend., 386; 8 Tex. App., 135; 80 Tenn., 651 and 3 or 10. The plaintiff in error was not prejudiced in being tried and convicted for a larceny when he might have been tried and convicted of robbery, an aggravated larceny, for the same act and offense.

We do not find that any other errors alleged to be in the record are well taken, and the judgment is therefore affirmed.

CONSTITUTIONAL LAW.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

STATE EX REL. FENNER V. HAMILTON CO. (COMRS.).

1. ACT 94 O. L., 725, IS UNCONSTITUTIONAL.

The act 94 O. L., 725, authorizing the county commissioners in a county containing a city of the first grade first class to issue bonds, not exceeding \$10,000, in amount, and to levy a tax to pay the interest and to provide for payment of the principal within a period of ten years, for the purpose of paying the cost of the improvement and repair of any levee or bridge approach used as a highway in such county, the subject matter being of a general nature, is unconstitutional, as lacking uniform operation.

2. THAT IT DOES NOT DESIGNATE LEVEE OR BRIDGE APPROACH IMMATERIAL.

The fact that the law in question does not specifically point out what levee, used as a road or bridge approach, is to be improved or repaired by the money realized from a sale of the bonds is not material; the act still remains local.

E. G. Kinhead and H. K. Rogers;
Wilson, Cosgrave & Jones.

INJUNCTION.

The question for determination in this case was the constitutionality of the act found in 94 O. L., 725, authorizing the commissioners in a county containing a city of the first grade of the first class to issue bonds not to exceed \$10,000, and to levy a tax to pay the interest and to provide for the payment of the principal of said bonds within a period of ten years, for the purpose of paying the cost and expense of the improvement and repair of any levee or bridge approach used as a highway in any such county.

SWING, J.

We are unable to distinguish this case from the cases of *Hixson v. Burnson*, 54 Ohio St., 470; *State ex rel. v. Davis*, 55 Ohio St., 15, and *Mott v. Hubbard*, 59 Ohio St., 199, and therefore feel bound to hold the act in question unconstitutional. The fact that the law in question does not specifically point out what levee used as a road or bridge approach is to be improved or repaired by the money realized from the sale of bonds, it seems to us can make no difference. The act still remains local, and the subject of roads and bridge approaches is a matter of a general nature, as decided by the above cases.

Injunction allowed as prayed for.

MUNICIPAL CORPORATIONS—NEGLIGENCE.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

BELL M. JOHNSON V. CINCINNATI.**1. RULE AS TO CONTRIBUTORY NEGLIGENCE.**

A charge, in an action against a city for damages caused by permitting a culvert to become obstructed, and after one recovery upon the same cause of action, that "in making repairs, after the rendition of the judgment in the former case, it was the duty of the plaintiff to exercise reasonable care and forethought to avoid recurrence of the injury. If you find that the subsequent injury to plaintiff's property was the result of negligence, partly of the city and partly of the plaintiff, your verdict must be for the defendant, however slightly such negligence contributed to said injury," does not correctly state the law. Unless plaintiff's negligence contributed directly to the injury, it does not preclude a recovery, because the negligence of the plaintiff in not providing stronger walls and digging trenches around the same may have increased the damage occasioned by the overflow from the street and yet not be a concurring cause, without which no damage would follow.

2. PROPERTY OWNER NEED NOT ANTICIPATE NEGLIGENCE.

While a property owner, after recovery from the city for damages caused by permitting a culvert to become obstructed, thus diverting water to plaintiff's premises and causing houses to slip and settle, is bound to exercise ordinary care in building and restoring the premises, he is not required to anticipate and provide against the negligence of the city.

3. ORAL EXPLANATION OF SPECIAL REQUEST NOT ERROR.

An oral explanation by the court, in giving a special request, unless prejudicial, is not reversible error.

Johnson & Levy and John S. Conner, for plaintiff in error.
Corporation Counsel, contra.

HEARD ON ERROR.**GIFFEN, J.**

The plaintiff claimed damages for the negligence of the city in permitting a culvert in Browne street to become and remain obstructed, whereby the water, which otherwise would have flowed through it, diverted on to and over plaintiff's premises, causing the foundations of her houses to slip and settle, greatly to her damage.

The answer of defendant sets up a former recovery in the sum of \$525, on March 16, 1891, for the same cause of action and charges contributory negligence in building and restoring her premises, with full knowledge that the ground was slipping and sliding since the former suit, thereby increasing the damage which would accrue to her by reason of said landslide. The jury returned a verdict in favor of the defendant, and judgment having been rendered thereon, the plaintiff prosecutes error.

It is contended that the court erred in orally modifying the second special charge in writing, requested by the plaintiff. It does not clearly appear that this instruction was presented to the court in writing, as contemplated by sec. 5190, Rev. Stat., but assuming that it was, it further appears that the comment by the court in the midst of the charge only emphasized the charge itself, as requested by the plaintiff, and hence could not have been prejudicial. The purport of the charge was that if the city, by the exercise of reasonable care, could have remedied the defects in the street, its failure to do so made it liable, and the court added the following: "So you see it all comes back to the question of reasonable care." The plaintiff could not ask any higher degree of care from the defendant, and if the oral explanation by the court was not prejudicial it can not avail as a ground of reversal. *Scovern v. State*, 6 Ohio St., 288; *McHugh v. State*, 42 Ohio St., 154.

It is further contended that the court erred in giving, at the request of the defendant, the following special charge, to-wit:

"In making repairs, after the rendition of the judgment in the former case, it was the duty of the plaintiff to exercise reasonable care and forethought to avoid a recurrence of the injury. If you find that the subsequent injury to the plaintiff's property was the result of negligence, partly of the city and partly of the plaintiff, your verdict must be for the defendant, however slightly such negligence of the plaintiff may have contributed to said injury."

In the recent case of *Schweinturth, Admr., v. Railway Co.*, 60 Ohio St., 215, it is held that: "In an action for negligence it is not error to refuse an instruction that the defendant can not be held liable, though guilty of the negligence charged, if the negligence of the person injured contributed in any degree, or in any way, to the injury of which he complains. Unless the negligence of the person injured contributed directly to, or as a proximate cause of the injury, it does not preclude a recovery."

Counsel for defendant seek to distinguish that case from the one before us in the fact that the court refused to give the charge in the former and did give it in the latter. It is manifest, however, that the refusal to give the charge is justified, not on the ground that the same is harmless, but because it incorrectly states the law of contributory negligence. The court approvingly cite a note from *Thompson on Negligence*, to-wit: "The house of lords has lately held it error to charge a jury in this or similar language without qualification."

The facts in this case will illustrate the rule that unless the negligence contributed directly to the injury, it does not preclude a recovery, because the negligence of the plaintiff in not providing stronger walls and digging trenches around the same may have increased the damage occasioned by the overflow from the street, and yet be not a concurring cause, without which no damage would follow. While it is true that plaintiff was bound to exercise ordinary care in repairing and strengthening the walls after the former suit, she was not required to anticipate and provide against the negligence of the city.

If the failure of the plaintiff to provide against the ordinary and natural conditions surrounding her premises was the sole cause of the damage, then there was no negligence of the city, nor could there be

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any question of contributory negligence. This is substantially the third defense of the answer, and if sustained by the evidence the plaintiff would fail, not because of her contributory negligence, but rather because of a want of negligence of the city.

We therefore hold that the court erred in giving this special charge, which was repeated substantially in the general charge.

Judgment reversed and cause remanded.

OPERATIVES—CORPORATIONS.

[Hamilton Circuit Court, 1900.]

Smith, Swing, and Giffen, JJ.

IN RE ASSIGNMENT OF THE ARMLEDER PLUMBING COMPANY.

DIRECTOR OF CORPORATION MAY BE AN OPERATIVE.

A director of a corporation performing services for the corporation under a contract with it, is an operative and his claim for wages is preferred where the validity of his claim has been established by finding of court.

John Marshall Smedes, for appellant.

Peck, Shaffer & Peck, for appellee.

SWING, J.

We think that the finding of the court as to the facts in this case may be considered as having found that McDonald performed labor as an operative for the plumbing company within twelve months preceding the assignment, although the finding is not very definitely made.

As to the question whether McDonald is entitled to the benefit of this statute, we are of the opinion that he is. It being admitted that McDonald's claim is a valid claim against the assigned estate, the act of the legislature makes it a preferred claim. This *preference* is not created by him as a director of the corporation, or by other directors of the corporation acting with him, or for him, but the statute creates it.

The claim itself undoubtedly arose out of a contract made by him while a director of the corporation with the corporation; but whether the contract itself was valid or invalid is not open to question, for the court found the claim a *valid* one, and being a *valid* claim and being for work performed by an operative, the law says it is a preferred claim. The statute makes no exception, and we see no reason why one should be made, the court having found that there was no infirmity attaching to the contract by reason of McDonald having been a director.

NEGLIGENCE—UNBLOCKED FROG.

[Morrow Circuit Court, December 9, 1898]

Adams, Douglass and Swartz, JJ.

C. C. C. & ST. L. RY. CO. v. BELLE ULLOM, ADMX.**1. RULE AS TO NEGLIGENCE NOT CHANGED BY STATUTE 87 O. L., 149.**

The fact that it is charged, in an action for personal injuries or wrongful death, that the defendant railway company has omitted to do or perform some act, or discharge some duty which is imposed upon it by statute, does not change the rule of law of the state in regard to the contributory negligence that may be charged against the party receiving injuries. This rule, as to contributory negligence, applies to a failure to block frogs or switches, except on bridges, as directed by the act of 1888, 85 O. L., 105.

2. UNBLOCKED FROG NOT WITHIN 87 O. L., 149.

A defective or unblocked frog is not within the rule of the act of 1890, 87 O. L., 149, providing that if a person is injured by a defect in a car or locomotive, or in any of the machinery or attachments thereto, the company is charged with knowledge of such defect, and that it makes a *prima facie* case of negligence on the part of the railway company. So far as a defective frog or defective road bed is concerned, the rule is, that to charge the railroad company, it must have either actual knowledge of the defect or the defect must have existed for such a length of time that knowledge of it should be presumed from the opportunity to know of it.

3. ASSUMPTION OF RISK BY EMPLOYEE.

A railroad employee knowing of a defective or unblocked switch or frog, who remains in the service of the company and continues to use such frog or switch without giving notice thereof to the company, should be deemed to have assumed the risk of all danger reasonably to be apprehended from such use and is not entitled to recover for injuries resulting therefrom.

4. EVIDENCE OF NON-EXPERTS—WHEN ADMISSIBLE.

In an action for wrongful death, resulting from an unblocked switch, the evidence of an experienced railroad employee as to whether or not, at the time of (before daylight in the morning), and under the circumstances of the accident, it would have been possible for plaintiff's decedent to have determined whether the frog was blocked, is within the rule that, where it is not practicable to place before the jury all the primary facts upon which they are founded, witnesses may state their opinions from such facts, where such opinions involve conclusions material to the subject of the inquiry.

5. REPORTS TO RAILWAY COMMISSIONER INADMISSIBLE.

Reports made up, by employees or agents of a railway company, from statements of parties who witnessed the circumstances of an accident and injury, are incompetent and objectionable, in an action against the company growing out of such accident or injury, as not part of the *res gestae*, and on the ground that they are not within the scope of the agent's or employee's employment; and the fact that the law (sec. 251, Rev. Stat.) requires such reports to be made to the commissioner of railways does not render them competent as evidence in such actions.

6. IMPROPER STATEMENTS BY TRIAL JUDGE.

Where a witness in the employ of a railroad company, summoned in behalf of plaintiff in an action against such company, was asked "Isn't it a fact that one of the requirements of holding your position is not to tell anything about this accident," a statement by the trial judge, upon objection to the question, "Well, I want to say this: A company has no right to place any such restrictions upon their employees. They have no right to embarrass a witness by any such rule, nor have no right to discharge them for telling what they know, the witness is here to tell all he knows about the case and they have no right to discharge him," and, upon statement by plaintiff's attorney that he would not press the question, "and the presumption being

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all against this which would be against pressing an inquiry of the kind, of course it don't make any difference to me whether parties take exceptions or not; it is the court's views as expressed upon the subject," thus assuming, without proof, that the railway company and its employees had been guilty of an attempt to suborn a witness, constitutes prejudicial error.

7. STATEMENT NOT SUFFICIENT TO CURE SUCH ERROR.

Where improper remarks are made in the presence of a jury by the trial judge or by counsel in argument of the case, the effect can only be cured by prompt apology or retraction or by telling the jury in unmistakable terms that such remarks are not to be considered. Therefore, in the case stated in preceding paragraph, merely stating in a general charge that "this duty you will perform uninfluenced by the character of the suit or the parties to the action, or by any side remarks by the court or counsel, in the course of the trial," is not sufficient.

8. RULES FORBIDDING EMPLOYEES TO COUPLE MOVING CARS.

Where a railroad company, in defense to an action for wrongful death, introduces in evidence rules which forbid employees to couple cars while in motion, it is competent to show that such rules have not been observed by the employees of the railroad company for a long time, with the knowledge of the representatives of the company; and in such case, the jury should be directed to find, first, what the practice was; to discover the rule; second, was that practice known to the superior servants of the decedent employee. Merely instructing the jury to simply determine whether the rule was abrogated by practice is not sufficient.

9. WHETHER JURORS MAY TAKE NOTES OF EVIDENCE.

It is a matter of doubt whether it is improper for jurors to make notes of the testimony. On questions of fact, judges make memoranda as to evidence before them and it would seem that if proper for judges it would be proper for jurors to do so.

HEARD ON ERROR.

Curtis E. McBride and James Olds, for plaintiff in error.

Mitchell & Bruce and J. W. Barry, for defendant in error.

ADAMS, J.

This case is in this court on error to reverse a judgment recovered by Belle Ullom, administratrix, against the railway company in the court of common pleas. The action is brought under the provision of Sec. 6134, Rev. Stat., for damages for causing the death of Paul Ullom.

The petition sets out at considerable length, the appointment of the plaintiff as administratrix of the estate of Paul M. Ullom, deceased; that Paul M. Ullom left surviving him, Ettie Ullom, his wife, now his widow, and a child unborn at the time of the accident, but born on March 4, 1897. Stating briefly the gist of the negligence charged against the railroad company, it is alleged in the petition that it is a corporation duly organized under and in pursuance to the laws of the state of Ohio, and now owns and operates a line of railroad extending from the city of Cleveland, Cuyahoga county, Ohio, westward through the county of Crawford, through the city of Galion in said county, and state of Ohio.

The gist of this petition is that the railroad company, at a certain point in Galion had negligently, carelessly and unlawfully failed to keep and maintain a blocked or filled frog, and on the contrary, they had allowed it, on January 7, 1897, and prior thereto, to be unblocked or unfilled, and they had allowed it to be in that condition some time prior thereto.

That Paul Ullom was a night switchman in the employ of the defendant company, and had, on January 7, 1897, in the course of his

employment, been under the control and direction of the night yard-master of said yards, who was the servant of the said defendant, and who issued his orders to the foreman of said switching crew; and that Paul Ullom, in uncoupling some cars that were about to be set in upon a switch, stepped between these cars, and that his foot was caught in this unblocked frog, and that he was struck by the car and thrown down and injured so that he died on the same day.

The petition sets out that at and before the time of the injury, the defendant had notice and knowledge of said unlawful and unsafe condition of the frog, but that Paul Ullom did not know, and had no means of knowing, that the frog was not filled or blocked; and that in the darkness it was impossible for him to see either the position or condition of the same.

The answer admits some of the allegations of this petition; admits the appointment of plaintiff as administratrix; admits Paul M. Ullom died on January 7, 1897; admits it is a corporation, duly organized under and in pursuance to the laws of the state of Ohio; admits that it owns and operates a line of railway extending from the city of Cleveland, through the county of Crawford, the city of Galion and state of Ohio, and that it did so own and operate said line on and prior to January 7, 1897. Defendant denies each and every other allegation in said petition of plaintiff therein not expressly admitted or denied. And the answer further avers that the injury in the petition described, if any there was, was caused by the fault and negligence of the decedent himself.

There is a reply to that denying the allegations of contributory negligence. That answer put in issue all the allegations of the petition as to the fact as to who were the wife and child of the deceased, and denies that his death was the result of the acts set out in the petition; and denies all allegations of negligence on the part of the railway company; and the reply, of course, puts in issue the contributory negligence of the decedent, Paul M. Ullom.

The cause was tried to a jury, and resulted in a verdict for the plaintiff; and there are very numerous exceptions in this record as to the admission of evidence; as to the charge of the court as given; numerous exceptions to refusals to charge as requested by the defendant below. The question is made of misconduct on the part of the trial judge who tried the case.

The act found in 85 O. L., 105, which is Sec. 8865-18, Rev. Stat., requires railway companies to block or fill frogs and guard rails, except on bridges; and that the railway company is required by law, to block its switches, is an important fact in this suit.

The fact that it is charged that the railway company has omitted to do or perform some act, or discharge some duty which is imposed upon it by statute, does not change the law of the state in regard to the contributory negligence that may be charged against the party receiving the injury. That has been decided by the Supreme Court in *Hesse v. Railroad Co.*, 58 Ohio St., 167. I will not attempt in this opinion, to take up all of the assignments of error, but will take them up somewhat in the order that they were argued upon the hearing.

There is an objection of the railway company to evidence being admitted as to the distance and route taken in carrying Paul Ullom after the accident, from the scene of the injury to his home. We see no proper place for that kind of evidence in this case. But we cannot see

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how it was material, how it would have affected the controversy, the issue between the parties, either way.

It is said that the court erred in the admission of evidence, of the testimony of Struble. This is the question: "You may state Mr. Struble, take it in the month of January, at the hour of about 4:45 in the morning, when it is dark, and you are engaged in switching cars upon the track, with the shadow cast by the cars and the darkness of the night, would it be possible for a switchman stepping forward to uncouple two cars from the train, to determine where a frog is situated, or whether it is blocked or unblocked?" The defendant objected to that question, and that was overruled by the court, and defendant excepted. The answer is: "It would be impossible for him to tell it." The previous examination of the witness had shown his experience in the business.

There are two cases in Ohio, that we think throw some light upon the question, as to whether or not that evidence was properly admitted as opinion evidence. In the case of Bellefontaine & I. R. R. Co. v. Bailey, 11 Ohio St., 383, our Supreme Court says: "In an action to recover damages against a railroad company for the killing of the plaintiff's horses by means of the negligence of the servants of the company in the running and management of a locomotive and train, the engineer in charge of the locomotive at the time of such killing, who saw the horses when they came upon the track, who is shown to be acquainted with the business of running railroad locomotives and trains, and had been engaged in such business for five years, is competent to testify as an expert upon questions in respect to the management of locomotives and trains, and to give an opinion whether, in view of the distance between the engine and the horses when the latter came upon the track, it was possible to avoid the injury complained of."

And in Railroad Co. v. Schultz, 43 Ohio St. 270, in an opinion by Judge Owen, there is a very exhaustive review of the authorities upon the question of the admissibility of expert testimony and the admissibility of opinion evidence by non-experts. And on page 282 of that opinion, the learned judge says: "A few general propositions are submitted, which, it is believed, fairly reflect the current of authority on the subject of the admissibility of the opinions of witnesses as evidence." I omit the first three paragraphs, but paragraph four reads: "In matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts, where such opinions involve conclusions material to the subject of the inquiry."

It is true that, in the Schultz case, the question that the court had to decide was, whether non-expert witnesses could express an opinion to the jury as to whether or not the fence was sufficient to turn stock. And the court held that where witnesses who show no other qualifications than that they had seen the fence, that it was error to allow to go to the jury, their opinion as to the sufficiency of the fence to turn stock, and it is said that those witnesses could have described the fence, the condition that it was in, as they saw it, and the members of the jury would be as competent as those witnesses, to say whether or not, the fence was sufficient to turn stock. But tested by the rule laid down on page 282, we think that the admission of the evidence in the case at bar comes within this rule, that it is a case where it is not practicable to

place before the jury all the primary facts upon which they are founded, and there is no exception in the record in that respect.

At various places in this record, the counsel for the plaintiff below attempts to prove by secondary evidence, the contents of certain written reports made by the different employees of the railway company. There is considerable controversy in the court of common pleas, between counsel for the respective parties. Counsel for the plaintiff below claims that the attorney on the other side promised to have these reports in court and furnish them; that was denied on the other side. There was an offer made, or suggestion made by counsel for plaintiff, that he would put the opposing counsel upon the witness stand, and the other attorney declined to be sworn, and he was not sworn. Counsel for defendant in error made his professional statement as to what the arrangement had been, and introduced in evidence a letter from the attorney for the railway company, written a week before the trial commenced, in which the statement was made that the reports were the private property of the company, and would not be produced upon the trial, and counsel should govern himself accordingly.

The court admitted parol evidence as to what was contained in these written reports; written reports of the occurrence of the accident to Ullom, and these reports contained, or were made up from statements that were gathered from the parties who witnessed the circumstances surrounding this transaction, and, as one witness says, from statements received from Ullom himself. Counsel for the defendant in error contend that, because Sec. 251, Rev. Stat., requires presidents or other officers in charge of railway companies to make reports of accidents and of injuries to employees and passengers, to the state commissioner of railways, those reports are the acts of the company, and that, therefore, any admissions or statements made in those reports are evidence on the trial of a case, to establish the truth of the facts that are recited in those reports.

We pass by the question of whether or not this was a case for secondary evidence. Counsel had not availed himself of the provisions of Secs. 5289 and 5290, Rev. Stat., by motion or notice, to require the other side to produce books or documents that he might require in evidence, but he relied upon the arrangement that he claimed to have made with opposing counsel. We dispose of this case just as we would dispose of it if these reports, written reports, themselves had been offered in evidence. Are they competent evidence to establish the facts that were in issue between these parties? Counsel for the defendant in error cited the Ohio Code of Evidence, and in that the citation of *Baltimore & Ohio Railroad Co. v. Campbell*, 36 Ohio St., 647. The case went up from Guernsey county. The case, as stated in the third syllabus, is this: "A passenger by a railroad train, as soon as practicable after its arrival at the place of destination, presented to the agent in charge of the baggage-room, a check for his baggage, and demanded the same, which baggage he had delivered to the carrier when he took passage on the train. The agent being unable to find the baggage, took the number of the check, and requested the passenger to call again. On the same evening the passenger returned to the depot, but the agent informed him that he had made further search, and the baggage could not be found. Held, that such acts and declarations of the agent were competent evidence for the passenger in his action against the carrier for loss of such baggage."

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That decision is put upon the ground that it was the declaration of the agent, made at the time and about the business that he was then engaged in. And that case would be like the case at bar, if the agent, after he had told the passenger that he could not find the baggage, had attempted to declare to the passenger where the baggage had been lost on its way from New York to Cambridge, and that it had been lost through the carelessness or negligence of some employee of the company. It is well settled that an agent or employee, either of a person or corporation, cannot fix a responsibility upon his employer by admitting after the accident, that he was negligent, or declaring that other employees of the company were negligent. It is the narration of a past event; it is not a part of the *res gestae*; it is objectionable upon that ground, and it is objectionable upon the other ground, that it is not within the scope of his employment. He is not employed for the purpose of binding the company by his admissions or declarations. But these reports here, even if the written reports had been offered in evidence, are not competent, for the reason that I have indicated; they are hearsay of hearsay, and the fact that the law requires those reports to be made to the commissioner, does not make them competent; that requirement is for a different purpose. The statute does not declare that those reports shall be used in evidence against the company. If the company was to make itself liable for damages by reason of its reports to the railway commissioner of the state, that would defeat the purpose of the act.

We think that there was an error in the admission of all that class of testimony as to these written reports. We have not been able to discover definitely from this record, whether the deposition of Archer, who was an employee or deputy in the railway commissioner's office, was admitted in evidence, or not, but there is none of that deposition that is competent evidence. It is all objectionable upon the grounds that I have indicated.

On page 225, the court charged the jury upon that subject: "In the absence of, and inability of plaintiff to secure the reports made to the company of the injury, verbal testimony thereof was admitted as reflecting on the fact of the injury, who it was, how, where and when occurring. But I think I may say to you, from the evidence and concessions on the trial, that the fact of the injury at the time and place averred, and the death of the decedent therefrom, is not now a matter of dispute; hence your inquiry will be directed at once to the question of liability or non-liability of the defendant, as resting on the question of negligence in issue on all the evidence offered before you on the trial of this case."

We think that that left these reports to the jury for whatever purpose the jury might see fit to use them, and it was erroneous and misleading; and that the court on that subject, ought to have taken all that evidence from the jury, as he was requested to do in the fourth request to charge made by the defendant in the court below. He asked the court to instruct the jury, that they were not to consider any of the testimony on that subject, but to wholly disregard the same.

On page 112 of the record this occurred, and it is in the examination of the witness, Fred. Lonius, and in his direct examination; he was called for the plaintiff below. It can be gathered from his previous examination, that he was either an unwilling witness, or at least that counsel for plaintiff below thought he was an unwilling witness. He

was asked this question: "Isn't it a fact that one of the requirements of holding your position is not to tell anything about this accident?" Objected to by defendant. Court: "Well, I want to say this; a company has no right to place any such restrictions upon their employees. They have no right to embarrass a witness by any such rule, nor have no right to discharge them for telling what they know, as the witness is here to tell all he knows about the case, and they have no right to discharge him." Attorney Bruce: "I won't press it." Defendant objected, and excepted to the foregoing remarks made by the court. Court: "And the presumption being all against this which would be against pressing an inquiry of the kind, of course it don't make any difference to me whether parties take exceptions or not; it is the court's views as expressed upon the subject."

We think that anybody who has had any experience in court proceedings, would agree that those statements coming from the judge presiding in the trial of the case, and made in the presence of the jury, would be highly prejudicial to the rights of the defendant company. I do not know that it is necessary that this court should attempt to characterize that kind of a statement from the bench. All must concede that it is improper. Has that been cured by anything that occurred later in the trial?

Our attention is called to page 227 of the general charge. After telling the jury that it is their province to determine the facts, and they must patiently and impartially consider all the evidence, the court continued: "This duty you will perform uninfluenced by the character of the suit, or the parties to the action, or by any side remarks by court or counsel in the course of the trial."

We have no means of knowing whether twelve men in a jury box, after a speech of this kind from the trial judge, when they heard the trial judge, in the closing part of his charge say to them that they were to disregard any side remarks by the court or counsel, would understand that these remarks were only "side remarks." Legally, where improper remarks are made in the presence of a jury by the trial judge, or by counsel in the argument of the case, the effect of that can be cured, in the case of an attorney, by the prompt apology or retraction; or let the court, being appealed to, absolutely and in unmistakable terms, tell the jury that those remarks are not to be considered; that they are withdrawn from the consideration of the jury, and that the case is to proceed as though those remarks had not been made. I say such error can be cured legally, but all lawyers, as a matter of fact, know it is not cured; that when the prejudicial matter gets to the jury, they once hear the improper remark from whatsoever source it comes,—it may be incompetent evidence,—I say all lawyers know that when the jury have once heard those remarks or words, that it cannot be taken away from them.

The court, in this case, made no effort, except (if it was an effort) in the reference to "side remarks," to take these matters from the jury. The court, in making these remarks, assumed that this railway company and its employees had been guilty of an attempt to suborn witnesses; to tell witnesses to testify falsely or conceal the truth, by threats to discharge them from their employ. There is nothing in the evidence that warrants any such assumption. If there had been evidence tending to prove that state of facts, it would have been a question for the

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jury to determine from the evidence, and not for the court to assume that those facts were proved.

We find no prejudicial error in this record as to the admission of the clothing and the shoe. Perhaps as to the clothing, the evidence was not what it should have been as to showing that the clothing was in the same condition at the trial that it was immediately after the accident, but that goes to the weight of the evidence and not to its competency.

As to the charges of misconduct of the jury, both in respect to looking at a frog at the Short Line railroad, and as to a juror making notes of the testimony, we think that on the affidavits as presented to the trial judge on the motion for a new trial, the court could have found either way, and while it is not necessary to pass upon the question, this court has very serious doubts whether it is improper conduct on the part of a juror to take notes as to evidence. This court, and every other court we know of, on questions of fact, makes memoranda as to the evidence before them, and it would seem to us that if it is proper for a member of this court, it would be proper for a juror. One is a jury of twelve as triers of fact, and this court, in appeal cases on the facts, is a jury of three; but that question is not before the court.

On page 226 in the charge of the court. In this case they showed a book of rules of the company, which was put in evidence, and attention is called especially to the rule of the company that employees were not allowed to couple or uncouple cars while in motion. And after the court had charged the jury expressly that, "If the employee had suffered an injury brought about by the violation of the plain instructions of his principal, he cannot be liable therefor. And the same rule applies in this case, that the deceased could not maintain an action for the injury if he had survived, his administratrix cannot; his death did not operate to change this rule. But in this connection I call your attention to the rules in evidence and the contract of employment, and also to the evidence as to how the switching, coupling and uncoupling of cars was done in the yards of the company at and before the accident, and determine whether or not, the rule of the company in regard to switching and coupling and uncoupling of cars was by the practice there in so doing abrogated."

What is the law relating to these rules of the company and their abrogation by custom or practice of employees in disobeying the rules, is a matter that we think is very well stated and determined by the United States Circuit Court of Appeals, *Lake Erie & W. R. Co. v. Craig*, 10 O. F. D., 469. Judge Clark, who announced the opinion in that case, is quoting from *Railroad Co. v. Nickels*, 1 C. C. App., 630, and quotes it with approval: "To hold that this defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it and be bound by it on one day, and know and acquiesce without complaint or objection in the complete disregard of it by the plaintiff and all its other employees associated with him on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty toward the plaintiff because he disregarded this rule, would be neither good morals nor good law. Actions are often more effective than words, and it will not do to say that neither the plaintiff nor the jury was authorized to believe, from the long-continued acqui-

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escence of the defendant in the disregard of this rule, that it had been abandoned, and it was not in force. The evidence of such abandonment was competent and ample, and the ruling and charge of the court below on this subject were right. *Barry v. Railroad Co.*, 98 Mo., 62; 11 S. W., 308; *Smith v. Railroad Co.*, 18 Fed., 304; *Schaub v. Railroad Co.*, 106 Mo., 74, 16 S. W., 924."

"And to the same effect, see also, *Coppins v. Railroad Co.*, 122 N. Y. 557, 25 N. E., 915; *White v. Railway Co.*, 72 Miss., 18, 16 South, 248; *Eastman v. Railway Co.*, 101 Mich., 597, 60 N. W., 309; *Railroad v. Reagan*, 96 Tenn., 128, 38 S. W., 1050."

So far as the evidence in this case at bar was concerned, there was evidence from which the jury might have found that for a long time this rule had not been observed by the employees of the company in the yards at Galion, Ohio; and they could have further found the fact from the evidence, that this utter disregard to the rule was known to the superintendent, servants or employees of the railway company, who were its representatives in and about the Galion yard; but that the question was not submitted to the jury.

In the charge in this particular he says, "you simply determine whether the rule was abrogated by the practice." Without seeing that, they must find first, what the practice was; discover the rule. 2nd, Was that practice known to the superior servants of this decedent? Was it known to the yard-master? Was it known to the agent of the company, or the ticket agent, or whoever was the agent of the company in the control of that yard? That question was not submitted to the jury, but it is said that that error, if error it be, was cured by the answer to one of the special interrogatories that was submitted to the jury, and that it brought it within the rule laid down by the Supreme Court in *Chase v. Brundage*, 58 Ohio St., 517.

The question is this: "Did decedent violate a rule of the company when he passed between the moving cars to uncouple them?" The answer is "No." Then the jury goes on: "Testimony shows that rule No. 203 was abrogated by custom and constant violation of said rule." Now, the latter part of that answer is not responsive to the question. They answered the question when they said "No." They were not asked there to determine, and they did not determine, that the railway company through its proper officers knew of that custom in violation of that rule. And we think the charge is erroneous in the way I have indicated on page 226.

On page 222 of this charge is another matter that I wish to call attention to: In this claim of the plaintiff after stating the claims in the pleading: "I say to you that there is a statute requiring railroad companies to adjust, fill or block the frogs, switches and guard-rails on its tracks, with the exception of guard rails on bridges, so as to prevent the feet of its employees from being caught therein; these requirements decedent had a right to presume that defendant would observe, and if there was any omission of this duty, the defendant was chargeable with knowledge thereof."

It is true, over on page 223, the court says: "You are further instructed that a railway company as regards its employees, must keep its railway tracks, switches and appliances in a good and safe condition;

and if its agents charged with the duty of inspecting and repairing the same, have notice of defects in them, or by any reasonable care and diligence could have learned of them, and omit to make repairs, in consequence of which an employee is injured while he is himself using reasonable care and prudence, then there is a want of such care on the part of the company as the law requires, and the company would be liable for such injuries."

The matter on page 222 is inconsistent with what follows, because it says, that because the statute requires a frog to be blocked, and if the company fails to perform that duty, they are chargeable with knowledge thereof. Now, that depends upon the circumstances. A defective or unblocked frog does not come within the rule of the statute of 1890, 87 O. L., 149-150, because that applies only to cars and locomotives and the machinery and attachments thereof; that is, the machinery and attachments of the cars and locomotives. And the statute says there, if a man is injured by a defect in either the car or locomotive, or in any of the machinery or attachments of the car or locomotive, that the company is charged with knowledge of that defect, and it makes a *prima facie* case of negligence on the part of the railway company; but so far as a defective frog is concerned, or any other defect in the road-bed is concerned, the rule is different. In the case of a municipal corporation, where it is charged with negligence for a defective street, it must either have actual knowledge from its employees of the defect, or the defect must have existed for such a length of time that knowledge of the defect is presumed, from the opportunity to know of it.

There were some twenty-six requests to charge the jury. I have already spoken of the fourth, and that it should have been given. The third request was given as we view it; the 12th request should have been given. "If the decedent, Paul M. Ullom, knew of the defect in the switch or frog from which the injury happened, and yet remained in the service and continued to use the frog or switch without giving notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is not entitled to recovery."

As to these remaining requests, many of them are true as abstract propositions of law, but they have no bearing upon the case at bar, and a number of others we think are not correct statements of the law, because they assume certain facts to be proved, which it was the province of the jury to determine.

The evidence in this case was of such a character that the jury might very well have found that Ullom was injured in the way it was charged in the petition; that the proximate cause of his injury was the failure of the railway company to block the frog,—in other words, that he caught his foot in the frog, by reason of which he was killed.

On the question of his contributory negligence, it could be said in behalf of the railway company, that he had been employed therefor two or three years as night switchman; that by reason of that employment he had the opportunity of knowing of the condition of this frog, and that he was chargeable with knowing what he might have known by the reasonable exercise of his faculties. On the other hand, it could be claimed with considerable force, that being employed there in the night season, that unless his attention was particularly called to the

condition of the frogs, that he would not know whether they were blocked or unblocked.

We are unable to say that the judgment of the court below was not sustained by sufficient evidence, and we do not reverse the judgment on that ground, but on the grounds that I have indicated, and we think, in the interest of justice, that the judgment of the court below should be reversed, and the cause is remanded for further proceedings, according to law.

BONDS—STOCKHOLDERS' LIABILITY.

[Licking Circuit Court, March Term, 1900.]

Adams, Douglass and Voorhees, JJ.

ELI HULL v. STANDARD COAL & IRON COMPANY ET AL.

AGREEMENT TO RELIEVE FROM STOCKHOLDERS' LIABILITY VALID.

A stipulation in a bond of a corporation that "no holder of this bond shall have recourse for its payment upon any stockholder of said company under or in pursuance of any law imposing liability upon stockholders of incorporated companies, whether such law be now in force or shall hereafter be enacted," is not void or against public policy, and constitutes a defense in favor of a stockholder in a suit to enforce the statutory liability in favor of bondholders or the owners of judgments on the bonds.

HEARD ON ERROR.

J. B. Jones, for plaintiff.

Kibler & Kibler, for defendant, *Larwill*.

Charles W. Baker, for Addy, Executrix.

ADAMS, J.

Hull was the plaintiff in the court below, and in his petition sets out that, by the consideration of the common pleas court, at its September term, 1896, he recovered a judgment against the Standard Coal and Iron Company for the sum of \$331,481. He further sets out that the defendant, Larwill, holds a thousand shares of capital stock of the Standard Coal and Iron Company, and that one Matthew Addy holds a thousand shares of the stock; and he makes the necessary allegations to charge Larwill and Addy with the stockholders' liability.

He alleges the insolvency of the coal company, and that it had no assets, and the usual allegations in a petition to assess stockholders.

Larwill and Caroline E. Addy, as executor of Matthew Addy, both answer, and the fourth defense of Caroline E. Addy and the fifth defense of Larwill make the same question, on which the cause was determined in the court below, and on which error is now prosecuted. The court of common pleas overruled demurrers to the fourth defense of Mrs. Addy and to the fifth defense of Larwill, and the plaintiff not desiring to plead further, judgment was rendered accordingly, and error is now prosecuted.

The defenses are the same in substance. The defense is probably set out at great length in the Addy answer, but each of these defendants set up that Hull's judgment was obtained on bonds of the coal company which contained the following stipulation:

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"No holder of this bond shall have recourse for its payment upon any stockholder of said company, under or in pursuance of any law imposing liability upon stockholders of incorporated companies, whether such law be now in force or shall hereafter be enacted."

The question is: Does this stipulation in the bond operate as a defense to an action to enforce the stockholders' liability?

It has been said, and we have no doubt correctly, that with the exception of an opinion by Avery, Referee, in *Hardman v. Railway Co.*, 10 Dec. Re., 67, this question has never been decided in Ohio; at least, counsel agree on that, and we have not been able to find any other decision.

Counsel for plaintiff in error cite the court to sec. 3, art. 13, of the constitution of Ohio, and also to sec. 3258, Rev. Stat.

Without reading them, this constitutional provision and the statute provide for the stockholders' liability; that is, the secondary liability of stockholders, in case the assets of the corporation are not sufficient to pay the debts of the corporation, equal to the amount of their stock. Counsel for plaintiff in error claim that this stipulation, contained in the bonds on which Hull obtained his judgment, is void because it is contrary to law and against public policy; and, while he has cited us to no decisions that have held that this exact stipulation is contrary to law, or contrary to public policy, he has cited us to a number of Ohio decisions where contracts have been held void because contrary to public policy.

The first of these is *Railway Co. v. Spangler*, 44 Ohio St., 471, and, without reading from it, that was a case where the Supreme Court held that a contract by a railroad company, whereby it attempted to exempt itself from liability on account of the negligence of its employes, was void. And we may say here that that holding of the Supreme Court is along the line that it was the well-settled rule of decisions in Ohio that corporations were liable for the negligence of their employes, and such contracts were against public policy, looking to the safety, not only of property, but of the lives of employes of the companies and the lives of passengers; that the railway companies should be held to liability for negligence, and that they should not be allowed to exempt themselves from that liability by contract, by reason of public policy which I have stated.

In *Insurance Co. v. Leslie*, 47 O. S., 409, 416, the court speaks about the statute which provides that insurance companies, in the absence of intentional fraud, shall be liable for the whole amount named in the policy where there is a total loss, and that, where there is a partial loss, they shall be liable for the amount of the partial loss in proportion to the amount of the insurance mentioned in the policy. An attempt was made in that case to evade that statute by a contract in direct violation of its provisions; and the court say that that statute was passed to remedy a well-known evil. That is, men paid their premiums on the basis of a certain amount of insurance on their property. Then, if the property was destroyed, instead of receiving the amount of the policy for which they had paid, the companies attempted to simply pay them what might be determined to be the value of the property.

On the other hand, we have been cited to a great many cases. We have been cited to 24 Cal., 518; 22 Cal., 379; 117 Cal., 157; 95 Ky., 492; 70 Fed., 346; 36 Md., 154; 36 Ia., 467; 22 Southern, 970; 19 Ia., 263; 134 Mass., 590; to 3 Thompson on Corporations, 3008, and to the opinion of

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Avery, Reteree, *supra*. These authorities unanimously establish the rule, as we find it laid down in Cook on Stock and Stockholders, sec. 216:

"A corporate creditor may, by express contract, when the debt is incurred, waive his right to collect from the stockholder debts which the corporation fails to pay. And the corporation in its contracts with third persons may, it is held in England, lawfully stipulate for the exemption of its members from the liability imposed upon them by statute in the event of the insolvency of the corporation.

"It has been held to be competent for any one dealing with the company to contract to hold the shareholders responsible to only a limited extent, to no extent at all, or to any specified extent mutually agreed upon."

24 Wendell, 337; 6 Hill, 47, and 3 Comst., 518, are authorities along the line that constitutional privileges may be waived.

With this unanimous line of authorities, holding that such a stipulation is a valid one, with no decision in Ohio, or elsewhere, cited to us to the contrary, and from the reason of the thing, we conclude that the right of a creditor of a corporation to enforce the stockholders' liability is a personal right, which he may waive or release after the liability has attached, or a party may waive it when he contracts with the corporation, and neither is forbidden by the constitution or by the statute.

I may call attention to the fact here that, in at least one of these answers, it appears that these were mortgage bonds, and, as the court is advised, this provision in these bonds, or a similar provision, is generally put in bonds that are secured by mortgages on railway property, and properties of like character; and, so far as we are advised, no court has ever held that that provision was contrary to public policy, or that it was contrary to the law which originally gave everybody the right to rely on the stockholders' liability.

In other words, here is a man making a contract with a corporation, by which he is to get a mortgage security on the property of the corporation, with the agreement that, if he is given the security of the mortgage, he will waive or release the contingent liability of the stockholder; and we see nothing, either in good morals, or public policy, against that kind of a contract.

The judgment of the court below is affirmed.

SERVICE—LIMITATIONS.

[Licking Circuit Court, March Term, 1900.]

Adams, Douglass and Voorhees, JJ.

*** BALTIMORE & OHIO RAILROAD CO. ET AL. V. RICHARD F. COLLINS,
ADMR.****1. LIMITATION OF SEC. 4988, REV. STAT.—ATTEMPTED SERVICE.**

The limitation of sec. 4988, Rev. Stat., providing that an attempt to commence an action shall be deemed equivalent to the commencement thereof, where the party diligently endeavors to procure a service, if such attempt is followed by service within sixty days, begins to run from the attempt to make the service, and not from the time when the court determines that the original service is defective.

2. ACTION FOR WRONGFUL DEATH—MUST BE WITHIN TWO YEARS.

An action for wrongful death, where service of summons upon defendant railway company was defective, and a later service was not made within sixty days from the attempted service, and not until after the expiration of the two years in which such action must be brought, is not within or saved by sec. 4991, Rev. Stat., providing that if, in an action commenced in due time, the plaintiff fail otherwise than upon the merits, a new action may be commenced within one year. In such a case, the court is without jurisdiction.

3. TRIAL ON MERITS DOES WAIVE QUESTION OF JURISDICTION.

Defendant in an action for wrongful death may question the jurisdiction of the court over his person, and, if the court decides adversely to him, may defend on the merits of the case without waiving the question of jurisdiction.

HEARD ON ERROR.

*Kibler & Kibler, and Judge J. H. Collins, for plaintiffs in error.
J. A. Flory, for defendant in error.*

ADAMS, J. (Orally.)

This action was brought in the court below by Collins against the Baltimore & Ohio Railroad Company to recover damages for the wrongful death of one Frank Priest, alleged to have been caused by the negligence of the railroad company, the accident and the killing of Priest occurring on November 11, 1895.

The petition against the Baltimore & Ohio Railroad Company was filed on June 30, 1896. Summons was issued the same date, and served July 2, 1896, on a man by the name of Parks, the freight agent of Messrs. Cowen and Murray, the receivers of the Baltimore & Ohio Railroad Company. On August 8, 1896, the railroad company, not entering its appearance for any other purpose, filed its motion to quash that service of summons. The cause was continued from term to term, and on November 9, 1897, an amended petition was filed against both the Baltimore & Ohio Railroad Company and the Central Ohio Railroad Company, as reorganized, and summons was issued for the Central Ohio Railroad Company, directed to the sheriff of Licking county, Ohio, but that summons was served by the sheriff of Franklin county, Ohio, on J. H. Collins, president of the Central Ohio Railroad Company. A motion to quash this service was filed on December 8, 1897. On March 5, 1898, these motions were heard, and the motions were sustained on

* Affirmed by the Supreme Court, October 9, 1900, unreported.

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March 5, 1898. On March 7, 1898, summons was issued to the sheriff of Franklin county, Ohio, for both companies, and served on March 10, by serving copies on J. H. Collins, the president of the Central Ohio Railroad Company. On April 6, 1898, both companies filed motions to quash this service of summons. Those motions were overruled, and exceptions taken. Issues were made up and the cause tried, resulting in a verdict in favor of the plaintiff below. The railroad companies prosecute error here, and, among other errors assigned here, is the action of the court, on April 6, 1898, in overruling these motions to quash the service.

It is contended, as to the service on the Baltimore & Ohio Railroad Company, made on the freight agent of the receivers, and the service by the summons issued to the sheriff of Licking county and served by the sheriff of Franklin county, even though they be defective, yet they were attempts to obtain service, that they were followed by actual service within sixty days, and, therefore, that the companies are in court.

It will be noticed here that the original attempt to serve the Baltimore & Ohio Railroad Company, where the service was on the freight agent of the receivers of the company, was on July 2, 1896; and that no further attempt was made to serve the Baltimore & Ohio Railroad Company until March 7, 1898.

It must be also noted that the original service, on the Central Ohio Railroad Company was on November 9, 1897, and that no further service was made on them until March 10, 1898, nearly four months after the original attempt to serve them.

Section 4988, Rev. Stat., provides: "An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter, when the party diligently endeavors to procure a service; but such attempt must be followed by service within sixty days."

When does the sixty days begin to run? Does it begin to run, as contended by counsel for defendant in error here, from the time when the court determines that the original service is defective, or, does it run from the attempt to make the service?

We think the language of the statute clearly means that the sixty days is to be computed from the attempt to make the service. The language is: "But such attempt must be followed by service within sixty days." In other words, a party cannot have a summons issued and have the service made in a manner in no way authorized by statute, and then stand by for six months or a year, or two years, and then, when the court says that that unauthorized service is defective, make another service within sixty days. The sixty days must be computed from the attempt to make the service.

But counsel say that it is saved by the provisions of sec. 4991, Rev. Stat; and that section provides:

"If, in an action commenced, * * * in due time, a judgment for the plaintiff be reversed, or the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff, or, if he die, and the cause of action survive, his representatives may commence a new action within one year after such date; and this provision shall apply to any claim asserted in any pleading by a defendant."

That is to say, if the court of common pleas was right in its action on March 5, 1898, in sustaining both the motions to quash the service

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of summons, that there the plaintiff had failed otherwise than upon the merits, and that he could commence his action anew within a year from that date, and that he could do that as well by issuing a summons in the action in which he had failed as by bringing a new action within the time limited.

I read from *Baltimore & Ohio Railroad Co. v. Fulton*, Adm'r, 59 Ohio St., 575 page 577 (and although what is said by the Supreme Court there may be said to be a *dictum*, yet the court collect the authorities, and give such a strong intimation of what the law on the subject is in this kind of an action, that we think it has the force of a point decided by the Supreme Court that was directly in controversy):

"Much can be said in favor of the proposition that the provisions of sec. 4991, Rev. Stat., do not apply to a case of this kind. For whilst it may be admitted that the plaintiff failed in the circuit court otherwise than on the merits, still there is much reason and authority for saying that the limitation of two years, fixed for bringing an action, for causing death by wrongful act, is a part of the right of action itself, and not merely a limitation of the remedy, and that the action cannot therefore in any case be brought after the time limited has expired. *Hill v. New Haven*, 37 Vt., 501; *Taylor v. Iron & Coal Co.*, 94 N. C., 525; *Cavanagh v. Steam Navigation Co.*, 13 N. Y., Supp., 540; *Hanna v. Railroad Co.*, 32 Ind., 113; *Railway Co. v. Hine*, 25 Ohio St., 629, 634; as apparently *contra*, see *Meisse v. McCoy*, Adm'r., 17 Ohio St., 225, though the point was not there made."

Then the court say: "But as we do not dispose of the case on this ground, no further consideration will be given it."

As we understand it, the court there reiterate the doctrine of the case in *Railway Co. v. Hine*, 25 Ohio St., 629, that the so-called limitation of two years in which actions for wrongful death must be brought is a part of the cause of action itself, and it is not merely a statute of limitations.

That being so, and the Supreme Court, in this late case, having reiterated that rule, and this later service not being within sixty days from the attempted service, and the two years having passed long before this last service was made, it follows that the court of common pleas had no jurisdiction of these two defendant companies.

It is said in argument here that they entered their appearance and waived this matter by going to trial upon the merits. We do not understand that to be the law. A party can question the jurisdiction of the court over his person, and, if the court decides adversely to him on that, he can defend on the merits of the case, and he does not waive the question that he has made as to the court's jurisdiction of his person.

We were cited to a decision that this court rendered a number of years ago in the case of *Hoskinson v. Hupp*, unreported. In that case *Hoskinson* questioned the jurisdiction of the justice of the peace over his person. The justice, having ruled adversely to him on that question, judgment was rendered before the justice of the peace, and no error was prosecuted from the action of the justice on his ruling as to his jurisdiction over *Hoskinson*. Later on, an independent action was brought by *Hoskinson* to enjoin the judgment that had been rendered in the other action on the ground that the justice had no jurisdiction, and this court held that the second action could not be maintained.

In the case at bar, these defendants are questioning the jurisdiction over their person in the very action in which they asked the court of common pleas to rule on that jurisdiction.

We think the court of common pleas erred in overruling these motions to quash this service; and, there being no jurisdiction of the person, it had no jurisdiction to render any judgment. So that the judgment is reversed, and the cause is remanded, with instructions to dismiss the action for want of jurisdiction of the person of the two railroad companies.

By Mr. Flory: And finding that there is no other error? By Judge Adams: We have passed on no questions except those indicated. We have in mind the provision of the statute, and we do not think that applies in a case where there is no jurisdiction of the person, or subject-matter.

RAILROADS—APPROPRIATION.

[Mahoning Circuit Court, April Term, 1900.]

Frazier, Burrows and Laubie, JJ.

PITTSBURGH & WESTERN RAILWAY CO. ET AL. V. GARLICK ET AL.

1. CONVEYANCE WITHOUT TITLE—ACQUIRED SUBSEQUENTLY INURES TO GRANTEE.

Under a quitclaim deed by a railroad company as lessee in perpetuity of an other company's railroad, conveying a strip of the right of way, parallel with the track, granting "all title that it has or ought to have" to said land, and covenanting that "neither it nor its successors or assigns, or any one claiming title by, through or from it shall ever assert any title" thereto, where neither lessor nor lessee had any title at the time of the conveyance, but afterwards, being compelled to appropriate, lessor acquired title and conveyed by deed to lessee, the title thus acquired inures to the benefit of the grantees of such lessee, and their assigns; and grantors and all claiming under them are estopped by such quitclaim deed from asserting title to the land in question.

2. RAILROAD COMPANY MAY SELL PART OF ITS RIGHT OF WAY.

Under secs. 3239, 3281, 3281, 3282, 6416, 6420, 6433, 6343 and 6344, Rev. Stat., permitting a railroad company to appropriate a fee, and requiring full compensation therefor, the title acquired by such appropriation is absolute for railroad purposes and the railway company may lawfully sell a part of such, land to another company for like purposes, without working an abandonment.

3. IRRESPECTIVE OF TITLE—COULD NOT COMPEL APPROPRIATION.

Whether a fee absolute or conditional, or a mere easement, was appropriated by the railroad company, under the statutes referred to, the original owner could not claim abandonment by reason of sale to another company, as the possession, in either case, would be perpetual and exclusive, and the additional use being the same for which the land was appropriated, there would be no remaining interest in the original owner to be compensated for and he could not, therefore, compel the second company to commence appropriation proceeding, unless, as adjoining owner, he still held lands that might be injured by the additional use, which he owned at the time of the appropriation.

4. ANOTHER RAILROAD NOT AN ADDITIONAL USE.

The fact that part of a strip of land acquired by one railway company for its railroad is sold to another company and another track is constructed thereon, running between two tracks already constructed, is not an additional use requiring appropriating or compensation to adjoining land owners.

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5. ACTION TO RECOVER OR COMPEL APPROPRIATION.

A person claiming ownership, where railroad companies were in possession under the conveyances referred to in the first paragraph of this syllabus, can maintain an action to recover the land or compel its appropriation only upon the strength of his own title. As grantee of the original owners plaintiff could not maintain such action unless the transfer from one railway company to another worked an abandonment.

6. PARTIES TO ACTION BY RAILROAD COMPANY TO QUIET TITLE.

Where a strip of abandoned canal land was sold by the owner to a railroad company, which built its road thereon, and thereafter another railroad company appropriated for its road all of such land not conveyed to such first company, and subsequently its lessee and grantee sold to a third company a portion of such strip lying between the tracks of the first two roads, and said third company built its tracks partly on the part of such strip so sold to said first company, in an action by the third company to quiet its title to said land against one to whom the original owner had quitclaimed, the first company is a proper party, and by cross petition may seek the same relief, especially when the line between such companies is in dispute.

APPEAL.

Jones & Anderson, for plaintiff.

Carey & Mullins, for cross-petitioners.

Arrel, McVey & Robinson, Hine & Kennedy, for Garlick.

LAUBIE, J.

The Pittsburgh & Western Railway Company, Thomas M. King, receiver of the Pittsburgh & Western Railway Company, and the Pittsburgh, Cleveland and Toledo Railroad Company, against Henry M. Garlick, the Pittsburgh, Youngstown and Ashtabula Railroad Company, and the Pennsylvania Company, is here upon appeal and has been tried and submitted to the court.

The action was brought to quiet the title of the Pittsburgh & Western Railway Company to a certain strip of land in this city at Spring Common, as it is called, that company alleging that Henry M. Garlick claims to own, and threatens, or is about to take steps, to compel that company, under the statute, to appropriate such land; and the company alleges that his claim is a cloud upon its title, and asks to have its title quieted as against him, and for an injunction to restrain him from any such proceeding. The defendant, The Pittsburgh, Youngstown and Ashtabula Railway Company, files a cross-petition for the same purpose in regard to a portion of the lands, alleging substantially the same facts against Garlick as alleged by plaintiff. Garlick lays claim to this property by deed from the heirs of the Parmelees. The Pittsburgh & Western Railway Company claims to own this land by intermediate conveyance to the Pittsburgh, Cleveland and Toledo Railroad Company by the New York, Pennsylvania and Ohio Railroad Company, and the question arises whether or not the New York, Pennsylvania and Ohio Railroad Company had any title to that land.

The New York, Pennsylvania and Ohio Railroad Company was in possession of the premises when it made and executed this deed to the Pittsburgh, Cleveland and Toledo Railroad Company, and it possibly had no title to the land when it gave the deed.

Counsel for Garlick seem to base their contention that no title was conveyed by this deed, upon the presumption that all of the facts and rights of the parties are to be determined as of the time the deed was

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made. That if the New York, Pennsylvania and Ohio Railroad Company had no title, then none could vest in the grantee. But this is a mistake, a contention we can not agree with, and is contrary to the covenants in the deed. If the New York, Pennsylvania and Ohio Railroad Company acquired title thereafter, that title inured to the benefit of its grantee, the Pittsburgh, Cleveland and Toledo Railroad Company, if for no other reason, for the reason that the deed estops the New York, Pennsylvania and Ohio Railroad Company, or any one claiming by or through it, from ever making any claim to the land. The deed of the New York, Pennsylvania and Ohio Railroad Company to the Pittsburgh, Cleveland & Toledo Railroad Company quit-claims "all title that it has or that it ought to have" to the land in question, and it covenants in that deed "that neither it nor its successors or assigns, or any one claiming title by, through or from it shall ever assert any title" to those lands; so that, if the New York, Pennsylvania and Ohio Railroad Company, after the execution of this deed, obtained title to the lands, that title inured to the benefit of the Pittsburgh, Cleveland and Toledo Railroad Company, its grantees or assigns.

Prior to 1880, the New York, Pennsylvania and Ohio Railroad Company was in the possession, as lessee in perpetuity, of the Cleveland and Mahoning Valley railway, and in 1880, the Cleveland and Mahoning Valley Railway Company was compelled to commence appropriation proceedings to appropriate certain lands, of which the land in question was a part, and of which it and its said lessee were in possession, for a branch track for the benefit of its lessee, The New York, Pennsylvania and Ohio Railroad Company, making that company and the Parmeleees and other parties; and compensation was awarded to the Parmeleees as the owners of the land of which the strip in question was a part to its full value of over \$13,000, which was paid by the New York, Pennsylvania and Ohio Railroad Company; and subsequently the Cleveland and Mahoning Valley Railway Company executed and conveyed to the New York, Pennsylvania and Ohio Railroad Company all the right and title to the lands in question which it had acquired by and through such appropriation proceeding; and this title, thus acquired, inured to be the benefit of the former grantee of the New York, Pennsylvania and Ohio Railroad Company, the Pittsburgh, Cleveland and Toledo Railroad Company, and to its grantee, the Pittsburgh and Western Railway Company. But at all events, the defendant, Garlick, is not in a position to raise this question. He is not claiming the land by any title derived from or through the New York, Pennsylvania & Ohio Railroad Company, or the Cleveland & Mahoning Valley Railway Company, but in opposition to them. The plaintiffs are in possession, and Garlick can recover the land, or compel its appropriation as owner, only on the strength of his own title. As grantee of the original owners, the Parmeleees, he can do neither, unless, as he claims, the conveyance by the Cleveland & Mahoning Valley Railway Company to the New York, Pennsylvania & Ohio Railroad Company, and by the latter company to the Pittsburgh, Cleveland & Toledo Railroad Company of a part of the tract appropriated, worked an abandonment of that part of the land.

I pass now to the principal contention of the defendant Garlick, that the conveyance by the Cleveland and Mahoning Valley Railway Company to the New York, Pennsylvania and Ohio Railroad Company, and by that company to the Pittsburgh, Cleveland and Toledo Railroad Company, was in law an abandonment of the right acquired by the

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Cleveland & Mahoning Valley Railway Company by the appropriation of the land; that thereby the land reverted to the original owners, the Parmeleees. But little weight can be attached to this claim so far as the New York, Pennsylvania and Ohio Railroad Company is concerned, because it was a party to the appropriation; and not only did the Cleveland and Mahoning Valley Railway Company allege in that proceeding that the appropriation was for the benefit of its lessee, the New York, Pennsylvania and Ohio Railroad Company, but the latter company paid the compensation awarded to the owners of the land, the Parmeleees.

Nor can we agree to the contention that the sale and conveyance by the New York, Pennsylvania and Ohio Railroad Company to the Pittsburgh, Cleveland and Toledo Railroad Company of a part of the tract thus appropriated by the Cleveland and Mahoning Valley Railway Company, worked an abandonment of so much of the tract.

The question of abandonment is said to be a question of "intention." The Junction Railroad Co. v. Ruggles, 7 Ohio St., 1; Hatch v. Railroad Co., 18 Ohio St., 92. And in Junction Railroad Co. v. Ruggles, *supra*, it was held that where there is no limit as to time expressed in a grant to a railroad company for a right of way, the easement is perpetual, and a sale of part of the line to another railroad company is not an abandonment of the easement. In that case, the lands in question, or the easement, was not appropriated, but was obtained by grant. The owner, Ruggles, agreed to quitclaim to the original company, if it would construct and maintain its road over and upon his lands, so much thereof as it might acquire by appropriation, for the uses and purposes of its railroad. That company located, but had not constructed its road over the land when the whole line was sold under mortgage foreclosure by the state; and in that sale, one Lane bought a section including the Ruggles' lands, and subsequently sold it to the Junction Railroad Company, and that company built its road over Ruggles' lands. Ruggles claimed an abandonment. The court held that the original company took a perpetual easement, and that there was no abandonment. While the court said it was not called upon to consider the question under the power of eminent domain, it held that the original company took only a perpetual easement for the uses of its railroad, and, as beyond all question, the company would have obtained at least that interest in the lands by appropriation, it is difficult to see why the owner of such easement could sell it in the one instance, without working an abandonment, and not in the other. In each instance the company would acquire the easement for the *same* special purpose—for the construction and uses of *its* railroad. Is it possible that the law cannot and does not confer upon the purchaser the same rights of ownership in the one case as in the other?

In Hatch v. Railroad Co., *supra*, the same principal was applied to a sale by the White Water Canal Company of its easement to the Cincinnati and Indiana Railroad Company for a right of way.

In that case it appeared that the canal company, by special act in 1837, was authorized to construct a canal, and the act conferred upon the commissioners of Hamilton county authority to appoint three arbitrators to assess the damages to the owners of property taken, and to ascertain, and set off against such damages, the value of the advantages to such owners by reason of the location and construction of such canal.

Hatch's property was appropriated under the act, and the damages to him cut down by reason of the advantage the location and construction of the canal would be to him in the way of mill sites and water power. The canal company held and used his strip of land for its canal until 1863, when it sold and conveyed it to the Cincinnati and Indiana Railroad Company for its right of way, and that company built its road thereon. The court held that such sale did not work an abandonment of the easement to the original owner.

In the opinion Judge Brinkerhoff said that the easement taken "was regarded when taken, as a perpetual easement; it was so looked upon by both parties; courts and juries awarded compensation to the plaintiff on this basis; and he can not now claim, with any semblance of justice, to be paid over again for the same thing. * * *

"The general purposes to which the easement was and is applied are the same, to-wit: the purposes of a public way, to facilitate the transportation of persons and property."

In *Malone v. Toledo*, 28 Ohio St., 643, the court held that where the land of the plaintiff had been appropriated for a canal by the state, and used as such, it was the same as if done by a corporation; that part of the canal having been conveyed to the city for a street, with water pipes and sewers placed therein, such sale and change of use did not work an abandonment whether the appropriation carried a fee or a mere easement, and that, therefore, it was unnecessary to determine whether the state took a fee or an easement.

In the opinion, page 660, it is said: "However it may be elsewhere, it appears to us to be the law in this state, that when property has been appropriated for one public purpose, it may be applied to another, not substantially different, and it is still subserving its original uses. Further, that such a change does not afford ground of complaint, that the property is wholly forfeited, or the public rights extinguished."

Counsel for the defendant, Garlick, however, claim that although there was no intention of abandonment in this case, the sale and conveyance operated as an abandonment in law, and they rely upon *Platt v. Pennsylvania Co.*, 43 Ohio St., 228, where, without undertaking to overrule the cases to which I have referred, by a divided court, three to two, a different doctrine was established, and which we would be compelled to follow, if this case could not be distinguished from that one.

We think, however, that this case can be distinguished from that one. In that case, the court was considering the effect of an appropriation under the provisions of the constitution of 1802, and under the act of February 11, 1848. So that it was not a case governed by the present constitution, or by the present statutes, and it might properly be dismissed with that simple remark. But we do not propose to do that. We have examined carefully to see wherein the principles enunciated in that case bear upon the case of an appropriation under the constitution of 1851, and the act of 1852.

In that case it is said: "Oliver was owner in fee of a lot of land, which extended to the middle of the Maumee river, on the east side of that stream. In February 1851, the Lake Shore Railway Company appropriated for its road running north and south, parallel with the river, a strip of ground through such lot one hundred feet in width and twelve hundred feet in length, which left a portion of such lot between the land appropriated and the river, and also a portion on the other side of the strip appropriated. No compensation in money was

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assessed or paid, the supposed benefits having been set off against the actual damages, as authorized by the constitution of 1802. The appropriation was made under the act of 1848, 'regulating railroad companies' (2 Curwen, 1894, section 9), by which such a company had the right to enter upon land and 'appropriate so much thereof as may be necessary for *its* railroad,' and 'hold the interest in such lands, * * * and the privilege of using any materials on said roadway within fifty feet on each side of the center of such roadway for the uses aforesaid. * * *

"The contention of the Pennsylvania Company is that the Lake Shore Company had the right to take and hold the whole of the strip of one hundred feet through the Oliver lot, although it had no occasion to use the east half of it, or any part thereof, at any time; that, after holding such east half for more than twenty-one years, and after finding that it would never need the same for any purpose, the Lake Shore Company might lawfully, not merely lease temporarily, but sell in perpetuity, one-half of such unused strip, that is, a strip twenty-five feet wide, to the Pennsylvania Company, and apply the purchase money (\$7,500) to its own use; that the Pennsylvania Company might thereupon construct and operate, on a different grade, a railroad on such strip of twenty-five feet, cutting off thereby the lot owner's access to the different parts of his lot, which, until, then, had been free and unobstructed; and that all this might be done without making to the owner of the lot any compensation whatever, except such as he received in assumed benefits, at the time of the appropriation of the strip of one hundred feet, in February, 1851.

"It would be very surprising to find a decision sustaining a claim so palpably and flagrantly unjust, and we will venture to say that no such case can be found. Not only can no such case be found, but the plainest principles and the clearest authorities absolutely forbid the allowance of any such claim."

And amongst other things the court held: "The land owner is not estopped by the condemnation proceedings to show that the first company appropriated more land than was necessary for its use."

Here we get the gist of that decision, what it was based upon; that it was inequitable and unjust, for the railroad company to take twice as much land as was necessary, without paying a dollar therefor, and then sell one-fourth of it for \$7,500, and pocket the money. That the original appropriation and building of the road did no damage to the owner's adjoining property, but the construction of the Pennsylvania road cut off access to the different parts of his lot, which, until then, had been free and unobstructed; that such injury arose from the construction and building of the Pennsylvania line, and was not contemplated when the appropriation was made.

In the case before us no claim is made of any new or additional injury by reason of the construction of the additional road. Nor does Garlick claim to be the owner of any adjoining lands, nor that more land was appropriated by the Cleveland & Mahoning Valley Railway Company than was necessary for its road. Indeed, he would be estopped from making the latter claim, by reason of the fact that the necessity for the appropriation of the land, including its extent and width, under the act then in force, unlike the act of 1848, was required to be decided by the court before the appropriation could be made. Having had his day in court upon this question, the owner could not again contest it. It is *res adjudicata*. Upon the first claim, the decision in *Malone v.*

Toledo, *supra*, seems conclusive. In that case it is said: "As regards plaintiff, Malone, none of his rights are predicated upon the fact of adjoining ownership. He only alleges that he owns the bed of the canal, and as to this it is not evident how any further servitude can by any possibility be imposed. * * * Clearly then, Malone, simply as owner of the canal bed, would have no right to complain of this change of use, whatever rights he might have, were he an adjoining owner, to recover, for additional servitude imposed."

The statute of 1848, and the one under which this appropriation was made by the Cleveland and Mahoning Valley Railway Company, are entirely different in their terms. The statute of 1848 is given in 2d of Curwen, commencing on page 1394. It is headed, "An act regulating railroad companies."

Section 9 provides for the appropriation, and the interest the company shall hold under the appropriation. The statute allowed a strip one hundred feet in width to be appropriated if it was necessary and the company needed it for its right of way, but no court or tribunal was vested with authority to decide upon that necessity; the railroad company decided that for itself, and the land owner never had his day in court upon that question. Under that statute three commissioners were to be appointed to ascertain and assess the damages that would accrue to the owner of the land by virtue of the construction of the road, and to also fix and assess the amount of benefits that would accrue to him from its location and construction, and if the benefits in their estimation exceeded the damages, as in the Platt case, then nothing would be due or paid to the land owner. Now, what are the companies' rights after that? It is provided in this section that after making tender of the amount found due to said owner, if any, or giving such security therefor as might be required, it shall be lawful for the railroad company to hold the interest in such land thus appropriated. What interest was appropriated under such a state of facts? Two questions only it would seem were to be submitted to the commissioners. First—what will be the damages to the land owner by the construction of the single track road this company desires to construct? Second—what benefit will its location and construction be to the land owner? The right the company would acquire, the interest it would acquire, might well be said to be to maintain simply such single track road, because the damages and benefits were to be estimated by virtue of what the company was to do, what it proposed to do in its petition. The commissioners must know what the company was to do in order to ascertain what the damages would be on the one hand, and what the benefits on the other, and if the company undertook afterward to sell a portion of the land and have another road built upon it at a different grade by another company that would bar access of the owner to the other parts of his lot, that would seem to be a new damage upon which the commissioners did not pass. At all events, under the act of 1848, fairly construed, the corporation could not acquire the land itself, but a limited interest only. In section 9, while the right seems to be given to appropriate lands, rights, etc., which should belong to the corporation, upon payment, the subsequent provision of the section is that upon payment, etc., "it shall be lawful for such corporation to hold the interests in such lands, or materials * * * for the uses aforesaid." And the same section provides that in the application, the corporation shall describe the "rights and interests intended to be appropriated," and that the appraisers shall "assess the

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damages which the owner may sustain by such appropriation," which is inconsistent with the idea of appropriating and awarding full compensation for the land itself.

Now, on the other hand, what title did the Cleveland and Mahoning Valley Railway Company acquire by the appropriation of these lands under the statute under which this appropriation was made? Did it acquire a fee, absolute or conditional, a perpetual easement, or some limited interest only? And did it cover the whole strip, or but a part? We may judge of that by what was to be done in acquiring it. The company was required to make an application and file it in the probate court, and describe the land it desired to acquire. And when the preliminary matters as to the right and the necessity of the appropriation were disposed of by the court, the jury were required to assess to the owner the full market value of that land, and in addition thereto the damages which would accrue to his adjacent lands by the uses the strip taken was to be devoted to, without regard to benefits. The owner was to get the full market value of the land itself, as the company sought to appropriate the land, not a mere interest in it, not some right to be held for some limited time.

The act under which this appropriation was made, sec. 3281, Rev. Stat. (1880), provided: "A company * * * may enter upon any land * * * and appropriate so much thereof as may be deemed necessary for its railroad, including necessary side tracks, depots, workshops, round-houses and water stations * * * ; but no appropriation of private property to the use of a company * * * shall be made until full compensation therefor is made in money or secured by deposit of money, to the owner, irrespective of any benefit from any improvement proposed by the company * * * as prescribed by law."

Section 6416. "In any such case the corporation may file with the probate judge a petition, verified as in a civil action, containing a specific description of each parcel of property, interest or right, within the county sought to be appropriated; the work, if any, intended to be constructed thereon; the use to which the same is to be applied; the necessity for the appropriation; the name of the owner of each parcel, if known, or if not known, a statement of that fact; the names of all persons having or claiming an interest, legal or equitable, in the property, so far as the same can be ascertained, and a prayer for the appropriation of the property."

Section 6420. "On the day named in any summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation its inability to agree with the owner, and the necessity for the appropriation. Upon these questions the burden of proof shall be upon the corporation, and any interested person shall be heard."

Section 6433. "Upon payment to the party entitled thereto, or deposit with the probate judge, of the amount of the verdict and such costs as have lawfully accrued in the case up to the time against the corporation, the corporation shall be entitled to take possession of, and shall hold the property, rights or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition, and the judge shall enter of record an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession thereof."

Here we find an entirely different statute from the one under consideration in the Platt case, and it seems to be broad enough to enable the companies to appropriate a fee, a conditional fee, a perpetual easement, or a less interest or right at their election. And unlike the act of 1848, which gave the land owner no right to question the necessity of the appropriation, this statute does provide that he shall have his day in court to contest the necessity for the appropriation as to all or any part of the land.

Under the new constitution the first act that was passed contained the same provision as the old act of 1848, that the company itself determined the necessity of the appropriation, and as to the existence of that necessity the land owner had no day in court, and had simply to submit to the amount of land taken by the company, if it did not exceed one hundred feet in width. After attention was called to this by Judge Ranney, in *Giesy v. Railway Co.*, 4 Ohio St., 308, where he declared that it ought to be left to some judicial power to determine that necessity, the statute was amended so as to provide that the necessity for the appropriation shall first be determined by the court before the case shall be submitted to the jury.

Now, when we consider that the company must pay the full market value of the land described in its petition, and may take and hold the land, as contradistinguished from a mere "interest" in it, by the words of the statute, it would seem as if it necessarily followed, that it took the land in fee just the same as if an individual had bought it; especially when the provisions of these sections are construed with others in *pari materia*.

Sections 6443 and 6444, Rev. Stat., provided that the fund paid in by the corporation, if there be conflicting claims thereto, "shall thenceforth represent the land," and proceedings shall be had "in the same manner as if the land had not been converted into money."

Section 3239 provided: "Upon such filing of the articles of incorporation the persons who subscribed the same, their associates, successors, and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession and power to sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, the same to alter at pleasure, and to do all needful acts to carry into effect the objects for which it was created.

Section 3283 provided: "Such company may acquire by purchase or gift any lands in the vicinity of the line of its road, or through which the same passes, so far as may be deemed convenient or necessary by the company to secure the right of way, or such as may be granted to aid in the construction of the road, and hold or convey the same in such manner as the directors may prescribe."

So that power was abundantly given to such corporations to take the title, to acquire and convey at pleasure, all such real estate as may be necessary and convenient to carry into effect the objects of the incorporation; and each and all of the sections of the statutes are consistent only with the idea that the company when it pays the full market value of the land, whether by appropriation or by purchase, takes an absolute title to it. The meaning of the statute is to be ascertained from a consideration of all of its provisions, and not from a single word or expression; and the difference between these statutes and the act of 1848 is plain and

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marked, especially in this: Under the act of 1848 the owner had no day in court to contest the necessity of the appropriation; damages were awarded to him only for an interest—an easement—in the land, and not full compensation for the land itself; and those damages paid by assumed benefits which his neighbor, whose land was not touched, received for nothing.

On the other hand, under the act in force when this appropriation was made, the land owner had his day in court to contest the necessity of the appropriation, and it provided that the corporation should be "entitled to take possession of, and shall hold the property, rights or interests so appropriated," thus authorizing the appropriation of the property—the land—itsself, upon payment of full compensation in money without deduction for benefits.

"When is a man fully compensated for his property? Most clearly and unquestionably, when he is paid its full value, and never before." *Giesy v. Railroad Co.*, 4 Ohio St., 308, 331.

To take and hold the property, after payment of its full value, means to take and hold the thing itself as owner, unless we rob the words of their ordinary signification.

It is well settled that it is for the legislature to determine the estate or extent of the interest which the public necessities require; whether an estate for years, for life, a mere easement, or a fee absolute or conditional.

So that corporations of this character, if the statute authorizes it, may acquire either one of these estates in an appropriation proceeding. Unlike the act under consideration in the case at bar, as I think I have shown, the legislature did not authorize corporations, by the act of 1848, to take and hold the land itself as owner, or in fee, but the act under consideration here authorizes corporations to take and hold either the land or an interest therein—an easement—at their option, unless the court finds that the necessity for taking the land itself, or all asked for, does not exist.

The Cleveland and Mahoning Valley Railway Company, by virtue of this appropriation wherein it described the parcels of land desired to be appropriated, as required by the statute, having paid the full market value of the land itself, and not a mere interest in it, as assessed by the jury, acquired a perfect title to the land, and had a perfect right to sell or dispose of it, or a part of it, to another railroad company, and its grantee was vested with the same rights; and if it were a conditional fee, one conditioned upon the character of its use, the result is not different, as it was sold and is still used for railroad purposes; and under the statute, so long as it is devoted to the uses to which it was appropriated, the original owner cannot retake it.

It would be sufficient in this case to entitle plaintiffs to the relief asked even if nothing but an easement passed, because it would be a perpetual easement, under the statute; one that would exist so long as the use for which it was appropriated existed. So long as the company that appropriated it, or its grantee or assignee continued to use it for railroad purposes, the easement would continue. The track of the plaintiffs runs between that of the Cleveland & Mahoning Valley Railway Company and the Pittsburgh, Youngstown & Ashtabula Railway Company at the place in question, and upon the same grade, and there is no claim, as heretofore stated, that the construction thereof has inflicted any additional injury to any adjoining lands of the Parmelees, the original owners, or that they owned any adjoining lands.

Having at least acquired the right to the property in perpetuity for the uses of a railroad, for the purpose of transporting passengers and freight—a public utility, for the benefit of the people, as well as for the benefit of the stockholders—having that in perpetuity, and having paid the full market value for the land itself, and for all injury to adjoining lands, there would be no remaining interest left to be compensated to the owner. The necessity of the appropriation having been determined, involving the necessity of its extent, including the width of the strip, and the compensation paid, why is it that, with a perpetual easement granted for railway purposes, that it does not still exist for railway purposes, although the company that appropriated it may have sold part of it to another railroad company. Why may it not sell it, when it has paid the full value for it, just as an individual purchaser might? Why is it not entirely immaterial who maintains the use, whether one company or two, especially where the owner has no lands left to be injured or damaged thereby.

The original company had the right to plaster that strip all over with tracks, and what difference does it make to the original land owner whether that company or some other company does it? An appropriation is a legalized purchase, and why should courts affix conditions to it that are not in the statute, and decree payment twice for the same land.

If a company may sell all, or a part of its right of way, transfer it to another company; if a canal company can transfer its easement to a railroad company without working an abandonment, why should the sale of one-fourth in width of the land in question, a part for the same use, work an abandonment? The greater includes the less. If one can sell the whole of a thing, he can sell a part of it. It would be the height of technicality to construe the statute under consideration to mean that the easement should exist only so long as the particular company holds it that appropriated it, instead of so long as it is devoted and used to and for the purposes for which it was appropriated. While that use exists, it is immaterial who controls it.

We think plaintiffs should be quieted in their title to these lands, and an injunction will be granted to restrain defendant, Garlick, from interfering with their possession by appropriation proceedings or otherwise. The same orders may be entered in favor of the cross-petitioner, the Pittsburgh, Youngstown & Ashtabula Railway Company. Its predecessor, the Liberty & Vienna Railroad Company, by the deed from the Parmeleees, took a conditional fee in a part of the canal lands at the point in question, built its track upon the berm bank; and the Cleveland & Mahoning Valley Railroad Company appropriated all of such lands not conveyed to the Liberty & Vienna Railroad Company, and that these two companies acquired all those lands. Garlick's claim of ownership covers a part of the lands thus acquired by the Liberty & Vienna Railroad Company. We have found that the latter company, as against Garlick acquired a strip at all points twenty-three feet southerly from the centre of its track, as we think the line should be a straight line; but whether straight or tapering, as claimed by Garlick, his claim of ownership covers part of the land thus acquired by that company.

We do not, however, determine, because of the agreement of the parties, the conflicting claims of the plaintiff and the Pittsburgh, Youngstown & Ashtabula Railway Company as to where the line is as between them.

MANDAMUS—MUNICIPAL TAX.

[Cuyahoga Circuit Court, December 3, 1900.]

Caldwell, Hale and Marvin, JJ.

STATE EX REL. VILLAGE OF SOUTH BROOKLYN V. CRAIG, AUDITOR.**1. MUNICIPAL TAX ON TERRITORY ANNEXED TO VILLAGE.**

When the boundaries of a municipal corporation are extended prior to the first Monday in June, no special provision is necessary to authorize the levy of the municipal tax upon the annexed property. Therefore, where territory became part of a village corporation on April 24, 1900, and on April 27, 1900, the levy for the township was certified to the auditor of the county, and on May 15, 1900, the municipal levy for the village corporation was certified to the county auditor, it became the duty of said auditor to enter upon the property of the annexed territory the municipal instead of the township levy; and, having failed to do so, he may be required to make such entry by writ of mandamus.

2. ORDINANCE ACCEPTING, COMPLETES ANNEXATION.

Upon the passage and legal publication of an ordinance accepting an application for the annexation of territory, such territory at once becomes part of the corporation. The fact that the transcript, map and other papers were not filed for record until a later date does not affect the question.

3. VILLAGE CORPORATION MAY SUE AS RELATOR.

A village corporation is a proper party, as relator, in an action for a writ of mandamus to compel the county auditor to enter a municipal tax upon property of territory annexed to the village.

APPEAL.

Smith & Langin, counsel for relator.

P. H. Kaiser and F. L. Taft, counsel for defendant.

HALE, J.

First. We hold the relator to be a person on whose relation the action can be instituted.

Second. On the fact stated by counsel for the auditor in his brief, conceded to be correct, it is clear that the territory upon the residents of which the auditor is asked to enter this tax, became a part of the village of South Brooklyn on April 24, 1900. The fact that the transcript, map, and other papers were not filed for record until a later date, does not affect the question. On the passage and legal publication of the ordinance accepting the application, this territory became a part of the village of South Brooklyn and was included within its boundaries. (Sec. 1597, Rev. Stat.)

Under sec. 2691, Rev. Stat., the council of a municipal corporation are required to determine and certify to the auditor of the county the percentage by it levied on the real and personal property in the corporation, on or before the first Monday of June annually. Taxes levied on real property become a lien thereon on the day preceding the second Monday of April. (Sec. 2338, Rev. Stat.)

The listing of all personal property for taxation is required to be made between the second Monday of April and the third Monday of May of each year. (Sec. 2747, Rev. Stat.) It is required to be listed by the

person who was the owner of the same, on the day preceding the second Monday of April.

It will be seen, then, that the listing of property for taxation, and the assessment of the taxes thereon, are not transactions of a single day. Many steps have to be taken, ending with the certificate of the levy by the municipal authorities to the county auditor on or before the first Monday of June of each year. Before that date the auditor is not called upon to perform any official act.

In this case, as we have stated, the territory in question became a part of the village of South Brooklyn on April 24, 1900. On April 27, of the same year, the levy for Brooklyn township was certified to the auditor of the county by the trustees of the township. This was required to be done on or before the fifteenth day of May annually. (Sec. 2827, Rev. Stat.)

On May 15, 1900, the levy for South Brooklyn village was certified to the auditor of the county. This was required to be done on or before the first Monday of June annually. (Sec. 2691, Rev. Stat.)

The question, then is: should the auditor have entered the levy certified by the trustees of the township or the clerk of South Brooklyn village, on the property of this territory annexed to the village?

At this time the annexed territory was included within the boundaries of the municipal corporation, and had been so included since April 24, 1900; and we are of the opinion that it was the duty of the auditor to have recognized that fact, and to have entered the levy certified by the municipal authorities upon all the property within the municipality, as it then was.

By sec. 2691, Rev. Stat., provision is made for the assessment of a tax in the discretion of the council, upon the property annexed to the corporation subsequent to the first Monday of June. No special provision is made for the levy of a tax upon property of territory annexed to the corporation between the second Monday of April and the first Monday of June.

It would seem, therefore, that when the boundaries of a municipal corporation are extended prior to the first Monday of June, no special provision is necessary to authorize the levy of the municipal tax upon the annexed property. If it were otherwise, no levy by the municipality could be made on property brought within the corporation between the second Monday of April and the first Monday of June; whereas a levy might be made on property of the territory annexed subsequent to the first Monday of June of the current year.

We are of the opinion that the levy certified by the municipality should have been entered upon the property of the annexed territory, instead of the levy certified by the trustees of the township.

Peremptory writ allowed.

INSURANCE—MARINE.

[Cuyahoga Circuit Court, December 8, 1900.]

Caldwell, Hale and Marvin, JJ.

C. P. GILCHRIST V. PERRYSBURG AND TOLEDO TRANSPORTATION CO.**1. CONDITION AS TO SUIT UPON UNDERWRITERS' POLICY.**

A clause in a Lloyds policy of insurance to the effect that "no action shall be brought to enforce the provisions of this policy except against the general manager as attorney-in-fact and representing all the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought, as fixing his individual responsibility thereunder," where the attorney-in-fact is also an underwriter and so named in the policy, is not contrary to public policy and is valid; and where the attorney-in-fact so continues and remains a resident of the place named for service of summons, suit upon such policy should first be brought in accordance with the clause referred to.

2. RULE WHERE ATTORNEY-IN-FACT CANNOT BE SERVED.

Where it appears that the insurance company has ceased to do business and that it has no assets of any kind, that the person who was the attorney-in-fact at the inception of the policy has resigned or absconded, and his place of residence is unknown, the assured, notwithstanding the clause referred to in the preceding paragraph, may maintain an action against any one of the underwriters.

3. INSTRUCTION TO DISREGARD TESTIMONY—EFFECT.

Where, in an action on a Lloyds policy, the court directs the jury to disregard all evidence bearing upon the authority of an attorney-in-fact, whether he had resigned, or absconded, or whether service of summons could be made upon him, etc., the rulings upon the admission of such testimony become immaterial and may be disregarded by the reviewing court.

4. EVIDENCE AS TO VALUE OF BOAT.

In an action, on a Lloyds policy of insurance, to recover for a boat destroyed by fire, evidence that the price asked for the boat when negotiations were first commenced for her purchase was \$10,000, it having been shown that the boat was sold for \$4,500, is incompetent.

5. SECONDARY EVIDENCE ADMISSIBLE.

Where notice was served upon the underwriters, in an action upon a policy of insurance, to produce the original proofs of loss at the trial, and they fail to do so, secondary evidence of the contents thereof is not incompetent.

HEARD ON ERROR.

Goulder, Holding & Masten, counsel for plaintiff in error.

Roger M. Lee, counsel for defendant in error.

HALE, J.

The action in the court below was brought upon what is known as a Lloyds policy of insurance, against one of the several signers in the policy.

The policy was underwritten by the plaintiff in error and fourteen others, acting by their agent Henry S. McFail. Under the terms of the policy the plaintiffs in error are severally, and not jointly, liable, each for the sum of two hundred dollars.

The petition was in the ordinary form, and sufficient in law to constitute a cause of action. The defense will be more definitely stated hereafter. Upon the issues joined, complaint is made of several rulings of the court in the admission and exclusion of evidence.

Gilchrist v. Transportation Co.

The policy of insurance covered the propeller "Idler," then owned by the defendant in error, and was issued on the ——— day of ———, 18 ——. She was destroyed by fire on January 12, 1896, but the extent of the loss was in contention between the parties.

The defendant in error was permitted to introduce the testimony of several experts to prove the value of the boat at the time of the fire; and complaint is made that some of those experts had no qualifications to speak as such. While it may be true that their testimony was of very little value, we are not prepared to say that any of the testimony given by the experts was entirely incompetent.

The plaintiff in error, upon the same issue, was permitted to prove the price at which the boat was sold prior to her loss. As the testimony appears in the record, we are not prepared to say in that regard that it was error.

The defendant in error having shown of whom the boat was purchased and the price at which she was purchased, was permitted to ask the several witnesses the following questions: "What was the price asked for the steamer when the negotiations were first commenced for her purchase?" This question was objected to, the objection overruled, and exception taken by the plaintiff in error. The answer to the question was, "Ten thousand dollars." It had been shown that she was purchased for the sum of \$4,500. This question was clearly incompetent, and the court erred in permitting it to be answered.

By the terms of the policy the insured was required to furnish proof of loss on or before a date after the loss, fixed by the policy. That proof of loss, it was alleged in the petition, had been furnished according to the contract. On the trial it was shown that notice had been served upon the company to produce the original proofs. They were not furnished, and the defendant in error was permitted to give secondary evidence of their contents. Under the circumstances disclosed in the bill of exceptions, we are not prepared to say that the court erred in the treatment of this subject.

The other complaints made of the rulings of the court upon the admission of testimony, will be considered in connection with other propositions in the case.

Several defenses are made in the answer filed to the petition. First, it is said, that the company issuing the policy, was forbidden to do business in Ohio; that the insurance brokers who procured the policy to be issued, were agents of the insured and procured the policy to be issued in violation of the statute of the state. This defense was not seriously insisted on, on the trial. There was no error growing out of the issue made by this claim.

The policy was issued in the name of the Niagara Fire and Marine Underwriters of Buffalo, New York, a corporation organized under the laws of New York. The policy contained this clause: "No action shall be brought to enforce the provisions of this policy except against the general manager as attorney-in-fact and representing all the underwriters, and each of the underwriters hereby agree to abide the result of any suit so brought, as fixing his individual responsibility thereunder."

This policy was issued; Henry S. McFall was the attorney-in-fact and the general manager of the insurance company; but it is alleged in the petition that he resigned and his resignation was accepted on March

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5, 1896,—the fire having occurred on January 12 1896; that this fact did not come to the knowledge of the insured until March 9, 1896.

The answer denies these allegations of the petition, and alleges that McFall continued to be the attorney-in-fact and at all times a resident of the city of Buffalo where he resided at the time the policy was issued, and where summons could at any time, subsequent to the loss, have been had upon him.

On the trial, much evidence was introduced on this issue. The defendant in error attempted to show, and gave much evidence tending to establish the fact of the resignation of McFall as attorney and general manager, and to show that service of summons upon him was impossible. The plaintiff in error also gave some evidence tending to establish the facts as alleged in his answer.

After this testimony had been given to the jury, the court, on objection made by the defendant in error, to a question put to the witness, of his own motion, withdrew all such testimony from the consideration of the jury. The court said: "I think that I will say to you, gentlemen of the jury, that all the testimony with reference to the resignation of the attorney-in-fact, and whether he was in Buffalo, or was not, at the time of this loss, of these meetings and subsequent to that time, for the purpose of being served with summons, so that he could not be served with summons, all that testimony you may pay no attention to;—the court holding that the assured here, this plaintiff in this action, had the right to bring this suit against any of the underwriters who had promised or was pledged to the payment of any portion of that loss."

Exception was taken to this ruling of the court by the plaintiff in error. But the holding of the court here made was further emphasized by the court in the charge to the jury,—and an exception taken.

Under this holding of the court, we deem the many objections made to the introduction of the testimony bearing upon the authority of McFall, the particular power under which he acted, whether he had resigned as attorney-in-fact and general manager, whether he absconded, or whether service of summons could be had upon him, as to what effort was made to induce McFall to return to Buffalo, whether the company had or had not assets, are wholly immaterial;—that testimony having all been withdrawn from the jury, we need not examine the various rulings.

The vital question in the case is, whether the court was right in holding as I have indicated above.

We are of the opinion that this clause of the policy is not wholly void.

Under the terms of the policy each underwriter is severally liable for the amount designated by him in the policy. In the absence of this clause of the policy an action might be maintained against any one of the underwriters to enforce his liability under the policy, without joining his co-underwriters. It was entirely competent by contract in the policy, to designate the one to be sued in case of loss, and that all the rights of the several underwriters should be fixed and concluded by the result of such action.

Whether this clause of the policy should be enforced in cases where the attorney-in-fact is not also an underwriter, need not now be decided.

What we do hold, is that in a Lloyds policy of insurance, where the attorney-in-fact for the underwriters is also an underwriter and so named

in the policy, this clause of the policy is valid and binding on all the underwriters, and not contrary to public policy. But, notwithstanding this, if on issue joined, it be shown that in fact the company had ceased its business, that it had no assets of any kind, that the person who was the attorney-in-fact at the inception of the policy, had resigned or had absconded, and his place of residence was unknown, so that service of summons could not be had upon him, then we think the action could be maintained by the assured against any one of the underwriters.

If it be true that McFall was at all times a resident of Buffalo, where service of summons could be had upon him, and was in fact, and did in fact continue to be general manager of the company and the attorney-in-fact of the underwriters to that policy, then we think that the action should first have been brought against him in accordance with this stipulation in the policy.

It follows that the court erred in the ruling given above, upon the validity of this clause of the policy, and for error in the admission of testimony as above indicated, the judgment of the court of common pleas is reversed and the cause remanded for further proceedings.

HOMICIDE.

[Summit Circuit Court, 1900.]

Caldwell, Marvin and Hale, JJ.

GIDEON CARR V. STATE OF OHIO.

1. RECOGNITION OF ATTORNEY AS COUNSEL—DISCRETION OF JUDGE.

It is within the discretion of the trial judge, in a criminal case, where an attorney has been appointed by the court to defend the prisoner, to recognize or refuse to recognize an attorney as counsel for the defendant who has not been thus appointed. And where it appeared that, upon request of accused that two attorneys, naming them, be appointed to defend him, the court appointed only one of them, and later, and after the jury had been impaneled, the other also appeared for the defense, the judge's refusal to so recognize him, was not an abuse of discretion, justifying reversal, although such attorney stated that he was not attorney for nor related to any of the jurors.

2. PROOF OF CHARACTER OF DECEASED—WHEN INADMISSIBLE.

It is not competent, in a homicide case, where self-defense is set up, for the accused for the state, in the first instance, where nothing has been shown, or attempted to be shown, as to the character or reputation of deceased for peaceableness or the contrary, to introduce evidence that deceased was a quiet and peaceable man; and such evidence is not competent or proper in rebuttal of proof by the defense that the deceased was a "large and strong man."

3. PRESUMPTION IN SUCH CASES—PREJUDICIAL ERROR.

The presumption in such cases, is that the character of the person killed was good without any evidence on that subject; and to undertake to strengthen it by evidence when such character has not been attacked, is to the prejudice of the party against whom it is introduced.

4. CORRECT STATEMENT AS TO BURDEN OF PROOF.

A charge that "on the trial of an indictment for murder the burden of proof that the homicide was excusable on the ground of self defense rests on the defendant, and must be established by a preponderance of the evidence" correctly states the law in Ohio.

6. CORRECT CHARGE AS TO INTENT.

A charge that "The law presumes that a rational man, being free to choose and capable of choosing between right and wrong, intends the natural consequences of his act. The purpose or intent to kill in general is proved by circumstances, by what the party does and says, the manner of inflicting the wound, the instrument used and its tendency to destroy life; if palpably calculated to take life it may be presumed he so intended" is a correct statement of the law in Ohio.

8. CORRECT CHARGE AS TO SELF DEFENSE.

A charge that "If appearances were such as would have alarmed a man of ordinary firmness and would have impressed him that such danger was imminent, and if the assailed party honestly believed such to be the case, it is not material whether the danger was real or not; the condition of the assailant must be such as to render it necessary on the part of the killer to do the act in self defense. The attack must have been such as in the belief of the defendant rendered the taking of the life of the deceased in his defense necessary. The slayer cannot urge in justification the necessity produced by his own fault," is a correct statement of the law on that subject.

7. TWO RULES GIVEN IN CHARGE—ERROR.

It cannot be assumed, where the trial judge gives more than one rule for determining the rights of the accused, that the jury followed the right one. Therefore a statement in a charge in relation to the claim of self defense, in the trial of a person accused of homicide, that "you must be satisfied that Hall manifestly and maliciously intended and endeavored to kill or do great bodily harm," without qualification, constitutes prejudicial error although the true rule, that if accused believed on good ground that deceased intended to kill him, and that his danger was great, it would be sufficient, is stated in other parts of the charge.

8. RULE AS TO BELIEF THAT KILLING IS ONLY MEANS OF ESCAPE.

It is not the law that the jury must be satisfied that the killing, to be in self defense, was the only way that accused could escape the threatened danger, and a charge to that effect, without the qualification that if deceased honestly believed, and had proper grounds for that belief, that the only means of escaping was to kill his assailant, it would be sufficient, constitutes reversible error.

9. USE OF WORDS "EXCUSE" AND "JUSTIFY."

There is a distinction between "justifiable" and "excusable" homicide and, technically, the use of the word "excuse" instead of "justify" would be preferable in a charge that "accused must act honestly and that the appearance and nature of the assault must be such as to "justify" him in the belief that he was in danger of great bodily harm, etc." The use of the word "justify," in such case, is not, however, calculated to mislead and does not constitute reversible error.

10. RULE OF STATE V. ELLIOTT, 11 DEC. RE., 332, CITED.

In view of the holding in *State v. Elliott*, 11 Dec. Re., 332, affirmed by the Supreme Court, unreported, the circuit court, in case at bar, declines to hold that a statement, in a charge to a jury, that "where self-defense is claimed and the homicide is sought to be excused on the ground of self defense, it implies, it presupposes, that the deceased was intentionally killed" constitutes reversible error.

HEARD ON ERROR.

E. F. Voris and *Nathan Morse*, for plaintiff in error.

R. M. Wanamaker, prosecuting attorney, and *N. D. Tibbals*, for defendant in error.

MARVIN, J. (Orally.)

The original case, in the court of common pleas, was a prosecution under an indictment in which there were two counts, each charging Carr with murder in the first degree. Upon a trial the jury found him guilty of murder in the second degree, and after motion for new trial

was overruled judgment was entered upon that verdict and sentence pronounced against Carr for that crime.

A petition in error is filed here, together with a bill of exceptions containing all the evidence, with a prayer that the judgment of the court below be reversed.

The case is this: On May 4, 1900, in Copley township, in this county, one Sylvester Hull was killed, either by Gideon Carr or by himself and his son Edward Carr. There was a fight; on the one side were Gideon Carr and his son Edward, and on the other Hull, the deceased, and one Bramley.

Gideon Carr and Edward Carr were jointly indicted for this killing, and, as has already been said, each count in the indictment charged murder in the first degree. Gideon Carr demanded a separate trial, which was, of course, granted, and it is the judgment in that case which it is sought here to reverse.

Gideon Carr set up as his defense that what was done by him was in defense of himself or of his son Edward, or both, from being killed or very seriously injured by the deceased.

The plaintiff in error asked the court to appoint counsel to defend him. Edward Carr made the same request; and the court appointed to defend Edward Carr, Mr. Nathan Morse of this bar, an experienced lawyer. Gideon Carr had asked to have Edwin F. Voris and Samuel G. Rogers, of this bar, both experienced lawyers, appointed. The court announced that but one attorney would be appointed in each case, that Mr. Morse would be appointed in the case of Edward Carr; and after some conversation between the court and counsel, the court appointed Mr. Voris to defend Gideon Carr, Rogers declining to take upon himself the responsibility alone of that defense. When the time came to impanel the jury, Mr. Rogers did not appear as counsel for the defendant, Judge Tibbals appearing, however, with the prosecuting attorney as counsel for the state, the court having announced that no appointment would be made of anyone to assist the prosecuting attorney of the county. It is said that Judge Tibbals was retained by friends of the deceased. In any event two experienced lawyers appeared on the part of the state, to-wit, the prosecuting attorney and Judge Tibbals. When, however, the case came on to be tried Mr. Rogers appeared with the counsel for the defense, Mr. Morse appearing with Mr. Voris in the defense also. Objection was made on the part of the prosecuting attorney to Mr. Rogers participating as counsel for the defense, and the court finally decided, after a great deal of talking back and forth between counsel and the court, that Mr. Rogers would not be recognized as counsel for the defense, and it is urged that there was error to the prejudice of Carr in the holding of the court in that regard.

It was doubtless a matter of discretion with the court whether Mr. Rogers should be recognized as counsel or not, and it was urged upon the court that as the jury was impaneled without any knowledge that Mr. Rogers was to appear, the state had not, or might not, have exercised exactly its challenges as it would have done it if had known that Rogers was to appear. Mr. Rogers stated to the court, however, that he was not attorney for any of the members of the jury, nor related to any, but the court, in the exercise of its discretion, said that Mr. Rogers would not be recognized as counsel.

We are not satisfied that there was such an abuse of that discretion as would justify a reversal on that ground.

Again, it is urged there was error on the part of the court in its ruling upon the introduction of evidence, and that one of the errors in that regard grew out of this state of facts. The state had introduced its evidence in chief and rested. The prisoner introduced his evidence and rested; some of the evidence of the prisoner tended to show that what he did was done in defending himself, or his son, or both of them, against an attack made by Hull upon them. Nothing, however, was shown, or attempted to be shown by the prisoner as to the character or reputation of the deceased for peaceableness or the contrary. It was, however, shown that he was a large and strong man.

The state then, in rebuttal, introduced David Bunn, as a witness, and, among other things, asked him if he had the means of knowing the general reputation of the deceased in the neighborhood in which he, the deceased, lived, as to peaceableness and quietness. To this the witness answered in the affirmative. He was then asked this question, as appears on page 357 of the bill of exceptions, "What was that reputation, good or bad?" Objection was made to this question; that objection was overruled, and the proper exception taken, and the witness then answered "Good." Other witnesses to the same effect were introduced on the part of the state, among them Theodore Patrick, Milton Thompson, John F. Moore, C. C. Frederick and Newman Adair. As to the question raised upon each of these witnesses counsel for plaintiff in error urges that the ruling of the court was wrong, and the evidence permitted to be given was prejudicial to the prisoner.

Perhaps it is not claimed on the part of the state that the evidence elicited on this subject was not to the prejudice of Carr if it was not competent, but it is urged that such evidence is entirely competent.

In argument it is said that this evidence was properly in rebuttal of what the prisoner had introduced on the defense as to Hull's being a large, strong man. It would seem that the way to have rebutted that would have been to show that the fact was otherwise, that he was not a large, strong man. Evidence that he was a quiet, peaceable man would have no tendency to show that he was not both large and strong.

The only authority to which the attention of this court has been called in support of the ruling of the trial court in this regard, is a case decided by the Supreme Court of Indiana, *Thrawley v. State*, 55 N. E. Rep., 95. The eighth clause of the syllabus in that case is directly in point, and reads: "Where the defendant testified that he killed deceased in self defense while the latter was committing an apparently felonious assault on him, the prosecution may, without defendant's consent, and though no evidence has been introduced against deceased to show that his reputation for peaceableness is bad, show that deceased had the reputation of being a peaceable man." And in the opinion, on page 98, the court gives the reasons for that holding, and quotes from two other cases in Indiana, one of which distinctly holds as the court held in this case, and the other seems so to hold, though it is said in the opinion that the record is not so complete as to show how the question arose in that case.

On the other hand, authorities are so numerous as to seem to justify the statement of counsel for the plaintiff in error, that the Supreme Court of Indiana is alone in holding such evidence competent when the character of the deceased for peaceableness has not been attacked by the defendant.

In *State v. Isaac Potter*, 13 Kan., 414, the first clause of the syllabus reads: "On a trial for murder it is error to permit the state in the first instance and as a part of its case to offer testimony showing the character or reputation of the deceased as a quiet and peaceable man."

And Judge Brewer, now a justice of the Supreme Court of the United States, in the opinion, gives the reasons for that holding. Among other things, this is said: "Again, he insists that the court erred in allowing the state to introduce evidence of the character of the deceased as a quiet and peaceable man. It appears that the deceased was killed in an affray; that this was the second quarrel upon the same afternoon between the deceased and the defendant, others participating." Further on this language is used: "On the trial and before closing their case, the prosecution was permitted, over objection, to ask witnesses, who had testified that they knew the deceased, this question: 'State if you knew his general reputation for being a peaceable, quiet and law abiding citizen?' and the witness testified he was a peaceable, quiet, law abiding man. No attack was made by the defendant at any time during the trial on the character of the deceased, and no attempt to show that he was a quarrelsome or turbulent man. The question then is fairly presented whether the prosecution on a trial for murder may, in the first instance and as a part of their case, show the character and reputation of the deceased. We don't understand counsel for the state as claiming that such testimony is admissible in all cases, but only in cases where there is a doubt as to whether the killing was done in self-defense, and where such testimony may serve to explain the conduct of the deceased and is, therefore, fairly a part of the *res gestae*. In such cases it is said that the authorities hold that the defendant may show the bad character and reputation of the deceased as a turbulent and quarrelsome man." A considerable number of authorities are cited in support of that. "And if the defendant may show that the deceased was a known quarrelsome, dangerous man why may not the state show that he was a known peaceable, quite citizen? The argument is not good. The books are full of parallel cases. The accused may in some cases show his own good character, but the state can never, in the first instance, show his bad character. A party can never offer evidence to show a witness's credibility until it is attacked. The reasons for these rules are obvious. Such testimony tends to distract the minds of the jury from the principal question, and should only be admitted when absolutely essential to the discovery of the truth. Again, the law presumes that a witness is honest, that a defendant has a good character, and that a party killed was a quiet and peaceable citizen, except so far as the contrary appears from the testimony in this case, and this presumption renders it unnecessary to offer any evidence in support thereof. No authorities have been cited sustaining the admission of such testimony." He then cites a number of cases which he says, are in point on the holding made by the court.

To the same effect is *Parker v. Commonwealth*, decided by the court of appeals of Kentucky, 28 S. W. Rep, 500; *State v. Eddon*, 86 Pacific, 189, a case from the Supreme Court of Washington. It is true that in this last case two of the judges dissented from the opinion, and give the same reasons, substantially in the dissenting opinion that are given by the Supreme Court of Indiana in the cases already referred to for the holding in those cases. The case of *People v. Bezy*, Supreme Court of California, 7 Pacific, 643, the text books,—Kerr's *Law of Homicide*, sec.

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420, and the authorities there cited; section, 423 McClain's Criminal Law, and the cases there cited, are all to the same effect.

But if it be said that this was not offered by the state in the first instance, what has already been said in this opinion seems to answer that, it was not in rebuttal of anything which had been shown on the part of the defense. The defense had made no attack upon the character of the deceased as to peaceableness and quietness.

Our own Supreme Court in *Blakeslee v. Hughes*, 50 Ohio St., 490, hold, in a civil case, an action for libel, where the defense was justification: "On the trial of the action in the court of common pleas, that court, over the defendant's objection, permitted the plaintiff to give in chief to the jury evidence of his good character. The circuit court, solely on account of this ruling of the court of common pleas, reversed the judgment and remanded the cause for a new trial, *Held*: That the circuit court did not err." And the reasons—the opinion is a very short one—but the reasons given substantially are as the reasons given in the authorities which have already been cited in the criminal cases; the presumption that the character of the party injured was good without any evidence on the subject, and that to undertake to strengthen it by evidence on that subject when such character has not been attacked, is to the prejudice of the party against whom it is introduced.

We think there was clearly error in the admission of this evidence, and that such error was prejudicial to the prisoner, and for that error the case must be reversed.

It is urged on the part of the plaintiff in error that there was error on the part of the court in its charge to the jury when it was said: "On the trial of an indictment for murder the burden of proof that the homicide was excusable on the ground of self defense rests on the defendant, and must be established by a preponderance of the evidence, so that under the law as laid down by the Supreme Court in this state, where it is sought to excuse an act of killing on the ground of self defense, it is incumbent upon the defendant to show it by a preponderance of the evidence." That is fully sustained by the holdings of the Supreme Court in this state and is distinctly stated in the syllabus, of which there is but one clause, in *Silvus v. State*, 22 Ohio St., 90. There was no error in that part of the charge.

It is urged that there was error in this language used by the court in the charge: "The law presumes that a rational man, being free to choose and capable of choosing between right and wrong, intends the natural consequences of his act. The purpose or intent to kill in general is proved by the circumstances, by what the party does and says, the manner of inflicting the wound, the instrument used and its tendency to destroy life; if palpably calculated to take life it may be presumed he so intended." We think there is no error in that. The language used by the court is fully justified by the decisions of the Supreme Court in this state and by numerous authorities.

But it is said that there was error in the part of the charge in which the court said, "If the appearances were such as would have alarmed a man of ordinary firmness and would have impressed him that such danger was imminent, and if the assailed party honestly believed such to be the case, it is not material whether the danger was real or not; the condition of the assailant must be such as to render it necessary on the part of the killer to do the act in self defense. The attack must have been such as in the belief of the defendant rendered the taking of

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the life of the deceased in his defense necessary. The slayer cannot urge in justification the necessity produced by his own fault."

We find that the court made no error in that part of the charge. The language used distinctly states the law as it is.

In another part of the charge this language is used, and it is complained of by the plaintiff in error as being prejudicial and erroneous: "You must be satisfied that Hull manifestly and maliciously intended and endeavored to kill or do great bodily harm to the defendant, Gideon Carr, or to his son, Edward Carr, or to one of them. Did Hull do that, and in doing it was he actuated by malice, or was he simply detending himself, trying to save himself from bodily harm? These are questions for your determination." Perhaps, it is not claimed on the part of the state that the language used alone properly states the law. The language is, "You must be satisfied that Hull manifestly and maliciously intended and endeavored to kill or do great bodily harm." In other parts of the charge, and immediately following this the court gives the correct rule, but this language says to the jury, "You, the jury, must be satisfied that Hull manifestly and maliciously intended and endeavored to kill or do great bodily harm." It is claimed by the plaintiff in error that the *jury* need not be thus satisfied. If Carr believed upon good ground that Hull manifestly and maliciously intended and endeavored to kill him, and that his danger was so great, or that of his son, that he must do what he did, that this would be sufficient. We think this is clearly the law. As has already been said, the true rule was given in more than one part of the charge. In several places in the charge the court gave the true rule, but will it do to say, in a criminal case that where the court gives more than one rule for determining the rights of the accused, we must presume that the jury followed the right and not the wrong rule? We don't understand that to be the law nor do we find any such qualifications of this statement as makes it conformable with the law as it should have been given, and for this language of the court the case would have to be reversed.

Again, the court used this language: "You must be satisfied that the killing of Hull was the only means of escape from the danger mentioned." Now, that by itself clearly is not a true statement of the law. It was not necessary that the jury should be satisfied that the only way that Carr could escape from Hull was by killing him, if Carr honestly believed and had proper grounds for that belief that the only means of escaping from Hull was to inflict upon Hull what he did inflict upon him, then Carr may be excused from doing what he did. And we think there was error for which the case would have to be reversed in that language of the court.

It is urged on the part of the plaintiff in error that the court again erred in this language used to the jury: "However, as I have stated, in such case he must act *bona fide* and honestly, and that the appearance and nature of the attack and assault upon his son were such as to justify him in the belief that he or his son were in danger of death or great bodily harm." Now, it is urged that the word "justify" is too strong a word there, that if he honestly believed that he or his son were in such danger, he might be excused, but not justified in such belief. Critically that may be true, but certainly it is not an uncommon thing, even among members of the legal profession, to use the word "justify" where Blackstone uses the word "excusable." Blackstone says there are three degrees of homicide, justifiable, excusable and felonious, and

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makes the distinction between justifiable and excusable, and perhaps, technically the word "excuse" instead of "justify" would have been the proper word; but it is not to be supposed that the jury would be mistaken or misled by the use of the word "justify" rather than "excuse," and we find no such error in that part of the charge as would authorize a reversal.

But it is said that this language used by the court in its charge to the jury is erroneous: "Gentlemen, where self defense is claimed and a homicide is sought to be excused on the ground of self defense, it implies, it presupposes, that the deceased was intentionally killed, and where the defense is that it was done by reason of attack and assault made by the deceased and he, the defendant, did what he did in danger or apprehension of death, or of great bodily harm, it is then a defense to be proved by the defendant. And the rule, I think, is stated here in this case, and I read the syllabus of the case, which reads, as to the last part of that language, 'That the burden is upon the defendant to show his defense that what he did was in self defense.'" but it is the first clause that is especially complained of. The latter part of this has already been spoken of in this case. "Where self defense is claimed and the homicide is sought to be excused on the ground of self defense, it implies, it presupposes, that the deceased was intentionally killed."

With what we know of the case of *State v. Elliott*, 11 Dec. Re., 332, we should not be justified in reversing this case for that language of the court. The *Elliott* case is not reported in the reports of the decisions of the Supreme Court, but we know what was said by Judge Pugh in the trial of that case, and the language was possibly stronger than this. The case was affirmed by the Supreme Court. Of course, that case had such notoriety that the general facts in regard to it are very well known. Whether the facts, however, as they came out in the trial, were such as to relieve from any prejudice by the use of that language, and on that ground the case was affirmed, is not clear. It strikes certainly a majority of the court as an extraordinary proposition to be allowed to stand, but, as has already been said, we would not feel justified, in view of the *Elliott* case, in reversing on that ground.

The judgment of the court below is reversed for the errors stated in this opinion and for no other, and will be remanded for further proceedings in the court of common pleas.

Mr. Voris: "Does the court pass upon the question of the admission of testimony showing whether there was a right or not?"

The Court: We hold there was no error. "We have not discussed all of the propositions raised, but we find no error except such as have been pointed out in this opinion."

ANNUITIES—TAXATION.**[Cuyahoga Circuit Court, October 27, 1900.]****Caldwell, Marvin and Laubie, JJ.****JEAN CHISHOLM V. JOSEPH C. SHIELDS, TR.****1. ANNUITY MUST BE A PERSONAL OBLIGATION.**

An annuity must be a personal obligation and not payable out of any specific fund; and, *prima facie*, it is held to be such unless the instrument creating it plainly indicate a different intent.

2. RULES APPLIED—WIFE'S ANNUITY.

Under a will bequeathing to testator's wife "in lieu of all dower, the sum of \$8,000 annually for and during the term of her natural life," with directions to pay the legacy in quarterly installments, with the further provision "for the payment of my wife's legacy I desire that a sufficient amount of my personal estate, either of stocks, bonds or money, shall be used to purchase government bonds, or equally good bonds, of such amount that the interest thereon shall be sufficient to pay the quarterly installments of \$2,000," if accepted by the widow, creates a pure annuity.

3. RULE AS TO CONSTRUCTION OF STATUTES.

Statutes should be construed together so far as they are material to each other. If other provisions of a law cover the question, the leaving out of a portion of a sentence or the transposition of words in the revision of a law, does not necessarily call for a different interpretation. It must plainly appear that the legislature intended a change; otherwise the same construction must be given to the statute as revised as that which had obtained previous to the revision.

4. ANNUITIES ARE TAXABLE.

Under the foregoing rules, where the legislature in a revision of the statutes omitted annuities from the definition of the word "credits," it cannot be held that it was thereby intended to exempt that class of property from taxation if they are referred to as subjects of taxation in other sections of the statute.

5. PURPOSE IN OMITTING ANNUITIES FROM "CREDITS."

The purpose of the legislature in omitting annuities from the definition of the word "credits" in sec. 2730, Rev. Stat., was evidently to prevent that class of property from being made subject to the offset of legal claims or debts, as such property should not be subject to such deductions.

6. SURRENDER OF DOWER FOR ANNUITY—AN INVESTMENT.

Where a widow surrenders her dower interest in, and distributive share of, her husband's estate in consideration of an annuity, she thereby becomes an "investor" in such annuity within the meaning of the statute relating to the taxation of that class of property. She is a purchaser, and the annuity is in no sense a gift by way of a legacy.

7. NOT DOUBLE TAXATION.

The taxation of such annuity does not require the annuitant to pay a tax upon the property which she gave to produce the annuity and is not double taxation.

NOT A TAX ON GOVERNMENT BONDS.

Taxation of such an annuity, based upon government bonds, does not involve the question of taxation of that class of property. Annuitant is not, under the will in question, an owner of the bonds.

APPEAL.

Williamson & Cushing, for plaintiff.

Kaiser & Taft, for defendant.

LAUBIE, J.

The case of Jean Chisholm against Joseph C. Shields, treasurer of Cuyahoga county, Ohio, is here upon appeal. It is brought for the purpose of enjoining the treasurer from the collection of taxes assessed against the plaintiff on what is denominated an annuity. The question before us is upon a motion by the plaintiff for judgment upon the pleadings, and does not, therefore, involve trial on the facts of the case.

The question arises out of the will of the deceased husband of Mrs. Chisholm, and all the provisions of it perhaps that is necessary to notice is contained in the petition of the plaintiff.

The will provides as follows:

"I give to her, my wife, in lieu of all dower, the sum of \$8,000 annually for and during the term of her natural life, and I hereby direct my executors to pay this legacy to my said wife in equal quarterly installments from the day of my death."

And subsequently this provision occurs in another part of the will:

"I desire to have my last will and testament carried out in the following manner, to-wit: for the payment of my wife's legacy I desire that a sufficient amount of my personal estate, either in stocks, bonds or money, shall be used to purchase government bonds, or equally good bonds, of such an amount that the interest thereon shall be sufficient to pay the quarterly installments of \$2,000, and that the same shall be paid to her promptly upon the very day they shall fall due."

It is to be assumed from the condition of this case and the arguments, that Mrs. Chisholm accepted the provisions of this will, and that she has been in receipt of this specified sum of \$8,000 yearly for a number of years, five of which the auditor has determined she should pay taxes upon the annuity, and thus entered it up under Sec. 2781 R. S.

At the outset, it would be proper to ascertain what is an annuity, and to determine whether this is an annuity. An annuity is defined to be a specific sum stipulated to be paid in fee or for life or for years at stated times, and chargeable only on the person of the grantor. That is, it must be a personal obligation and not payable out of any specific fund. And *prima facie* it is held to be such, unless the instrument creating it plainly indicates a different intent, that it is not a personal obligation or designed to be such, but is payable, or to be payable, out of a specific fund; and it may arise either by gift or by purchase.

In this case it seems that there is a specific sum to be paid of \$8,000 a year, \$2,000 quarterly, and from the terms of its creation, or of the contract between the parties by which it is created, it is evident that it is a personal obligation chargeable upon the person of the grantor only, and is not to be paid out of any specific fund, because he gives it to her in lieu of dower absolutely, in the first place; and secondly, thereafter in his will he directs his executors how and in what manner they shall obtain money with which to pay it, and in what manner they shall make it so that the money is always at hand with which to pay it; that they shall take sufficient of his estate and purchase bonds to the amount of \$200,000, sufficient always so that the interest thereon will pay or equal the amount to be paid to his widow of \$8,000 per year.

It is evident, therefore, that it is a charge upon his personal estate and therefore a personal obligation, and it is not payable out of any special fund. Because, if this fund should prove unavailable by reason of the deterioration in the value of these bonds or interest due upon them,

so that there would not be sufficient from that source to pay the \$8,000, she might have recourse against the whole body of the estate, or the executor of that estate, for the balance. Or, if the rest of the estate had passed out of the hands of the executors, she might look to the principal, the bonds themselves, to make up any deficiency in payment of the \$8,000 to her. So that it clearly is not a sum payable out of any specific fund only, but it is a charge on his estate, and, therefore, a personal obligation. It is technically and truly a pure annuity, and one purchased by her. It was not a gift, but an annuity purchased by her. It was one created by contract, as it were, between her and her husband. She was not obliged to accept this, but might have rejected it and sought her interest in his estate as provided for by law. Her dower interest and her distributive share of his estate, by force of her election to take under the will, is what she relinquished and gave up for this annuity. She paid a consideration for it, a valuable money consideration.

It is evident in whatever aspect we look at it, that this was the creation of a pure annuity; and now is it taxable as such under the laws of this state? It is claimed that it is not now taxable; that under the old constitution and the act of 1846, annuities were taxable, but that they are not now.

The contention is that the present statute is entirely different from the statute of 1846 under which *Wetmore v. State*, 18 Ohio, 77, was decided, the syllabus of which is: "A sum of money certain, to be received annually, and at stated periods, is, within the meaning of the tax law of 1846, an annuity, unless the same be receivable as a pension, a salary, or as compensation for labor or services, subsequently to be performed."

Counsel for the plaintiff say that this case, was not only decided under an entirely different statute from the present, but under the old constitution of the state, which did not provide for uniformity in taxation. And they call our attention to the fact that annuities, under the act of 1846, was especially enumerated under the head of credits.

Section 1, of that act, provided—"That all property, whether real or personal, within this state, and the money and credits of persons residing therein, except such as is hereinafter expressly exempted, shall be subject to taxation; and such property, money and credits, or the value thereof, shall be entered on the lists of taxable property, for that purpose, in the manner prescribed by this act."

In the next session, the general assembly proceeded to give a definition of the terms used in the act. In the fifth section it declared that the term "credits," wherever used in this act, shall be held to mean or include every claim or demand for money, labor or other valuable thing due or to become due, and every annuity or sum of money receivable at stated periods, and all money invested in property of any kind, which is secured by deed, or mortgage, or otherwise."

Credits within the meaning of the act therefore were: 1. "Every claim or demand for money, labor, or other valuable thing 'due or to become due.' 2. 'Every annuity or sum of money receivable at stated periods.' 3. 'All money invested,'" etc.

And in the case cited, it was held that under that provision "a sum of money receivable at stated periods" was substantially the same thing as an annuity, or considered so by the legislature. But it is said that that case does not apply to, and can not govern this case, because the present statute does not describe "credits" to mean "an annuity or

sum of money receivable at stated periods;" that this portion of the statute is left out of the revision in the definition of the term "credits."

A change of phraseology, however, or a transposition of words in the revision of a law, does not necessarily call for a different interpretation. It must plainly appear that the legislature intended a change, otherwise the same construction must be given to the statute as revised that had obtained previous to the revision. And if we find that in the present statute, while the phraseology may be different, annuities are classed under a different head, then in leaving out annuities from the definition of credits, it would be clear that the legislature did not mean and intend to exempt annuities from taxation. That is precisely the case we have here.

Section 2730, Rev. Stat., defines the particular terms, or some of the particular terms, used in title 13, relating to taxation; and it does not include in the term "credits," annuities or monies receivable at stated periods."

In that respect the two statutes are different, and in that respect counsel is correct in saying that in the definition of "credits" in the revision, annuities are left out.

But we are not to look simply to one section of the title which relates to taxation. We are to take all of the sections that relate to the same subject-matter, and which may elucidate and explain in one section that which has been named in others; so that by a comprehensive view of all we may obtain the meaning and intention of the legislature.

Section 2731, Rev. Stat., gives a statement of the property which is subject to taxation, and I read but the first sentence:

"All property, whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted therefrom; and such property, moneys, credits and investments shall be entered on the list of taxable property as prescribed in this title."

So that, so far as the subjects of taxation are concerned, the legislature attempted in this section to give us a general grasp or comprehension of it, and it is all real or personal property in this state.

We might halt here and ask if any one thinks an annuity is not personal property? But we proceed farther. The section specifically enumerates "all moneys, credits, investments in bonds, stocks or otherwise." Of course the term "or otherwise," so far as it comprehends other things, must be confined to those of a somewhat similar character to those specifically named, not to those absolutely similar, but those somewhat similar—other investments. So that we have here a generic term which covers other investments of a somewhat like character, to those named, and is a term that may very well include annuities, and as subsequently explained in other sections we think does.

Section 2734 provides who shall list taxable personal property:

"Every person of full age and sound mind shall list the personal property of which he is the owner."

Section 2736 provides what property is to be listed as follows:

"Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or, within five days thereafter, make out and deliver to the assessor, a statement, verified by his

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oath, * * * of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities or otherwise, in his possession or under his control."

So that the legislature here explains that by the term "or otherwise" in §2781, it meant to include an investment in a joint stock company and an annuity, and the owner is required to list them for taxation.

Again, sec. 2787 provides what that statement shall contain, and in what order. That it shall truly and distinctly set forth amongst other things, "the amount of credits as hereinbefore defined," and "the amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise."

And now we, perhaps, can grasp the reason why "investments in annuities" was not defined to be a credit in the statute as revised. Credits are subject to what may be termed "off-sets." The taxpayer has the right in making his return to deduct his legal debts, those which may be enforced against him, from the amount of his just credits. And there might come a difficulty, if the definition of "credits," were still to include annuities or moneys receivable at stated periods. It might well be claimed that being defined and specified by the legislature to be credits, they were subject to these deductions, while justly an annuity ought not to be subject to such deductions, but the true value of it assessed against the owner.

And so annuities are taken out of the definition of credits in the revision and placed in another class, the fifteenth, so that there may be no claim or right on the part of the owner thereof to deduct his liabilities from the amount thus invested.

So, we say the reason why the change was made to which our attention is called, was not for the purpose of exempting annuities from taxation, but so that there might be no possible show of deducting legal credits from that class of personal property.

Then in sec. 2789 where the rule is given for the valuation of personal property, it is provided that "annuities, or moneys receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing."

The legislature intended, therefore, to tax annuities and to compel the owner thereof to return them for taxation, and it has established a method by which the value of these annuities shall be determined for taxation. Therefore, we cannot agree to the contention of counsel, that under the law in force at the time this annuity was created and when it was placed upon the tax duplicate for taxation, annuities were not taxable. They were and have been taxable ever since the revision referred to, under the plain terms and provisions of the law.

It is perhaps unnecessary to notice further the question whether or not Mrs. Chisholm had made the investment, or whether the annuity was a mere gift to her by way of a legacy. While this might be immaterial it is evident that it was her property, that which the law gave to her upon the death of her husband, her dower interest and her distributive share in his estate she gave in consideration for this annuity. She, therefore, was the investor; she invested the money which brought this sum to her annually.

And this is in no sense, either, a case of double taxation as to the plaintiff. It is simply requiring the annuitant to pay a tax substantially upon the amount of property that she gave to produce the annuity.

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It is like the taxing of money invested in mortgages, and also taxing the income, while compelling the mortgagor to pay taxes on the property mortgaged and the money borrowed.

Certainly she was not required to pay taxes on the estate of the decedent. Her annuity was not payable out of any specific fund. It was a charge simply upon the general estate, and while the executor may be compelled to pay taxes upon the general estate, that does not make it a case of double taxation or exacting payment twice for the same thing any more than in the case of a mortgage. Nor does this present a case of taxation upon United States bonds. That, of course, may arise with the executors, whether or not they are required to pay taxes upon these bonds, but it is not a matter in which Mrs. Chisholm has any interest, as none of these bonds belong to her. She has no claim upon them at all of any character, except as a part of the estate. If the estate should fail to pay the amount of \$8,000 out of the interest, she could look to the principal, but as an owner of the bonds, she has no interest, and therefore, the amount she has to pay cannot be regarded as a tax upon United States bonds.

On the whole, we think the motion for judgment upon the pleadings by the plaintiff should be overruled, and the case be left to be determined or tried hereafter upon the questions of fact involved in it, that can not be disposed of here on this motion.

CONTRACTS—BIDS.

[Cuyahoga Circuit Court, October 27, 1900.]

Caldwell, Marvin and Laubie, JJ.

W. H. POLHAMUS V. BOARD OF EDUCATION.

CONTRACTS—BIDS FOR FIRE-PROOFING SCHOOL HOUSE.

Where bids were received by a board of education in response to an advertisement calling for bids for three systems for the fire-proofing of a school building, and it appears that anybody could bid on the work, it is not unlawful for the board to select a certain system though the bid for that system was not the lowest bid received. The fact that the systems were patented and owned by a single company, to render the transaction unlawful, must be proved.

APPEAL.

Sanders & Wilson, counsel for plaintiff.

Hogsett, Beacom, Excell, Gage & Carey, counsel for defendant.

LAUBIE, J.

This case of Polhamus against the Board of Education of Cleveland is here on a motion for an order restraining the board from performing, or paying any money upon a contract referred to in the pleadings, until the case can be heard on its merits.

The board of education was to build what is denominated in the pleadings, the Franklin High School building, and, under the statute, prepared specifications and called for bids for the construction of various portions of this building and, among others, for what is termed the fire-proofing of the building. These were published, according to law, in the newspapers in the county, calling for the work to be

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done according to certain systems of fire-proofing, and that the board of education reserved to itself the right to determine which system would be adopted after the bids were opened.

And it is claimed that the board of education instead of following the statute and awarding the contract to the lowest responsible bidder, disregarded that provision in the statute, and awarded the contract to the highest bidder.

The method adopted by the board was to call for bids upon three distinct systems of fire-proofing : the Paige Concrete, the Expanded Metal and the National Concrete. They were represented by the parties that are named in the pleadings: The Paige Concrete Fire-Proofing Company, the Expanded Metal Fire-Proofing Company, and the National Concrete Fire-Proofing Company. And as to these three systems there was but one bid on the Paige Fire-Proofing System, one bid on the Expanded Metal Fire-Proofing System, and two bids on the National Concrete Fire-Proofing System. And, in awarding the contract, the board of education did award it to the highest bidder, and whose bid was considerably higher than the bid of the Paige Fire-Proofing Company. And the question is, whether this was a violation of the statute, in awarding this contract to the highest bidder instead of the lowest responsible bidder.

It is claimed that these systems, which were numbered 1, 2 and 3, in the call for bids, were each patented and were each held and owned by one company only. And if this was so, individually I should agree with the contention of the plaintiff that it was illegal to award the contract to either of the bidders under such circumstances. I say "individually," because I give it as my own individual opinion and not as that of the court, it being unnecessary to decide that question. Under such a state of facts, where but one person or company could bid upon the system because it was patented and owned by a single company, and the board of education undertook to do as it did in this instance, ask for bids upon three of these patented inventions and selected one after the bids were in, it would seem to be only a method of asking the lowest price of one individual to do the work, and entirely annul the provisions of the statute requiring competitive bidding. The board of education might just as well advertise for one party only to bid, or it might just as well award the contract to such party without any publication or bid: but, perhaps, that would not be the opinion of this court if it were necessary to decide it.

But it is not necessary to decide it, because there is no showing, and no allegation in the petition, that these systems were patented and were owned simply by the companies whose names they bear, or by any single individual or company. Indeed, it is alleged in the answer that everybody of the public could bid upon these systems, and there is nothing to show differently. In any event, even though the court should take my individual view of the question, it would be necessary to show the fact that these systems were each patented and were each owned by a single company. Nothing of that character appears in this case; and, so far as we know, anybody and everybody could bid upon each system.

That being the case, it disposes of the question, and we see no reason why the board of education might not, at the conclusion of the bids and the opening of them, select a system and award the contract, as

was done; because it would be the same then—as everybody was entitled to bid upon the system—as though the board had named one system in the call for bids.

It was no violation of the law for the board of education to determine which system to adopt after the bids were opened, and to award the contract to the only bidder upon such system, under such circumstances.

The motion, therefore, for a temporary injunction, will be overruled.

GIFTS—ACTIONS—TRUSTS.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

JOSEPH RINGEMANN, JR., CO. V. JOHN BROXTERMANN, EXR., ET AL.

1. MONEY CLAIM AS GIFT—HELD TO HAVE BEEN A LOAN.

Where it appeared that Mrs. S., in negotiating a sale of several parcels of real estate, said she "could use the money to better advantage upon the hill by improving some property," and upon receipt of the money, \$16,000, equal to about one-half her estate, she went with her son-in-law to a bank, and after depositing the money gave him a check for \$14,300, which, after her death, he claimed was a gift, in view of the statement referred to, as opposed to those made by the son-in-law and by other persons not members of the family, and in view of the fact that Mrs. S. had a family of nine children, and a will in their favor rebuts the presumption of a lack of parental regard for them, and no good reason appears why she should have given half her estate to her son-in-law, a majority of the court holds that a verdict holding the transaction between Mrs. S. and her son-in-law to have been merely a loan, was not manifestly against the weight of the evidence.

2. TRANSFERRED TO CORPORATION—NOT REACHED BY ACTION AT LAW.

While, in a proper proceeding, a fund, claimed to have been received as a gift but which the court holds to have been a loan, and afterwards invested in a corporation, may be followed and property in the hands of the corporation subjected to payment of the claim, the facts stated do not authorize a judgment against the corporation as a party, with the person receiving the money, to an action at law.

Charles W. Baker, for plaintiff in error.

C. B. Matthews, for the executor.

The original action was commenced by John Broxtermann as executor of the last will and testament of Mary E. Schlichte, deceased, against Joseph Ringemann, Jr., Emma Ringemann and the Joseph Ringemann, Jr., Company, a corporation under the laws of Ohio, to recover the sum of \$14,300 as money had and received to plaintiff's use. The defendants filed a general denial, and on the trial sought to prove that the money received was a gift from Mrs. Schlichte to her son-in-law, Joseph Ringemann, Jr.

At the conclusion of plaintiff's testimony, the defendants, the Joseph Ringemann, Jr., Company and Emma Ringemann, separately moved the court to arrest the case from the jury and to render judgment in their favor. The motion was sustained as to Emma Ringemann, the wife of Joseph Ringemann, Jr., and overruled as to the company.

The errors relied on are:

First. That the verdict is not sustained by sufficient evidence.

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Second. That the court erred in overruling the motion of the Joseph Ringemann, Jr., Company to arrest the case from the jury.

If we weigh only the direct testimony of the witnesses as to the transaction itself and what Mrs. Schlichte said concerning it before and after the delivery of the check, giving full credit to each witness, there can be no escape from the conclusion that the money received was a gift; but viewed in the light of the surrounding circumstances, the conduct of Joseph Ringemann himself, the interest of some of the witnesses, and the probability that others misunderstood Mrs. Schlichte who spoke the English language imperfectly, we are unwilling to say that the verdict is manifestly against the weight of the evidence.

It appears from the testimony that Mrs. Schlichte had several pieces of real estate, one of which she sold to the Herman Lackman Brewing Company for the sum of \$16,000, and pending negotiations gave as a reason for selling that "she could use the money to a better advantage upon the hill by improving some property," whereas, upon receipt of the same, she went with her son-in-law to the Merchants National Bank, and after depositing the proceeds of the sale, gave him a check for \$14,800.

Being a strong-minded business woman, it is not probable that she would make such a statement to Mr. Lackman and yet at the same time talk so freely to other persons, not members of the family, about *giving* the money to Mr. Ringemann. The latter admits that a short time after he received the money he executed and delivered to her a note for that amount, but says that "she just simply wouldn't listen to it, and took the note I handed her in an envelope and tore it up."

He says: "I could hardly realize she had done so much for me," and yet he thought it necessary to be present at the office of the Lackman Brewing Company when the sale was made and afterwards to go with Mrs. Schlichte to the bank when the sale money was deposited, although she herself was a woman of affairs, and had by her own industry and close attention to business amassed a small fortune.

It further appears that about five months before the date of the alleged gift, Mrs. Schlichte executed her last will and testament, which provided that the residue of her estate, after the payment of certain charitable bequests, should be divided equally among her nine children, naming each of them and including Mrs. Ringemann, which rebuts the imputation that at this time there was any want of parental regard and affection for any of her children.

It also appears that Ringemann, a few days before the death of Mrs. Schlichte, requested her to sign a will prepared by himself, and after she refused to sign the paper destroyed it, for the reason, as he stated, that he did not want anything lying around in his handwriting. The absence of any good reason why Mrs. Schlichte should give nearly one-half of her entire estate to her son-in-law adds to the improbability that the money received by him was a gift.

We think, therefore, that the court did not err in overruling the motion for a new trial on the ground that the verdict is not sustained by sufficient evidence.

We are unable, however, to understand upon what principle of law the judgment against the corporation can be sustained. It was not organized until a month after the transaction, and hence could have received no part of the money from Mrs. Schlichte. It is true that Ringemann afterwards transferred by check \$8,500 from his account in the

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bank to that of the corporation; but this alone would not support a judgment for the entire sum of \$14,300 and interest.

There is no allegation of fraud in the pleadings; and while, in a proper proceeding, the fund might be followed and property in the hands of the corporation subjected to the payment of the claim, the plaintiff is not entitled to a judgment at law.

Mrs. Ringemann holds thirty-six of the forty shares of the capital stock, and in the event the property of the corporation is insufficient to satisfy the judgment, may be required to pay an amount equal to the stock held by her, notwithstanding the court dismissed the petition as to her.

Judgment affirmed as to Jos. Ringemann, Jr., and reversed as to the company.

SMITH, J., dissents in part, as appears from the syllabus.

LIENS—PRIORITIES.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

ROBERT B. TISCHLER ET AL. V. EDWARD R. TISCHLER ET AL.

LIENS—JUDGMENT CREDITOR'S BILL—PRIORITIES.

The commencement of an action in the nature of a creditor's bill gives the plaintiff priority over mere judgment creditors, who acquire no lien where judgment debtor's interest in property consists only of an equity; and an assignment of debtor's interest in property to his attorneys in payment of fees, takes precedence over claims of mere judgment creditors and is second to claim first above referred to.

APPEAL.

Louis Reemelin, for Mrs. Fleischer; *Goebel & Bettinger*; *Scott Bonham*; *Robertson & Buchwalter*; *Stallo, Richards & Shaw*, and *Heilker & Heilker*, for various defendants.

SMITH, J.

As we understand, it is conceded on all hands that the fund in the hands of the court for distribution is to be paid out, so far as necessary to do so, as follows: First, to the payment of the taxes and assessments, if any, on the real estate which was sold; second, to the payment of the costs in this case, and, third, to the payment of the Heilker mortgage. The residue would then be payable, if the claim of Teresa is settled (as it is suggested it is or will be), to the two brothers, Robert and Albert Tischler, subject to the claims of the other parties to the suit against the same.

Three claims are asserted against the share of Robert, viz., by Anna Fleischer, the Ringgold Building Association and Goebel & Bettinger.

First. The claim of Mrs. Fleischer arose as follows: On June 24, 1895, she recovered a judgment in the court of common pleas of this county against said Robert Tischler for \$762.50. On December 21, 1895, she caused an execution to be issued thereon, directed to the sheriff of this county, who returned the same, finding no goods or chattels, lands and tenements whereon to levy; and on December 21, 1895, she filed in

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the court of common pleas a creditor's bill against said defendant, seeking to subject his equitable interest in certain lands, afterwards sold in this case (he having no legal estate therein), to the payment of said judgment. Said action is still pending, awaiting the determination of this case in this court, all parties being before the court and asserting their claims in this court.

Second. By the Ringgold Building Association. It secured a judgment against defendant Robert Tischler in the superior court of this city for \$724.84, October 28, 1895. No execution was issued on this until October 27, 1900. By the decree of this court, on June 18, 1900, the equitable interest of Robert in the real estate producing the fund had been converted into a legal estate, and before the issuance of this execution, October 27, 1900, the real estate had been sold and the money was in the hands of the sheriff.

Third. Goebel & Bettinger. Their claim arose in this way: They were the attorneys for Robert Tischler in this litigation, and on March 12, 1895, he agreed to pay them for their services therein \$500, and to transfer to them any decree rendered in his favor to secure the same, and on October 1, 1900, after said decree, he assigned to them all his interest in writing, which was duly filed with the clerk.

Neither the judgment of Mrs. Fleischer or that of the building association became a lien on the interest of Robert Tischler in this land, as he had only an equity therein. But by the commencement of the action by Mrs. Fleischer against him, in the nature of a creditor's bill, she did, as against all other of his creditors, who did not hold specific liens on his interest in said lands, obtain a priority as to the funds or interest so sought to be appropriated to the payment of her claim. Such seems to be the undisputed law of this state. *Miers v. Turnpike Co.*, 13 Ohio, 197-8; *Douglass v. Huston*, 6 Ohio, 156; *Robbins v. Klein*, 60 Ohio St., 199, 206. Mrs. Fleischer is then entitled to be first paid out of Robert's share; and Goebel & Bettinger, by virtue of the assignment to them by said Robert of his interest in the judgment to the extent of their claim, come next, and have priority over the building association, and these two claims of Mrs. Fleischer and Goebel & Bettinger, it is said, are more in amount than the share of Robert. Distribution will be made accordingly.

STREET IMPROVEMENTS.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

CHARLES W. BAKER V. NORWOOD (VIL.) ET AL.

STREET IMPROVEMENTS—UNAUTHORIZED.

The statutes do not confer upon municipal corporations the right to improve private property for street purposes without condemnation or consent of the owner, and much less to assess upon individual property the cost of an improvement which was not desired nor solicited.

APPEAL.

C. W. Baker, for plaintiff.

Wm. R. Collins, for the village.

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GIFFEN, J.

The plaintiff alleges in his petition that the village of Norwood has, without his permission, and without condemning for public use, improved his certain lot of land for street purposes, and assessed the costs thereof upon his lots adjacent thereto, the prayer being for an injunction.

The answer admits the making of the improvements and levying the assessments, but avers that plaintiff was served with notice pursuant to the provisions of sec. 2304, Rev. Stat., and received the benefits.

The proof is that plaintiff was not served with any notice, nor did he in any manner consent to such improvements.

The village, in making the improvements upon the land of plaintiff and thus attempting to appropriate the same for street purposes, was a trespasser.

The statute did not confer upon the village the right to improve the private property of the plaintiff, and much less to assess upon his individual property the cost of an improvement he never desired nor solicited. *Harbeck v. Toledo*, 11 Ohio St., 219.

Perpetual injunction allowed.

DEBTORS AND CREDITORS.

[Hamilton Circuit Court, January Term, 1900.]

Smith, Swing and Giffen, JJ.

IN RE ESTATE OF JOHN P. SKELTON, DECEASED.

CHILD ALLOWED COMPENSATION FOR TAKING CARE OF PARENT.

While it will not be presumed that services of a child in taking care of and nursing a parent are to be compensated, yet such compensation should be allowed, without express agreement, where it appears that the circumstances were such that the child, who was in needy circumstances, was justified in assuming that she would be compensated for such services, and it also appears that the father, who was abundantly able to pay, required all of the daughter's services, and compelled her to give up working for others, and also that he received such services expecting to pay for them, but died without making provision therefor.

HEARD ON ERROR.

SWING, J.

We are of the opinion that the judgment of the court of common pleas in this cause should be affirmed.

The evidence was clear and certain as to the character of the services incurred by Mrs. Martin to her father, Mr. Skelton, and the value of the services was also shown with equal clearness, and the judgment was not excessive if the relation of debtor and creditor existed. There is, however, room to doubt whether the services were rendered with the understanding between the parties that Mrs. Martin was to be paid for the same; but we are of the opinion that the court was justified in finding that in rendering the services Mrs. Martin was authorized to believe that she would receive compensation for her services, and that Mr. Skelton understood that they were so rendered, and that he received them expecting to pay for the same. The circumstances and relations of the parties together with the declarations of Mr. Skelton would seem to authorize such a conclusion.

In re Estate of Skelton, Deceased.

It is shown that they were not living together as parent and child, for it is fair to conclude that Mr. Skelton lived with his daughter in her home, and that he paid for his board by paying \$16.00 per month for the rent of the house. It is also fairly shown that Mrs. Martin had no property, but depended largely upon her own work to support herself and her family of four children. Mr. Skelton had property, and was able to pay for the services of this kind, which he so badly needed. He required all of Mrs. Martin's services. He compelled her to quit working for others where she was raising money required to support her children in order to take care of him, and he could hardly expect her to do this without receiving compensation, especially when he was able to pay her and she needed the compensation to discharge an obligation which was more obligatory on her than his care, viz., the support of her children. Nor do we see how she could perform this work without expecting under these circumstances, to receive pay for the same.

The circumstances and the relations of parties are always to be looked to by the court to ascertain the true relation of the parties, and in this particular case, we think, it goes a long way towards showing that Mrs. Martin was to be paid for her services. But in addition to the court being in possession of these facts, there was direct evidence to the effect that Mr. Skelton told others that Mrs. Martin would be well paid for the services rendered to him, and that they were of great value, and under the circumstances, we think, these declarations indicated that he, Skelton, understood the relation of debtor and creditor to exist, and that the services rendered by Mrs. Martin were not to be gratuitous.

The judgment will be affirmed.

NEGLIGENCE.

[Hamilton Circuit Court, January Term, 1900.]

Smith, Swing and Giffen, JJ.

FLANNAGAN V. HOLLOWAY.

SUDDENLY STARTING HORSE—OCCUPANT THROWN FROM WAGON.

Starting a horse suddenly while another occupant of the wagon had his face to the rear of the wagon, is not such negligence as will render the driver liable, where it appears that the person thrown from the wagon heard the driver call to the horse to "get up," and it does not appear that such person might not have guarded himself against falling off, and that the falling off was the probable or necessary result of starting the horse.

HEARD ON ERROR.

SWING, J.

We think the judgment of the court of common pleas should be affirmed. The evidence in our opinion does not tend to show any negligence on the part of the defendant, and there was nothing to go to the jury, and thus conceding that Flannagan and young Holloway were not fellow servants. The only negligence claimed was that young Holloway started the horse while Flannagan had his face turned to the rear of the wagon, and the wagon starting suddenly, plaintiff said he heard Holloway say "get up King," so that he must have been aware of what the horse was going to do. It did not appear from the evidence that it was

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negligence to start the horse while plaintiff's face was to the rear, and it did not appear from the evidence that after Flannagan heard Holloway say "get up King," that he could not have guarded himself against falling off if he had desired to do so, and that the falling off was the probable or necessary result of starting the horse while Flannagan's face was to the rear. The evidence fell short of tending to prove the claim of negligence.

DESCENT AND DISTRIBUTION.

[Hamilton Circuit Court, January Term, 1900.]

Smith, Swing and Giffen, JJ.

DOPPLER ET AL. V. CLOUWETTER.

1. WILL VESTING FEE UPON TESTATOR'S DEATH.

Under a will bequeathing to each of testator's children one-fourth of his estate, subject to be divested in the event that either died before the widow leaving issue surviving, and that event does not happen, each child becomes vested with a fee, subject to the widow's life estate, upon the death of testator.

2. ANCESTRAL PROPERTY—DESCENT UPON DEATH OF CHILD.

Upon the death of a child so inheriting, without issue, her husband takes a life estate and the fee goes to her brothers and sisters, though subject to the life estate of testator's widow who still survives.

HEARD ON ERROR.

SWING, J.

We think the judgment of the court of common pleas should be affirmed. By item three of the will of Andrew Doppler each of his children became vested with the fee of the one-fourth of his estate, subject of course to the life estate of his widow, and subject to be divested in the event that either died before the widow leaving issue surviving; but this event did not happen, and therefore each child became vested on the death of Andrew Doppler, with the fee of one-fourth of his real estate subject to the widow's life estate.

Upon the death of the child Caroline her estate descended to her heirs. Who are they under the statute?

In this case, being ancestral property and leaving no issue, the life estate goes to the husband and the fee to her brothers and sisters. The fact that the life estate of Doppler's widow still existed at the time of her daughter's death, can make no difference. Whatever estate she had, and it was clearly a fee, passed under the statute, and by the same law that the brother and sisters take the fee, the surviving husband takes a life estate.

The judgment below must therefore in our judgment be affirmed.

MUNICIPAL CORPORATIONS—SIDEWALKS.

[Lucas Circuit Court, November 5, 1900.]

Haynes, Parker and Hull, JJ.

MARY MATTHEWS V. TOLEDO.**1. DUTY OF CITY TO INSPECT SIDEWALKS FOR ALL DEFECTS.**

It is the duty of a municipal corporation to make an examination of sidewalks from time to time, and to look after latent as well as patent defects; and where it appears that a walk had been out of repair, having boards which were loose at one or both ends, and would fly up when stepped upon, for over two years, the city must be held to have been negligent; and an instruction which, in substance, directed the jury that if, when plaintiff attempted to pass over such walk, it appeared to be in good condition, or that the defect was latent, the plaintiff could not recover, constitutes prejudicial error.

2. PROXIMATE CAUSE—IMPROPER INSTRUCTIONS TO JURY.

Unless the negligence of a person injured contributed directly to or was a proximate cause of the injury, it does not preclude a recovery. Under this rule it is improper for the court, in an action for injuries resulting from a defective sidewalk, to instruct the jury that "if plaintiff contributed in any degree" to the injury, he cannot recover.

HEARD ON ERROR.

E. G. Love, and A. W. Fraser, for plaintiff in error.

M. R. Brailey, city solicitor, for defendant in error.

HAYNES, J.

A petition in error is filed in this case for the purpose of reversing the judgment of the court of common pleas in an action brought by Mary Matthews against the city of Toledo, seeking to recover for personal injuries which she received in falling upon a sidewalk in the city of Toledo, which she alleges was in a defective condition. It appeared upon the trial of the case, that the particular street upon which she fell was called McKinley avenue and lies in the eastern part of the city, that she was coming to the city from the country and came on to this sidewalk and that in walking with some person that person stepped upon the end of a plank, which flew up and she was tripped and fell. It is alleged that the sidewalk was in a defective condition, especially in that the stringers were rotted so that they would not hold nails and would not keep the planks down. It further appears by the record that that sidewalk had been in this condition nearly two years and that the inhabitants, from time to time, had been in the habit of putting down a plank and occasionally one would nail a cleat upon a plank and try to hold it down, and in various ways they had made efforts to keep the sidewalk in a passable condition; and, so far as appears from the record, the city had never done anything to it.

Upon the close of the evidence the court charged the jury, and its general charge is fair and sets forth the law; but, coming towards the conclusion of the charge, the court says this, in regard to the alleged negligence of the plaintiff, that:

"If her own negligence contributed in any degree to the bringing of this misfortune upon herself, she is not entitled to complain of the

city of Toledo, although the sidewalk may have been defective and the officers of the city having those matters in charge may have been guilty of negligence in failing to repair or remedy that defect."

It will be observed that the phrase is: "If she contributed in any degree." Prior to that he has charged that she should use care and judgment in walking upon it.

In *Schweinfurth v. Railway Co.*, 60 Ohio St., 215, the Supreme Court had that question before them and have made a rule which is the law of Ohio today so far as we are aware. I read from the second of the syllabi:

"In an action for negligence, it is not error to refuse an instruction, that the defendant cannot be held liable, though guilty of the negligence charged, if the negligence of the person injured contributed in any degree, or in any way, to the injury of which he complains. Unless the negligence of the person injured contributed directly to, or was a proximate cause of the injury, it does not preclude a recovery."

That matter is discussed in the body of the opinion, and authorities are cited which show that in this part of the charge, although it was not claimed in argument, there is error occurring in regard to the degree of negligence that plaintiff should have been chargeable with in order to prevent an action; but the material part of the charge of the court and the one that we really pass upon is this:

"It is your duty to look carefully into the evidence in the case in determining whether or not the city of Toledo is guilty of any neglect of that ordinary care which the law imposes upon it with reference to this particular walk. If it appears from the evidence that this sidewalk was in such condition that a person passing over it, in the exercise of reasonable care and prudence, would not discover the defect, but would regard it as safe, the city cannot be held guilty of negligence for failing to know that there may have been a latent defect in the walk. A latent defect in a sidewalk is one that does not appear to the eye or would not appear or be known by a person walking over it in the exercise of ordinary care. The law does not presume notice to municipal corporations of a latent defect; and before a municipal corporation can be held in damages for injuries caused by latent defects in its walks, the jury must find that the municipal corporation has had actual notice of the existence of such latent defects. And it is the duty of the jury to consider the testimony with reference to the character and condition of the walk, the nature of the defect, and the situation of the sidewalk at the point complained of, where it is claimed the injury happened."

We think in that the court erred. The practical effect was to charge the jury that if, at the moment the lady passed, the walk appeared so safe that she would not be guilty of contributory negligence in passing it, the city would not be guilty of negligence in leaving it in the condition it then was. It was shown that this walk had been out of repair for over two years by those who nailed down the planks from time to time; the nails would not hold and the planks were loose and continually flying up or getting off. In some instances people would come along and go over and throw the loose planks into the middle of the street; and thereupon the neighbors would put the planks back again and try to hold them in place.

We think it clear that it was the duty of the city to make some examination of the sidewalks, and we cannot think or hold that the city authorities may sit silently by, the officers of the city in their offices, and say

that they did not know anything about the condition of the walk. There should be some examination, at some time, of these walks, and they should be examined with reference to the whole walk and the condition of the stringers, whether they would hold the planks. Certainly there is nothing so dangerous as to have a plank in a sidewalk that is not fastened down and will not be held down by the nails driven in it, and is so loose that a person stepping upon one end may throw the other end up in front of another person; that is a most dangerous condition of affairs, and a person is liable to meet with a most severe accident under just those conditions. Now we think the duty of the city was to make an examination from time to time and look after such latent defects as well as for patent defects, if you want to call that a latent defect which exists in the whole structure of the sidewalk, so that it was of no use in supporting, maintaining or keeping the sidewalk in a condition to be travelled over. The charge had proceeded before that in regard to the walks, following perhaps some of the lines of the decision of the Supreme Court. The Supreme Court have held that in these outlying parts of the city, in regard to snow upon the ice, it was not expected that the city authorities could traverse the whole city immediately after a storm and thus ascertain the condition of the street, but we know of no case which would apply to a case of this kind, and hold that they were excused from an examination of the sidewalk for two years leaving the streets out of repair all that time.

For these reasons the judgment of the court of common pleas will be reversed and the cause remanded for another trial.

CHATTEL MORTGAGE.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

JOSEPH GRIEFENKAMP V. ROBERT BEAL ET AL.

1. TO RETAIN POSSESSION AND SELL OR EXCHANGE INVALIDATES.

A chattel mortgage which contains a provision allowing the mortgagor to retain possession of the property, with power of sale, although good between the parties, is invalid as against creditors, though the latter live on the property, who assert their rights against such property.

2. PROVISION WHICH IMPLIES POWER TO SELL OR EXCHANGE.

A provision in a chattel mortgage, under which the mortgagor retains possession, that "in case of the exchange of any of the above articles of personal property for other articles of the same kind in the course of said business, this mortgage is to operate as a lien upon the articles that may be acquired to take the place of such as may be exchanged or sold," while it conveys no express power to sell or exchange, clearly implies that such power is to be exercised and is within the rule above stated.

3. FAILURE TO EXERCISE POWER DOES NOT VALIDATE.

The mere fact that the power of sale or exchange, under a provision in a chattel mortgage by which the mortgagor was allowed to retain possession of the property and sell or exchange, does not change the rule or render the mortgage valid against creditors.

HEARD ON ERROR.

John J. Gasser and Ed. M. Spangenberg, for plaintiff in error.

Martin M. Durrett and Sidney G. Stricker, for defendants in error.

GIFFEN, J.

The only question in this case is whether a chattel mortgage which contains a provision allowing the mortgagor to retain possession of the mortgaged property, with a power of sale, is valid as against a judgment creditor who has lived on the property.

The provision in the mortgage is as follows:

"It is agreed between the parties hereto that in case of the exchange of any of the above articles of personal property for other articles of the same kind in the course of said business, this mortgage is to operate as a lien upon the articles that may be acquired to take the place of such as may be exchanged or sold."

While this provision confers no express power either to sell or to exchange, yet the terms used clearly imply that such power was to be exercised by the mortgagor, and whether by sale or exchange is immaterial, as in either case it is a disposition of the property mortgaged.

In *Collins v. Myers*, 16 Ohio, 547, the syllabus is as follows:

"A mortgage of personal property, where the mortgagor retains possession of the property mortgaged with the power of sale, is void as against subsequent purchasers and execution creditors."

And at page 552, Read, J., says:

"The retention of possession on the part of the mortgagor is only a badge of fraud, which may be removed by showing the transaction was honest. * * * But a continuance of possession, with a power of disposition and sale, either express or implied, is quite a different thing."

To the same effect is the recent case of *Francisco v. Ryan*, 54 Ohio St., 307, 309.

The clause of the mortgage under consideration in that case is as follows:

"It is hereby understood that whatever portions of said stock that may be sold in general trade, that the goods purchased by the said grantor shall replace those that were so sold in general trade, and that this mortgage shall be a lien on same."

This stipulation grants no express power of sale or other disposition of the mortgaged property, yet the parties manifestly intended to give such power, and it may be fairly implied as the court did in that case. In the case before us, the power of exchange or sale was never exercised, the property at the time of the levy remaining the same as that covered by the mortgage; but this fact does not change the rule that the mortgage, although good as between the parties, is void as against creditors, who assert their rights against the property.

Judgment affirmed.

NEGLIGENCE—MASTER AND SERVANT.

[Lucas Circuit Court, June Term, 1892.]

Haynes, Bentley and Scribner, JJ.

*** PENNSYLVANIA CO. V. THEODORE N. HICKLEY.****1. NEGLIGENCE TO SEND TRAIN WITHOUT SUFFICIENT EMPLOYEES.**

A railroad company in sending out a train, though not a regular one, without a sufficient force of trainmen (without conductor or brakeman in case at bar) to assist in giving signals for the protection of employees engaged in switching, and coupling and uncoupling cars, is guilty of negligence.

2. ENGINEER SUPERIOR OF FIREMAN, WHEN.

An engineer who is sent out with a fireman and a force of section men, but without a conductor or brakeman, and who has charge of the movements of the train, receiving his orders from the superintendent and train dispatcher, is the superior of the fireman, and where the latter, being directed to couple a car, and being inexperienced in such work, is injured by the negligence of the engineer in moving the train, the railway company is liable.

3. RULE OF RAILWAY AS TO ENGINEERS AND FIREMEN NOT APPLICABLE.

A rule of the railroad company to the effect that the only thing a fireman is bound to do, as between himself and the engineer, is to obey the latter in the proper use of fuel and in the matter of firing, and that in all other things the engineer and the fireman are independent of each other, if applicable to a train equipped with a sufficient force to properly manage it, is not applicable to a train sent out, in charge of an engineer, without conductor or brakemen.

4. CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

The question whether a fireman was guilty of negligence in or assumed the danger of going out with a train in charge of an engineer, without conductor or brakemen, is, ordinarily, a question for the jury. To charge such fireman with negligence or assumption of risk, under such circumstances, which would defeat his right to recover for injuries, it must appear that he knew, when he went out, that the train could not be safely handled without a conductor and brakemen.

5. MORTALITY TABLES AS BEARING UPON PERSONAL INJURY.

Evidence, in the nature of tables of a life insurance company, derived from experience of about fifty years, showing probable duration of life is not restricted to use in actions involving death; such evidence is competent in an action for personal injuries, as bearing upon plaintiff's financial loss and pecuniary damages by diminution of earning capacity.

HEARD ON ERROR.*E. W. Tolerton*, for plaintiff in error.*Hamilton & Ford*, for defendant in error.**HAYNES, J. (Orally).**

This is an action brought by the plaintiff company for the purpose of reversing the judgment of the court of common pleas, it being an action for damages for a personal injury.

The plaintiff in his petition, which was filed on April 5, 1890, sets up the organization of the defendant company, and says that on July 18, 1886, the plaintiff was, and for a long time prior thereto had been a fireman in the employ of the defendant company on one of its locomotive engines engaged in the operation of said railroad. He then says: "On

* Settled and dismissed in Supreme Court by plaintiff in error, June 7, 1892.

Lucas Circuit Court.

said date and for a long time prior thereto, the crew, or force of men, for an engine, by the usage of the said company and the requirements of the work to be performed in the said business, consisted of a conductor, engineer, fireman and two switchmen or brakemen." That on the morning of July 13, "the engineer, then in charge of the engine on which plaintiff was employed and belonging to and under the control of the defendant, received orders and directions, from the superintendent of said road, or other employees thereof, superior in authority over said engineer and the plaintiff, and whose orders in that behalf it was the duty of the said engineer and plaintiff to obey, to the effect that said engineer and engine should work extra between the stations of Walbridge and Gibsonburg, on the line of the defendant's said railroad, with flags out against all trains until they come in sight, and that all trains would look out carefully for them until they came in sight. Doing extra work between the stations aforesaid, on defendant's said road as embraced and directed by the aforesaid order, consisted in the movement of said engine from place to place, picking up and leaving freight cars between said limits, coupling, uncoupling and switching cars, and such other work as the business of the defendant required that day, and required the aid and services of a full crew of hands to man the same and do said work. The defendant well knowing the premises, carelessly and negligently omitted and failed to provide sufficient help and assistance to do such work on said day, and excepting the engineer and the plaintiff, set the remainder of the crew of hands, belonging to said engine, at other work and thereby prevented their going with said engine, and they did not go."

He then sets up that they started out to perform their duties as they were ordered, and he says that the engine and the work to be done by it was wholly without a conductor, or other person, except the said engineer, to take charge of and direct the same, and by reason of the premises, said engine and the plaintiff and all the work to be performed by it, were placed under the charge and control of said engineer, who thereupon took charge of the same and directed and controlled the same in the capacity of a conductor and director of said work, and all orders and directions of the defendant, as to doing said work, were communicated to and received by said engineer. Plaintiff says that said engineer was then and thereby, by the defendant, placed superior in authority over the plaintiff during said day, whose orders and directions it then and there became and was the duty of the plaintiff to obey, and he received all his orders and directions from said engineer and none else.

While doing said work in pursuance of said order, on said July 13th, and while the same was under the charge and control of said engineer, at a point about two miles and a half west of Gibsonburg, on the defendant road, said engine was standing on the main track attached to a string of six gondola cars, which had then been loaded with railroad ties, said engine facing west. In the rear of said six cars and standing on the same track, were four other similar cars standing some six or eight feet distant from the other cars which were attached to the engine. About noon of said day, and while said cars were so standing, said engineer, so placed in charge of said work by the defendant, decided to take said cars to the station of Woodville, next west, and set them on a side track there, and thereupon said engineer, whose orders and direct-

ions in that behalf it was the duty of plaintiff to obey, directed the plaintiff to go to the opening between said strings of cars and make the coupling between them, while he with the engine shoved said six cars back against the others, to enable plaintiff to make the coupling, which order plaintiff proceeded to obey and went between said cars for the purpose of making said coupling, and with the exercise of all reasonable care on his part was proceeding to make the same, when said engine with cars attached was, without warning or notice by said engineer, carelessly and negligently and with great force and violence, suddenly forced back, bringing said cars suddenly together, and without ability on the part of plaintiff to prevent it, or escape, plaintiff's right arm was caught between said cars and crushed at the elbow, as hereinafter stated.

Plaintiff says that the work of coupling cars or doing other work of a brakeman or switchman was no part of his employment by the defendant; that he was never employed by the defendant for such work, but solely as a fireman on engines; at the time he was so ordered by his said superior, and when he attempted to make said coupling, he was wholly without experience in said work and unskilled and without knowledge as to the way of doing the same or the manner of avoiding the danger and hazard attending such work, as defendant well knew. Plaintiff says that the work of coupling cars is and was much more hazardous and attended with much greater danger than the work of a fireman, which plaintiff was employed by defendant to do, but which plaintiff, at the time he undertook to make said coupling, did not appreciate and understand, and with the knowledge at his command and want of experience he could, and did not know, which was well known to defendant.

Plaintiff says that when his arm was caught between said cars as hereinbefore described, it was crushed to such extent above and below the elbow as to require amputation, and it was soon thereafter amputated near the shoulder. That by reason of said injury he has suffered from the loss of his right arm; he was confined to his home some five or six weeks, suffered great bodily pain, anguish and unrest in consequence thereof, and has expended a large amount for surgical attendance, nursing and medicine in being treated for said injury, to-wit, the sum of one hundred dollars. Plaintiff says he sustained the injury aforesaid without any fault on his part and through the negligence of the defendant in failing and omitting to furnish sufficient hands and help to do the work of said engine, and in sending the two switchmen and the conductor that belonged with said engine to do other work at Toledo instead of allowing and requiring them to go with said engine, and through the negligence of said defendant through its said engineer in ordering and directing plaintiff to make said coupling and in sending said cars by said engine back on to plaintiff in a reckless and careless manner as herein set forth, and that he has sustained damages by reason of the premises in the sum of thirty thousand dollars for which amount he asks judgment against the defendant."

To that, the defendant answers, admitting that it was a corporation and was engaged in operating the line of railroad which is charged in the petition; and it admits that on July 13, 1886, the plaintiff was, and for a long time prior thereto had been, in the employ of the said defendant, and denying every other allegation in the petition. "For a second defense, the said defendant says that the injuries complained of by the

said plaintiff were caused by his own negligence and carelessness, and not that of the defendant. For a third defense the said defendant says, that if the injuries complained of by the plaintiff were caused by the negligence of any other person or persons than himself, it was the negligence and carelessness of the fellow servants of the said plaintiff, and not the negligence of the said defendant."

To this there was a reply denying the contributory negligence and the clause in regard to the fellow servant.

Thereupon the case went to the jury and a verdict was rendered for \$8,000, and there was ordered by the court below a remittitur of \$2,600, which was made, and thereafter the judgment was affirmed.

A motion for a new trial was made, upon the grounds:

- (1) That said verdict was not sustained by sufficient evidence.
- (2) That said verdict was contrary to law.
- (3) For errors of law occurring at the trial and excepted to by said defendant.

(4) That the damages rendered by said verdict are excessive in amount, appearing to have been given under the influence of passion or prejudice."

The evidence offered by the parties shows that the plaintiff was a fireman on engine No. 57, and that on the night before, at eleven o'clock, it had left Mansfield with the regular fast freight train, I believe, and arrived at Toledo about six o'clock in the morning of July 13, 1886; and when they arrived there they received an order, which is substantially as follows: "Order No. 6, Engine 57, No. 14 engine house P. C. Engine will run extra from engine house to Walbridge ahead of No. 14. J. S. Morris, Superintendent, July 13, 1886. Issued at 6.24 A. M.," and that was received by the engineer. It seems they soon after got another order, like this: "All trains west Tiffin, all trains east, and Engine 57 Walbridge. Engine 57 will work extra between Walbridge and Gibsonburg today until six o'clock P. M. with flag out against all trains until they come in sight. All trains will look out carefully for them." Signed "J. S. Morris, Superintendent." In pursuance of that order, the engineer and fireman of this locomotive, as soon as they had their breakfast, took their train and started for Walbridge. They took with them Denman, who was a section foreman, and one man, and on arriving at Walbridge they received further orders. These orders were given generally to the engineer, and perhaps to the section man there. They were ordered to run to and take on another section of men; which was done, and then they ran to Woodville, to the siding, and took on ten gondola cars, and then ran down to Gibsonburg and went into the side track for the purpose of awaiting the arrival of the morning passenger trains, both east and west, and also a freight train. When they had passed, they pulled out over that side track and went up to Sugar creek, where there were ties to be loaded, along the line of the road, and stopped on the main track and took on a lot of ties; they were to take there ten carloads of ties, and it was at this point where the accident occurred.

The testimony of the fireman is, that when they got to Woodville he started, as was his duty, perhaps, to open the side track—turn the switch; that Denman, the foreman, who also, it seems had a key to the switches, was a little ahead of him, and he opened the switch and they went in there, and when they got up to the gondola cars Denman con-

nected them, and when they were about to start the switches were turned, under the order of the engineer. The fireman went back over the train and turned the brakes, and in that way they went down to Gibsonburg. When they got to Gibsonburg, he started also to open that switch, but the switch was opened by Denman before he could get there, and I think when they came out he closed the switch and got upon the car. That, however, was a part of his duty. When they came up to where the ties were the foreman said that he wanted to disconnect three cars so that they could work to better advantage, and Denman made the uncoupling and the train was started and ran a few feet, and they staid there working about two hours and a half. During that time the men, under the direction of the foreman, were loading the ties. The engineer was about his engine, and the fireman was engaged in cleaning up the engine, working at the headlight and doing work of that kind, until noon. It seems that then the engineer and fireman took their dinner. Just the time they did that does not appear, but I suppose at noon. About half-past twelve or a quarter to one, the foreman, Denman, called his men, and they started to eat their dinner, which consisted of their taking their pails and climbing upon the bank and commencing to eat. Denman was seated in front of the opening in the train. It appears that the only man who had attempted to work about brakes, other than the fireman, was Denman. He testifies that he had been a brakeman a good many years, and that he had been in the habit of setting brakes. While the section men and the foreman and his men were eating their dinners, the engineer and fireman having concluded their meal, were standing in the vicinity of the cars it being then about twenty minutes to one. The engineer testifies that a train was due at Gibsonburg at 1:15, and he claims that he said to the fireman: "We had better couple the cars together and go up to Woodville." The fireman states, however, that he said to him: "You go in and couple these cars, and I will back down and we will take the train to Woodville and leave these cars on the side track so they will be out of the way, and come back and take the others." At any rate, the engineer started for his engine, and the fireman gave the signal to back, and as the cars started to back the fireman went in to make the coupling, and he says it was the first coupling he had ever undertaken to make. According to the testimony of the fireman, the cars were coming back quite rapidly, he thinks at the rate of three miles an hour; at any rate they seemed to him to be coming back rapidly. He having set the pin, it seems, dropped the link and started to get out of the way, started to pull his hand away—his arm—and in doing this, before he was able to get it away, the cars came together and his arm was caught by the bumpers and was injured in the manner stated. The arm was nearly taken off and hung by some shreds and was supported by his coat. It was bleeding, but he had nerve enough to go to the engine before he had any help. He was taken to Gibsonburg and his arm was attended to.

Now, under this state of facts, the question is: whether the plaintiff company here, is liable.

It is contended here very earnestly on behalf of the railroad company that there is no evidence here, whatever, to make the company liable. It will be noticed that the grounds of negligence set forth by the plaintiff's petition, are: First, that the locomotive was sent out to perform this work without any regular brakeman; second, that the engineer backed

his train more rapidly than he ought; that he backed it up carelessly, negligently, and that the plaintiff was thereby caught; third, that he had ordered the fireman to go in and make a coupling knowing that he had had no experience, and that that was a ground of negligence.

The contention of the defendant below is: First, that the fireman was guilty of contributory negligence; second, that if any negligence occurred, it occurred by the act of a co-employee; in other words, that the engineer and fireman were co-servants employed by the same company, and that, under well established rules of law, there was no liability on the part of the company for any negligence that might occur on the part of the engineer. The testimony shows, on behalf of the plaintiff,—and it is not contradicted by any evidence on behalf of the defendant below, that in the operation, not only of a freight train, but of construction trains, it is customary to have a conductor and one or more brakemen, for the purpose of managing the trains. It will be observed in this case that the engineer had gone out with the fireman and section men, had gone out with eight other men, and the question arises: who was responsible for the running of the train? Who was in charge of the train? The solution of that question will, perhaps, have considerable to do with the liability of the company. Now we are clearly of the opinion in this case, from the evidence, that the engineer of that locomotive had charge of the running of the train, of the movements of the train. He received his orders from the superintendent, or from the train dispatcher, as to the points he was to make and where he was to stop, and had his general orders to look out for all trains and cars, and by his time-tables, he was able to know when they were due. It does not appear that the section foreman had any control whatever over the fireman. The only thing he did, when he arrived at the point where the ties were lying, was to suggest to the engineer the fact that he wanted the cars parted there, as, he testifies, that he could load the ties with more facility and work his men more advantageously, and thereupon he drew the pin and left the cars standing in the position in which he wanted them in reference to the ties. All other movements of the train were to be regulated, and were regulated in fact by the engineer. So that, in the absence of contention, it is quite apparent to us that the engineer stood, so far as the movements of the train were concerned, in the position of a representative of the company the same as a conductor would have been if there had been a conductor present aiding in the movement of the train.

The next question that seemed to arise was the relation of the engineer and the fireman. It seemed to be assumed by counsel in argument, that, as between the engineer and the fireman, they were co-servants and stood in the same relation that other co-servants would; but it rather seemed to us, upon a discussion of the question, that there might be some invasion of that rule; indeed it seemed to us that the fireman might probably be said to be under the direction and control of the engineer, his duties would naturally bring him to that position. We thought first that there was some decision of the Supreme Court of this state upon that question, but upon commencing to look for that, we do not find any. Such text-books as we had were quite meager upon that question. We did, however, find a case decided by the superior court of Cincinnati, this state, in which Gholson, Hoadly, Spencer and Storer were the judges, a recognized able court; and the case I refer to is that of *Jenkins v. Little Miami Railroad Co.*, 2 D., 49 (12 Re.).

Gholson says: "This action is brought to recover damages sustained by an alleged act of negligence on the part of an engineer in the employment of the defendant. The plaintiff was a fireman also in the employment of defendant, at the time he sustained the injury, which was the loss of an arm, while engaged in what he claimed to be an act of duty, done under the control and direction of the engineer, a superior officer.

"The first question which arises is, whether the case by the allegations and proof, is brought within the principle of the doctrine established in the state, by the case of Little Miami Railroad Co. v. Stevens, 20 Ohio, 415. We think that it very clearly is. The plaintiff was under the direction and control of the engineer, and the negligence alleged is that of the engineer. It consisted, if at all, in an act over which the plaintiff had no control, and in the doing of which he cannot be said to have participated.

"The next question is, whether the plaintiff himself was in fault. It appears, we think, that he was engaged in doing that which he had before been ordered to do, and at a time and place, which under the circumstances made it a proper discharge of duty on his part. At least such a conclusion may be properly and fairly drawn from the evidence. This makes a *prima facie* case of not being in fault.

"The remaining question is, whether there was negligence in the engineer. And if the plaintiff, at the time and under the circumstances he received the injury, was in the discharge of his duty, then it can scarcely be doubted but that the engineer in moving the train without notice or signal, to the certain peril of the plaintiff, was guilty of negligence.

"It is, therefore, upon the question whether the plaintiff was himself at fault, that the defense has mainly turned. Certain acts or parts of the conduct of the plaintiff have been selected, and it is strenuously claimed that these constitute such negligence as to preclude the plaintiff from a recovery. The court at special term was requested so to direct the jury, and its refusal is now claimed to be error. When these charges were asked, the court, refusing them in the form they were proposed, modified them by bringing before the jury certain inferences to be drawn from the evidence, and which, if drawn, would alter the conclusion.

"Without inquiring whether the defendant could justly complain of the modifications made by the court, we think it sufficient answer to say, that the charges asked were in themselves improper. On the one side it is claimed that there was negligence on the part of the engineer, and on the other that there was negligence on the part of the plaintiff. The question of negligence was the one involved. Would it have been proper for the court, taking certain of the facts apart from the others, and the surrounding circumstances, such facts not having in law any conclusive and definite effect, to say to the jury that they did constitute negligence? We think in such case as the present, negligence, if not a question of fact for the jury, is at least a mixed question of law and fact which it would have been improper to take from the jury by the charges which were asked. It would have been very proper for the court to direct the jury as to the premises from which they might draw their conclusion on the question of negligence, but they ought to have been left to say under all the circumstances, whether the negligence alleged was established."

I have read more than I intended, but it disposes of some questions which are raised further on, in the charge of the court; so that so far as that court is concerned, they hold that the relation of principal and subordinate may exist between an engineer and a fireman. Some light is thrown upon that question by a couple of decisions in this state: one is *Railroad Co. v. Lewis*, 33 Ohio St., 196; also the case of *Railroad Co. v. Ranney*, 37 Ohio St., 665. In those cases the brakeman of a train was injured by what was claimed to have been negligence on the part of the engineer, in giving certain signals and then immediately starting up his train, the general orders being, in the general rules, that the engineer was to give, as a signal for the switchman either to set or to let the brakes off, a certain number of blasts of the locomotive whistle. He had, in each case, given the signal, and in each case had immediately started up the engine, and in each case the result had been that the brakeman had been injured; and in each case suit was brought, claiming that the engineer was an officer superior to the brakeman, and that therefore the company was liable. Now, in the discussion of those questions in each case—the first one was before the Supreme Court commission—and three judges held that it was not a case in which he was acting under the orders of a superior; that he was simply obeying the orders of a common master; although the signals were given under the rule by the engineer, but that it was not, in the sense of law, an order of the engineer such as would make him an officer superior to the brakeman. To that decision two of the judges dissented, Scott and Ashburn.

In *Railroad Company v. Ranney*, *supra*, a majority of the court held that the engineer was simply a co-servant with the brakeman. But to that decision Judge Okey delivered a dissenting opinion, in which Judge White concurred; so that, as between a brakeman and an engineer, their relations are very much different from those of a fireman and engineer. The Supreme Court by a single majority in the case, held that the engineer was a co-servant. We think, under the decisions, and we think on principle, taking the relations of these parties to each other, that the true rule of law is, as a general rule, that the engineer is, as to the fireman, a superior officer, and that the fireman, as a general rule, is bound to obey the orders of the engineer. In *Railroad Co. v. Lewis*, *supra*, the Pittsburgh & Ft. Wayne Railroad Company was the defendant company. The rule of the company as laid down at that time provided that the fireman should obey the orders of the engineer. That road was run then, I believe, by this same company, the Pennsylvania company.

Under the rules which were offered in evidence, there seems to be some attempt to lay down a different rule.

"Rule 328. They must report for duty at least thirty minutes before the time for starting, and assist in the shifting and making up of their trains.

"327. Firemen report to and receive their instructions from the road foreman of engines. They must obey the orders of the train master. When in the engine house they are under the direction of the foreman.

"329. They must obey the orders of the engineman in regard to the proper use of fuel, and manner of firing.

"330. They will assist in keeping a lookout on the track and if they see any obstruction or signals, they must instantly give the engineman notice.

"331. They must be familiar with the train rules that apply to the protection of their trains; they must understand the use of signals, and be prepared to use them promptly, as per rules Nos. 91, 93, 95 and 99."

Then it gives the rules in case of accidents, and times where they are going ahead and backing, etc., and the giving of notices.

"Rule 147. No general relation of superiority exists between conductors and enginemen, firemen, baggage-masters or brakemen; nor between enginemen and firemen or other train men; nor between yard-masters and enginemen, firemen or other train or yardmen. The duty of each employe is herein fully set forth, and, except as herein provided, neither employe has any superiority over the other."

That is to say, so far as they can lay down the law of the land, they have undertaken to say that the only thing a fireman is bound to do, as between him and the engineman, is to obey the orders of the engineman in the proper use of fuel and in the matter of firing; in all other things the engineer and the firemen are independent of each other. Whatever might be the finding of the court in regard to those matters, it is very certain that in this present case that ought not to be implied. There can be no question but that this train was sent out under the orders and in charge of the engineman; that he was the officer in charge of that whole train and had control of it; that as to its times of running and stopping, where it was to go and when it was to come, he had the whole direction. How far he had control of the section men and the men under him, it is not particular. For aught that appears from the testimony, they seem to have run as independent features, one having charge of the loading men and the other of the train. The fireman did turn a switch and coupled cars and coupled them together at Woodville, and we are very clear in our own minds in the conclusion that, so far as this train was concerned at this time, he was under the control of the engineman, and that the relation of superior officer and servant did exist as between these two persons.

Now stopping at this point a moment, for the purpose of disposing of a matter which arose on the trial of the case, I will turn to the testimony of Mr. Arndt, an insurance agent, who was put upon the stand to give testimony, and to whose testimony some objection was taken. It was not pressed very hard in the argument, but still it is raised and left before the court for its decision. The question was asked Mr. Arndt:

"What is your business?" A. "District agent for the Mutual Life Insurance Company of New York."

Q. "How long have you been in the insurance business?" A. "About three years, nearly."

Q. "Have you any tables in your possession or control, showing the probable duration of life?" A. "Yes, sir."

Q. "Have you them with you?" A. "Yes, sir."

Q. "Tell us what would be the probable duration of a man at thirty-one?"

Mr. Tolerton: "I object to that testimony; I think it is incompetent; I merely desire to preserve my objection."

The Court: "We don't want to admit it unless it is proper."

Mr. Ford: "It is bearing upon the question of this man's financial loss and the pecuniary damages which he has sustained by this injury; there has been some testimony offered as to what he could earn in one year."

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The Court: "I understand it has been admitted."

Mr. Tolerton: "It has been admitted in death cases; but I think, in cases like this, it is not proper testimony."

Thereupon the court allowed the question, but said: "I think it ought to be shown that these tables that he is reading from are recognized tables."

Thereupon the defendant, by its attorney, excepted to the admission of said testimony.

Witness: "They are recognized tables in life insurance companies."

The Court: Q. "Those tables are what?" A. "The Mutual Life Insurance Company's tables of New York. But other companies work upon the same."

Q. "How long have those tables been in use?" A. "It is the outcome of nearly fifty years experience of the Mutual Life."

Mr. Ford: Q. "By whom was that table prepared?" A. "By the actuaries, but I couldn't say whether by the actuaries of the Mutual Life or not."

The Court: "It is proper to say that that is simply one species of evidence; there is nothing conclusive about those, and the jury will have to take it into consideration themselves."

Mr. Ford: "Yes, sir."

Witness: "At the age of thirty-one the average life is 84-62 years."

And thereupon the defendant excepted to all the foregoing testimony.

It seems to us there was no error in the admission of that testimony. It is simply one method of ascertaining the probable life, and it is derived from the experience of an insurance company for nearly fifty years, the same as the Carlisle tables, which have been followed.

The testimony having been closed on the part of the parties, the court proceeded to charge the jury, gave a charge that is very full and very clear, and to which no exception was taken by either party, other than that the defendant asked that there might be two charges given in its behalf, which were refused by the court, and to which I shall refer further on.

It will be noticed that one ground that is alleged in the petition in regard to acts of negligence is, that the railroad company failed to furnish any conductor or any brakeman on this train; and it is claimed on behalf of the railroad company that at the time the train left Toledo, or that at the time it left Walbridge, this plaintiff below was aware of that fact, and that it was his duty at that time either to have made objection and refused to go with the train, or else he must be held to have accepted the situation and waived objection. And it was claimed also that the failure to furnish these men was not the immediate cause of the disaster. Now, upon that the court charged the jury very fully and in terms which were not excepted to.

"The rule upon that subject is this: If the servant of a railroad company has a full knowledge of any omission of duty or neglect on the part of the company, and with such knowledge, notwithstanding such knowledge, continues in the service of the company without making any objection, or without using any exertions to have the omission or neglect remedied, he thereby takes upon himself the risk of injury arising from such neglect, and waives the right to recover of the company for the injury. If the plaintiff in this case knew, at the time the engine left East

Toledo, on the morning of July 18, that the engine or train was not then equipped, and was not thereafter to be equipped during the performance of the work, with a conductor or with brakemen for the work to be done upon that day, and if he knew that his safety in the performance of his duty would be imperiled, or that the hazards of the service would be increased by the absence of the conductor or brakeman, and if with such knowledge, he went along with the engine without making any objection or complaint, then he cannot now complain of the absence of a conductor or brakeman. To prevent him from recovery for that reason, it must appear that he knew that the train could not be safely and properly managed without the conductor or brakeman; or, in other words, he must know that it was negligence on the part of the railroad company to fail to provide the engine and train with a conductor or brakeman.

"In this connection I will read to you and give to you as the law of the case two special requests or instructions that are made by the defendant:

"1. The jury is instructed if they find from the evidence that the plaintiff, upon the day in question, proceeded on his train as fireman, knowing that there was no conductor or brakeman in charge of the train and that he would be required to perform the duties ordinarily performed by such conductor and brakeman, then he assumed all the extra risks incident to such employment and thereby waived any obligation on the part of the company to furnish a conductor and brakeman for such train.

"2. If the plaintiff knew when he started on this train on the morning in question that there was no conductor and brakeman in charge of the same and that he would be required to do the duties of a brakeman, he had a right to abandon the service and refuse to proceed without such conductor and brakeman, and his refusal to do so and his election to proceed without such conductor and brakeman was a waiver on his part of any obligations of the company in that regard, and the plaintiff in such case would not be entitled to recover on that account. It is a question of fact for you to determine from all the evidence, whether the plaintiff knew that he would be required to perform the duties of a brakeman that day; so that under the first alleged ground of negligence there are these questions for you to determine:

"1. Was the train in question supplied with an adequate force of employees?

"2. If the force of employees with which the train was furnished was insufficient or inadequate, was it the proximate cause of the plaintiff's injury, or did it proximately contribute to the plaintiff's injury?

"3. Did the plaintiff by his conduct assume the risk of injury resulting from this cause?"

Now in regard to this question, it was contended on behalf of the railroad company, that *C. J. & M. R. R. v. Marshall*, cases decided by the Supreme Court without report, 23 W. L. B., 285, is decisive of this case, that is as a matter of law, it ends this case. Now in that case, the conductor of the train, living at some point on the road, I think Van Wert, on the train at Cincinnati, was offered two brakemen. He rejected one of them, didn't want him, said he was incompetent. The company had no other brakemen present and couldn't furnish him with another brakeman in the place of the one whom he said was incompetent, and hereupon he started out with one brakeman. About 8 o'clock

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in the morning, it being very dark, they stopped to put some cars out at some point on a side track. In the performance of that duty the train was broken in two, and the engine with a part of the cars was started forward and then was backed in on a side track and the requisite number of cars detached and the locomotive started ahead with the remaining cars attached to it onto the main track for the purpose of backing down to the cars on the main track. The conductor directed them to back down, and he himself stepped in for the purpose of coupling the train. They were on a little grade and the train came down rapidly, and as they came down to the cars which was standing, they came with such rapidity that he was caught and was killed. An action was brought against the railroad company, and the petition was demurred to in the common pleas and the demurrer was sustained, and the case was taken to the circuit court, which reversed the judgment of the common pleas, and the case was taken to the Supreme Court and that court reversed the judgment of the circuit court. Now there were two or three defenses made. The first was, that there was no negligence on the part of the railroad company; that they furnished all the men they had. The second defense was, that the conductor himself was guilty of contributory negligence. The case was heard by the Supreme Court, but was never reported, except among cases decided without report, where it appears that the judgment of the circuit court was reversed by the judgment of the Supreme Court, but no reason is given or the ground upon which they based their decision. But it will be noticed that the party performing that work was the conductor of the train himself.

In this case, the man was acting, as we have held, under the orders of a superior officer. If a brakeman had been sent in there by the conductor, we imagine that a very different question would have arisen, and one in which the decision would have been different in the Supreme Court. At any rate, it is a question of mixed law and fact and should be left to the jury.

In *Northern Pacific Railroad Co. v. Mares*, 123 U. S., 710, is a decision directly in point upon that question, the opinion of the Supreme Court of the United States having been given by Mr. Justice Matthews. In that case an engineer having backed his locomotive so suddenly, and it would almost seem intentionally, as to knock the brakeman or persons on the car to control it, off of the car, he was knocked off and was thrown across the track and very badly injured. The engineer was a pretty high-tempered fellow, and they had had some words a little while before, and it was not long before the brakeman was on the track with the train over him. I should think there were about thirty requests in that case, making it a question of law, and the Supreme Court there held that it was a question to be submitted to the jury, without any doubt, as to whether the party was guilty of negligence in standing in the position in which he did upon the car for the purpose of managing that brake, and they confirmed the decision of the court below, in favor of the plaintiff and against the defendant. And this is authority also upon another point, and that is, whether the defendant was guilty of negligence in remaining in the employ of the company. They held that was a question also to be submitted to the jury, as to whether under all the circumstances, he was guilty. It was a question here as to whether he

knew how far he would be used as a brakeman, and that was a question which was properly left to the jury.

Now, without discussing this matter farther, our conclusion is: that there was negligence on the part of the railroad company in sending this train out without somebody to assist in giving the signals protecting the parties at the time they were attempting to unite the train for the purpose of coupling.

We hold also, that the engineer had control of the fireman, and that the fireman was to obey his orders, and that in what he did when he attempted to couple these cars, he did in obedience to the orders of the engineer and in the line of his duty. The train was a wild train, and was perhaps under wild management, at least it was not equipped and did not go out as a train ought to go.

Third, we are of opinion that the question as to whether the defendant below was guilty of negligence, was properly left to the jury; and that upon all of these questions the verdict and finding of the jury is properly sustained by the evidence in the case and by the law.

The case is no doubt a close one; it is one that has occupied a good deal of our time and has been discussed in all its aspects in the consultation room; but, after a very fair and full investigation of the case, we are of opinion that it is our duty to let this judgment stand, and it will therefore be affirmed, without any penalty.

I should say that there were two requests to charge, made by the defendant, as follows:

"In all acts performed by Cayia, the engineer of said train, as engineer, he was a fellow servant of the plaintiff while acting as brakeman, and if the plaintiff's injuries were caused by the negligence of such engineer in backing the train, then the defendant is not responsible for injuries received by the plaintiff through such negligence of the engineer.

"Cayia, the engineer, and the plaintiff were fellow servants in the operation of said train, and the defendant is not responsible for injuries received from the negligence of said engineer in handling the train."

It follows from what I have already said, that these requests and others of the same tenor should have been refused, as they were.

CORPORATIONS.

[Cuyahoga Circuit Court, December, 1900.]

Marvin, Hale and Voorhees, JJ.

ANTOINETTE MUHLHAUSER V. CLEVELAND HOSPITAL FOR WOMEN AND CHILDREN.

1. CORPORATION—PRELIMINARY ORGANIZATION DOES NOT CONTINUE.

In as much as every corporation is effected after one or more preliminary meetings have been held for the consideration of the subject in the interests of which it is desired to organize a corporation, it cannot be held that the preliminary organization thus formed continues after the articles of incorporation have been returned by the secretary of state and adopted, and that the perfected corporation is necessarily a separate and distinct organization.

2. PRELIMINARY OFFICER BECOMES PERMANENT OFFICER.

Under the foregoing rule a person elected treasurer of a preliminary organization, formed for the purpose of incorporating a hospital association, and who is subsequently, after articles of incorporation have been forwarded to and returned by the secretary of state and adopted, elected treasurer of the perfected corporation, becomes the treasurer of that organization, which succeeds the preliminary organization, and, as such treasurer, may be required, at the suit of the corporation, to account for all moneys at any time received as such treasurer.

HEARD ON ERROR.

Hessenmueller & Bemis, for plaintiff in error.

Edward Bushnell, for defendant in error.

MARVIN, J.

The defendant in error was plaintiff and the plaintiff in error defendant in the original action brought in the court of common pleas, and the words "plaintiff" and "defendant" used in this opinion refer to the parties as they were in the original case.

The plaintiff is a corporation, not for profit.

The petition avers that in the year 1887, the defendant was elected to the office of treasurer of the plaintiff and continued to hold such office until September 16, 1895; that a large amount of money came into the hands of the defendant as such treasurer, the exact amount of which plaintiff is unable to state; that Norton T. Horr, is now the treasurer of said corporation; that the defendant refuses to recognize said Horr as such treasurer and has notified him that any demand made upon her for the money in her hands as treasurer would be useless and unavailing.

The prayer of the petition is for an accounting by the defendant as such treasurer, and that the plaintiff may have judgment for such amount as the court shall find to be in the hands of such treasurer, belonging to the plaintiff.

Attached to the petition are three interrogatories, to which answers are sought from the defendant. Said interrogatories read as follows:

"1. How much money is there in your hands or under your control, belonging to the Cleveland Hospital for Women and Children?"

"2. Where is said money deposited?"

"3. If a portion only is deposited, state how much and where, and how much is in your hands?"

These interrogatories were answered by the defendant as follows:

To the first: "About \$6,800, the same being subject to certain debts against the said hospital."

To the second: "In several banks in Cleveland, Ohio."

To the third: "All deposited except a little less than \$200 that was withheld by Mr. Ford, referee, and for which a suit is pending to recover."

The defendant also filed an answer to the petition, admitting that she was treasurer of the corporation during the period of time stated in the petition, and that, as such treasurer, she received a considerable amount of money.

She denies that those now claiming to be trustees of such corporation, are such trustees; denies that Horr is treasurer of the corporation; and avers that she is now the duly and legally elected and qualified treasurer of the plaintiff and as such is entitled to the custody of the money in her hands belonging to such corporation.

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Later the defendant filed an amended answer, in which she admits again that she was treasurer of the corporation during the time stated in the petition, and avers that she is now and has been at all times, from 1887 to the present time, by annual election, the treasurer of the corporation; that she has both received and paid out money on account of her said official position, and that she has been occupied a large part of her time in each year during the entire period of her said treasurership, in the performance of the duties of said office and that her services in that behalf were worth \$1,000 per year, and she asks that such sum be allowed to her for each year of her said incumbency of such office; and she joins in the prayer for an accounting between herself and the plaintiff, and says that the allowance to which she is entitled, is in excess of the amount of money which she has received as such treasurer, after deducting the payments made by her for said plaintiff; and so she prays for judgment against the plaintiff for such sum as shall be found due to her.

Later, the defendant filed an amendment to her former answers, in which she says that she was mistaken in her admissions that she was ever treasurer of the plaintiff. She says this both in the amendment above mentioned and in a later supplemental answer filed by her in this case.

In the pleadings last referred to, the defendant says that in February, 1887, a voluntary association was organized in the city of Cleveland, known as "The Cleveland Hospital for Women and Children." That she was, at the first election of officers of such voluntary association, elected its treasurer, and that she has never been treasurer of the plaintiff, but that her treasurership, set out in her former answers, has been as treasurer of such voluntary association, and that she has been called upon by such association to render an account to it of her treasurership, and that whatever monies have come to her hands as treasurer of The Cleveland Hospital for Women and Children, has been as treasurer of the voluntary association having such name and not as treasurer of the corporation having such name.

Without calling attention further to the pleadings in this case, it is sufficient to say that the controversy at the trial was upon the question of whether the defendant was the treasurer of the corporation.

The case was referred by the court of common pleas to Walter J. Hamilton to report the evidence and his findings thereon; which was done and, in such report, the referee finds that the defendant was the treasurer of the corporation and that there is an amount in her hands for which judgment should be entered in favor of the plaintiff. This report was approved and confirmed by the court, and judgment entered against the defendant. By proper proceedings the case has been brought to this court; a petition in error being filed, and also a bill of exceptions embodying all the evidence adduced before the referee.

The claim is, on the part of the plaintiff in error, that the referee's report should not have been confirmed; that judgment should not have been entered for the plaintiff but should have been entered for the defendant.

The facts are, so far as they need be stated here:

On February 1, 1887, a number of ladies met at the residence of the defendant for the purpose of organizing a hospital association. At this meeting a motion was adopted that the name of the association

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should be "The Cleveland Children's Hospital Association;" an annual membership fee of one dollar was fixed upon; and the meeting adjourned to February 8, 1887.

The following is a quotation from the minutes of that meeting:

"A temporary organization was perfected with Mrs. Dr. Scweender, president; Mrs. Wm. Kaufman, vice-president, and ———, English secretary; Mrs. F. Muhlhauser, treasurer; Mrs. P. Umbstaetter, German secretary."

On the last named date a meeting was held, in pursuance of this adjournment; a committee was appointed on a constitution, and another committee on trustees; the meeting then adjourned to February 23, 1887.

On the date last named the committee on constitution reported a constitution and by-laws, which constitution and by-laws, were approved, and the name of the association was then changed to "The Cleveland Hospital for Women and Children." At this meeting, as appears by the minutes: "Attorney Piwonka was present and drew up articles of incorporation, which were properly signed and forwarded to the secretary of state. Dr. Carpenter was appointed to look after the incorporation articles." And the meeting adjourned to March 8, 1887.

On the date last named a meeting was held in pursuance of such adjournment, and, at such meeting, among other things in the minutes, appears the following:

"Dr. Carpenter presented the articles of incorporation bearing the seal of the secretary of state, and they were received and adopted. The constitution was also reapproved at this meeting, the same being necessary as the association was now a legally organized body." This meeting adjourned to March 17, 1887.

A meeting was held on March 17 which adjourned to April 2, and, on this last named date, a meeting was held, at which, among other things, officers of the association were elected for the year ending February 27, 1888; among the officers elected, the defendant was elected treasurer. Thereafter from year to year the defendant was re-elected as such treasurer for a number of years; and the real question is, of what organization was she thus elected? She now says, it was as treasurer of the voluntary association. The plaintiff says, it was as treasurer of the corporation.

It is urged on behalf of the plaintiff in error, that, at the time the defendant was first elected treasurer and up to September 16, 1895, there never was a corporation known as "The Cleveland Hospital for Women and Children;" that the minutes from which quotations have been made in this opinion and which minutes are set out in full in the bill of exceptions, are minutes of the voluntary association and not of the corporation; that no trustees of the corporation were ever elected until September 14, 1895, and that the trustees first qualified on September 16, 1895.

It is said that this corporation was an entirely new organization, separate and distinct from the association, and that the association still continues as an independent separate organization from the corporation, and that the defendant is the officer of this association to whom, and to whom alone, she is bound to account.

From the quotations hereinbefore made from the minutes of the association, it will be seen that the meeting of February 1, was preliminary to the formation of some organization thereafter to be perfected;

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that at this meeting a temporary organization was effected by the election of various officers, including the defendant as treasurer; that this temporary organization continued until after articles of incorporation had been prepared, signed, forwarded to the secretary of state, and returned, and, on the 17th of March, 1887, were adopted; and the constitution and by-laws which had prior to that time been adopted by the temporary organization, were "reapproved * * * the same being necessary as the association was a legally organized body." That at the later meeting, to-wit, April 22, 1887, officers were elected, including the election of this defendant as treasurer.

It can hardly be claimed, in view of these proceedings, that, after the last named date, she was treasurer because of her election on February 1. It is clear that this election of April 22 was intended to be to a permanent office, and that it was understood by the defendant and all concerned, that her official position thereafter was dependent upon this last named election, and not upon that of February 1.

It is said by the plaintiff in error that the election of April 22 was in accordance with the constitution and by-laws of the association; but such election was also held in pursuance of the constitution and by-laws reapproved at the meeting of March 8, which was after the articles of incorporation had been received, duly certified from the secretary of state and adopted. So that the same constitution and by-laws which were effective as to the temporary organization which existed prior to March 8, were equally effective upon the organization as it existed after the certificate of incorporation was adopted.

It seems clear that all of the meetings prior to March 8 were for the purpose of effecting an organization to be incorporated under the laws of the state relating to corporations, not for profit. Doubtless, every corporation is effected after one or more preliminary meetings have been held for the consideration of the subject in the interests of which it is desired to organize a corporation; and to hold that, after such preliminary meetings have been held at which it has been voted to have articles of incorporation prepared and forwarded to the secretary of state, and then after such articles have been returned, properly certified by such officer, and adopted by the organization, that the preliminary organization continues, and that the corporation is a separate and distinct organization, would certainly be in conflict with the every day experience of those who join in such organizations.

Practically all the monies which have come into the hands of the defendant as treasurer, came into her hands after her election on April 22, and, if she was then elected and became the treasurer of the corporation, the plaintiff is entitled to the accounting prayed for in the petition.

It is said that there was no corporation until the officers elected on September 14, 1895, had taken the oath of office, because this court had, prior to that time, to-wit, earlier in the same year, held that there were no trustees of the corporation, then lawfully holding office, and ordered an election for such trustees to be held by S. S. Ford, appointed referee for that purpose. And it is said that it necessarily follows that there never had been, prior to that time, any trustees of the corporation.

It does not, by any means, follow from the finding, that there had never been any trustees of this corporation.

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It is certain that elections had been held for trustees, and that the parties elected had acted, or assumed to act, in that capacity long before the election directed to be made by this court.

In *Ashtabula & New Lisbon R. R. Co. v. Smith*, 15 Ohio St., 328, it is said by Judge White in his opinion, beginning on page 333:

"When the persons, associating to form a company for the purpose of constructing a railroad, have complied with sec. 2 of the act to provide for the creation and regulation of incorporated companies (S. & C. Stat. Vol. 1, 271), they and their associates, successors and assigns, by the name and style provided in the certificate, become a body corporate, invested with all the powers conferred upon this class of corporations, and subject to the restrictions provided by sec. 8 of the act."

The case of *Mason v. Finch*, 28 Mich., 282, cited by counsel for plaintiff in error, differs in its facts materially from the case at bar. In that case a masonic lodge had, for a long time, existed as an unincorporated association. Then a corporation was organized under the same name. Many of those associated in the corporation were members of the unincorporated lodge. The unincorporated lodge continued to hold its meetings, elect its officers, and hold its property, after the formation of the corporation, separate and distinct from the meetings, officers and property of the corporation. And it was there held that the unincorporated association was not merged in the corporation. This language is used in the opinion:

"There is nothing but unanimous consent which can bind any member of an unincorporated company by any action not within the terms of the association. In joint enterprises, matters within the proposed scheme are usually left to be determined by such agencies or such votes as are agreed upon. Outside of the agreement no one can be bound without his assent. * * * It is not claimed there was any unanimous consent. It is found, and there is no showing to the contrary, that there never was any action in or by the society assuming to give any such power, and the society articles contain no authority which could validate any such action if taken."

In the case at bar the minutes already quoted, clearly indicate that all present at the meeting on March 8 understood and agreed that the corporation was the direct outgrowth of the temporary organization theretofore effected. It is stipulated in the record that "for the purpose of this litigation there was never any organization or association of individuals acting as 'The Cleveland Hospital for Women and Children' between February 1, 1887, and the annual meeting in 1895, other than the one the record of whose proceedings is contained in the record book referred to."

This record book is that from which the minutes to which attention has already been called in this opinion, are found.

So that there was but one organization under the name of "The Cleveland Hospital for Women and Children" doing anything between March 8, 1887, and the annual meeting in 1895.

The defendant, as appears by her pleadings in this case and pleadings filed by her in other cases introduced in evidence in this case, understood that the organization which was doing business during this time was the corporation.

It seems never to have occurred to any one that such was not the case until a considerable time after the present suit was begun. It is

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true that the business was not conducted altogether in conformity with the statutes of the state relating to corporations not for profit, but this did not work a forfeiture of the franchise granted to the corporation.

And we hold that there was no error in the judgment of the court below in holding that the defendant was the treasurer of such corporation, and the judgment is affirmed.

ATTORNEYS—DISBARMENT.

[Cuyahoga Circuit Court, December 22, 1900.]

Caldwell, Marvin and Hale, JJ.

*** IN THE MATTER OF THE DISBARMENT OF VERNON H. BURKE.**

1. POWER TO REVIEW AND MODIFY ORDER OF DISBARMENT.

The circuit court has power, upon motion of a disbarred attorney, acknowledging his wrong, and regretting it, accompanied by a petition signed by a large number of attorneys, signifying that they would be satisfied with a modification of the order, to review and modify its former judgment, without further evidence and in the absence of a report by a committee appointed to act on behalf of the court in producing anything which might be produced as to why action should not be taken.

2. ORDER MODIFIED AND APPLICANT REINSTATED.

Applicant for modification of the order of disbarment was disbarred in February, 1899, on the charge of misconduct in office, in that he, as agent of and acting with a common pleas judge, was guilty of extorting a large sum of money from a person who was threatened with being named as co-respondent in divorce proceedings. In December, 1900, applicant filed a motion for modification of the order, which would amount to reinstatement, acknowledging his wrong and regretting it, but without evidence of restoration of money extorted, which motion was accompanied by a petition signed by a large number of attorneys, signifying that they would be satisfied with a modification of the order of disbarment. A committee appointed to act in behalf of the court in producing anything which might be produced as to why action should not be taken made no report. A majority of the court held that as restoration of funds secured was impossible, such action need not be a condition precedent and that, on principles of humanity, applicant being a young man, and having been manly and straightforward in disbarment proceedings, and his conduct, as observed by the court, having been blameless since then, and the purpose of the punishment having been accomplished, he should be reinstated. (Hale, J., dissented.)

MOTION for modification of judgment of disbarment.

CALDWELL, J.

Mr. Burke has filed in this court, under the statute as amended at the last session of the legislature, his motion for a modification of the judgment of disbarment. He has filed with that motion a statement to the court in which he sufficiently, we think, acknowledges the wrong that he did in the matter, and his regret that he did it. He also files with the court a petition, if we may call it such, on the part of a large number of the attorneys at this bar, signifying that they at least would be satisfied with a modification of the judgment. And in this shape the case comes before us for action.

As the statute provides for us to appoint a committee to act on behalf of the court really in way of producing anything that may be pro-

* For decision in disbarment proceedings, see 9 Circ. Dec., 350.

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duced as to why this action should not be taken, we appointed the same committee that we had appointed to try the case, in the first place, to prosecute the case. That committee has taken no action by way of filing any papers or placing itself on record in the court. And this is what we have before us for the consideration of this question.

Every member of the court as it was composed at the trial of this case, believed at the time, and still believes, that the judgment at that time pronounced was correct and not too severe.

The question we are to act upon now is, whether we will modify that judgment. It is usual in cases of this kind, where money has been extorted or when any other act has been done for which the party has been punished, for the party before asking restoration, or modification, which will amount to restoration as it is asked in this case, that the party should make restoration, to some extent at least, undo the wrong that he has done ; but in this case, we are satisfied that to ask Mr. Burke to refund all or any portion of the money that he obtained wrongfully in this case would be a useless thing ; it is utterly impossible for him to do it, and he has done, in our judgment, all that he can do in presenting this matter to the court. He has come before the court with a paper that at least a majority of the court are of the opinion is sufficient to enter upon a consideration of this question.

It is the policy of all enlightened countries and christian countries to pay some regard to the amount of punishment, even after the sentence has been imposed, if the object of punishment is the reformation, the main object of the punishment is the reformation of the party punished.

There is another object, perhaps to deter others, and not to make it so light and so trifling as to make it no object of fear for others who may commit a like offense against the law ; and there is no place where it is of greater importance that heavy penalties should be dealt out to persons offending against the law than among attorneys. Attorneys are public officers ; they are officers of the court ; they hold certain relations to the state ; they help perform the functions and the duties, and are aids to the court in one of the callings that is perhaps the most trustworthy and most important that is known among men. The dignity of the state and the dignity of our courts must be upheld, and the morality of the bar must be kept at a high standard or our courts will become useless to people as bulwarks of defense.

All this may be said, and all this the court had in mind in pronouncing this judgment. But the object and purpose of a parent in punishing a child is not to go beyond that point where the punishment has effected the remedy sought ; and that is, as I have already said, the object and purpose of all enlightened governments. The amount of that punishment cannot be known at the time the penalty is inflicted ; the amount required is uncertain ; hence all christian nations have provided such regulations that when a person being imprisoned or being punished for crime, shows by his conduct and acts that the punishment has accomplished his purpose, machinery is provided by which that party's sentence may be somewhat ameliorated, and it would seem strange if this doctrine ought not to be applied to cases of this kind. The courts at least ought to be on the side of humanity and of the proper mode and of the proper amount of punishment equal to the state of guilt of the party. When punishment goes beyond this, when it goes beyond its design, it accomplishes no good beyond that to society ; it accomplishes

Disbarment of Burke.

no good beyond that to the party being punished, and it accomplishes no good to anybody. That is recognized so thoroughly, so thoroughly recognized by all the states of this union, that it seems to a majority of us, at least, that this court ought to act on that principle.

We have had Mr. Burke under our observation ever since his trial and disbarment, knowing or supposing, that something of this kind might come before us. And we have observed the conduct of the man, and we may go back to the time of his trial. In every way he was manly and, we believe, truthful to the very letter almost, in all of his testimony before this court. At least there was no variation except that that would come to almost any mind which is greatly biased and influenced in his own favor or in favor of his client.

Since his disbarment he has not railed against the court; he has not condemned the court that we know of, and certainly has upheld the court in talking to its members. His conduct throughout has been that of manliness and that of integrity and that of truthfulness. His conduct since then, so far as we have been able to observe him, has been without blemish. We know of nothing, so far as we can observe or have heard, we know of nothing that he has done or said, either in act or language, that would show that he has presented to the court or members of the bar any resentful spirit. And we further know of no reason why in this case the punishment has not reached the point that it was intended to reach when it was inflicted.

Now, it may be said that the court cannot at this time modify this judgment without stultifying itself as to the judgment it gave in the case. That might be said of a man who is sentenced to the penitentiary for thirty years or perhaps twenty years; that the court in doing that, in presenting the question of the penalty, has reference to the person's surroundings, and has nothing to do with the object of the accomplishment of judgment as I have stated, and the only purpose of the punishment is to give the criminal sufficient length of time to warrant his reformation, if that can be done; and when that reformation comes earlier, or when there are strong indications of it, the enlightened state of the country interferes and gives the man his liberty.

Now, not only have we observed Mr. Burke's conduct in this regard, but here are a large number of the members of the bar that have signed this petition, and very many of them who, at the time, believed that the punishment or the judgment pronounced in the case was proper and right. These members of the bar have had Mr. Burke under their observation almost daily; and, in a matter of this kind, it will not do for us to say that simply because a petition is presented to a member of the bar he must sign it. In fact the moral condition of this bar is so high that to say that of a member of this bar in a matter of this kind would be to place upon this bar an unwarranted stigma. We cannot believe these signatures were put there only through sentiment or mere formality.

Mr. Burke is a young man. He may have before him a long life of usefulness. In granting him at this time the favor that he asks, he certainly will have the ambition, and a burning ambition, to see that the court has not misplaced its confidence. He will have every stimulant to be a man in every respect worthy of the action of the court, should the court take that action.

In considering this matter in all its aspects, the majority of the court are of the opinion that this judgment in this case ought to be modified, and a majority of the court modify the judgment from that of disbarment to suspension to terminate on December 31, 1900.

HALE, J., dissenting.

I have been unable to agree quite with my associates in the disposition just made of this motion. But I have no desire, however, to go into a discussion of the facts, or to throw a straw in the way of Mr. Burke as he is to come back to the bar.

This case was very carefully considered by the court composed as it was at the time this case was heard. I think we all felt the responsibility of the case and gave it the most careful consideration we could give. I think we all felt that we were compelled by the facts of the case to pronounce the sentence that was pronounced.

When this motion was submitted, the committee appointed to take charge of it in behalf of the public and the attorneys for Mr. Burke were present, and it was stated then that the case was submitted solely upon the testimony offered at the trial and it was said that if nothing further was to be considered by this court, then the committee did not desire to be heard.

Now, as I understand, the conclusion reached by a majority of the court goes beyond that.

Personally I have no knowledge whether Mr. Burke has reformed or otherwise. I have not a particle of knowledge about the case except as it appears from the record as it stood at the time we heard the case; and I do not know of any legitimate way that has come to the knowledge of the court of any evidence of reformation on the part of Mr. Burke. I supposed the case was submitted upon the testimony clearly and only as it appeared at the former trial and, guided by this testimony, I have been unable to bring myself to the point of changing that sentence at present.

Now as I say, I am willing to acquiesce in this matter with the rest of the bar and give Mr. Burke a fair chance; but this is what I conscientiously believe in the matter in regard to modification.

I regret very much at having to differ upon the questions of this kind with my associates.

ATTACHMENT AND GARNISHMENT.

[Cuyahoga Circuit Court, December 17, 1900.]

Caldwell, Marvin and Hale, JJ.

CLEVELAND CO-OPERATIVE STOVE CO. V. FRANK A. MEHLING.

1. PROCEDURE IN ATTACHMENT AND GARNISHMENT.

While, in an attachment proceeding, in the absence of a showing that the court, by virtue of its writ of attachment or garnishment, has reached property of defendant, or that the court made any order finding it had jurisdiction to proceed to judgment, a stay of proceedings until plaintiff brings suit against the garnishee and it is made to appear that he is indebted, seems to be in harmony with the statute, it may well be doubted whether that is the only method the court may pursue. The statute is not so specific as to the mode of procedure as to include one mode and exclude all others.

2. JUDGMENT PERSONAL, IN FORM ON SERVICE BY PUBLICATION.

The affidavit for attachment and proceedings under it form no part of the pleadings, and where the court, in such a case, renders judgment, it is upon the pleadings. Therefore, in attachment where service was by publication, a judgment, personal in form, for the full amount of plaintiff's claim, is proper, although the facts in the case render such judgment valid only to the amount of the property attached.

3. DEFECT NOT AVAILABLE ON COLLATERAL ATTACK.

Where it appears that the court issued process of garnishment in a case in which it had jurisdiction, obtained service by publication, and seized property, and, after seizing such property, proceeded to judgment, the mere failure to spread upon the record a finding that the garnishee was indebted to the attachment debtor, if essential or proper, would amount to nothing more than an error, which could only be raised by proceedings in error, and is not a matter upon which a judgment can be collaterally attacked.

4. PRESUMPTION THAT COURT FOUND FACTS NECESSARY TO JUDGMENT.

Where the record shows that the writ was properly issued, service made by publication and property actually attached, and that the court proceeded to judgment, the mere failure to have the record show a finding that the garnishee had in his hands, property belonging to defendant, and an order to pay the same into court, does not of itself indicate a lack of jurisdiction. Under such circumstances, where the record is silent as to whether the garnishee was ordered to pay money into court, which would imply that the court had found that it had reached property of the defendant and had entered that upon record, it will, in a collateral proceeding, be presumed, where judgment was entered against the attachment debtor, that the court made such a finding.

5. ACTION IN THE NATURE OF COLLATERAL PROCEEDING.

An action against a garnishee to receive the amount due from defendant in the attachment suit at the time of the service of process, is collateral to the attachment suit.

HEARD ON ERROR.

Wilcox & Friend, for plaintiff in error.

Weed & Meals, for defendant in error.

CALDWELL, J.

This is a case on a petition in error from the court of common pleas, and it is claimed that that court erred in its rulings as to the jurisdiction of the court trying the original case out of which this action grew.

The defendant in error commenced a proceeding in attachment against the Elwood Gas Stove & Stamping Company, in which action the plaintiff issued a summons which was returned endorsed: "The defendants not found in the county." The action was for \$173.37, with interest from September 1, 1893. Thereupon the plaintiff filed his affidavit for attachment, and the court made an order of attachment which was served upon the Cleveland Co-operative Stove Company as a garnishee, and a proper return of the writ was made into court; and thereafter an alias order of attachment was made, and an affidavit for service by publication, under which proper service was had. The garnishee answered in court, in which it denied that it owed the defendant in the action. And the case thereafter came on to be heard in court, and the defendant was found to be in default of answer or other pleadings; and thereupon the court rendered judgment against the defendant for the sum of \$1,905.14. After the rendering of said judgment, this action was brought by Mehling against the Co-operative Stove Company to recover

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from it the amount due to the defendant in the former action at the time the writ of garnishment was served upon the defendant in this action.

In this action it was claimed that there was no judgment against the defendant in the former action because the court had no jurisdiction of the defendant or any of its property; and that the record shows the want of such jurisdiction. And it is further claimed that the court had no jurisdiction to render any personal judgment against the defendant in the former action, even though it had jurisdiction of some of its property; and these claims of want of jurisdiction are based upon the state of the record in the former case as introduced in evidence in this case, and such want of jurisdiction is based upon the fact that the only attempt to attach the property of the defendant was by service of garnishee process upon the Cleveland Co-operative Stove Company, it having answered that it did not owe the defendant; and that the court was bound by that answer, could proceed no further; and it is claimed that the court did not proceed any further, and did not make an order upon the garnishee to pay any money into court; and that, before that case could proceed any further, the court must have reached some property of the defendant and must have so determined and entered upon its record such finding, and, after having so determined and entered the same upon the record, that it then might proceed further to try any questions that might arise between the plaintiff and the defendant.

The record, as introduced, does not show that the court, by virtue of its writ of garnishment, had reached any property of the defendant; nor does it appear from the record that the court made any order finding it had jurisdiction to proceed to judgment in the case.

And it is claimed in this case, that the only thing the court could do under the facts as they appear by the record of the former case, was to have stayed any further action in the original case until the plaintiff therein had brought suit against the garnishee and made it appear to the court that the garnishee was indebted to the defendant; and, after that fact is made to appear by the judgment of the court, and the court has so found and placed the same upon its record, then it may proceed to judgment in the original action.

This mode of proceeding, as claimed by the plaintiff in error, seems to be in harmony with the statutes provided in such a case; but whether it is the only mode that the court may pursue may well be doubted. The statute is not so specific as to the mode of procedure, as to include one mode and exclude all others.

The manner in which this question is raised in this action is collateral; it is not a direct attack upon the judgment in the original proceeding, and where there is no proof of what the court did actually do, other than appears by the record, the question becomes one of how far the court will presume that the court trying the first cause of action had jurisdiction.

The first question to be considered is, had the court jurisdiction to render a personal judgment in the original action; or is a personal judgment in an attachment case proper where the court has jurisdiction only *in rem* and not over the person of the defendant?

This question, it seems to us, is settled in the Supreme Court of this state, as well as in other courts. In *Leonard v. Lederer*, 8 Dec., 711, the amount of the claim was \$300. and the amount of property attached was \$80.00. The court had jurisdiction only *in rem*. The court say:

"That it was the duty of the justice of the peace in such case, to render judgment in favor of the plaintiff for the full amount of his claim, if within the jurisdiction of the justice." But while the judgment was, in form, a personal judgment for the full amount of the claim, it was only valid to the extent of the property attached.

And in the *Chicago & Columbus Coal Co. v. Manley*, 10 Dec. Re., 394, Judge Philipps made a holding to the same effect.

The reason for these holdings seems to be that the affidavit for attachment, and the proceedings under it, form no part of the pleadings and when the court renders a judgment, that judgment is rendered on the pleadings, and such judgment as they authorize, and the proceedings present simply a claim for personal judgment. The other facts of the case make that personal judgment good only for the amount of property attached.

In *Whitman v. Keith*, 18 Ohio St., 134, 135, it appears that a personal judgment was rendered in the original action, in favor of the attaching creditor against the attachment debtor, and the court so held. Howe recovered a judgment in his action against Cornwall in 1858, for the sum of \$1,442.83. And this we believe to be the rule for entering judgment in such cases in this state; and there was no want of jurisdiction on the part of the court to enter the judgment it did, if it had jurisdiction to enter any judgment at all.

The next point relied upon is, that the original action is void for the reason that the court did not spread upon the record a finding that there was property in the hands of the garnishee. And it further appears from the record, that the court had no evidence before it on which it could make any such order. In the first place, the record as it appears, shows that an attachment was duly issued.

The proceedings up to that point are clearly shown by the record; that the writ of attachment was properly issued, and notice was duly served upon the garnishee. And the record as it appears in this case, shows that at that time, at the time of such service, the garnishee was indebted to the attachment to the extent of about \$1,100. And when we take, therefore, into consideration all these facts that are appearing from both records, it would appear that the writ of attachment was duly issued and that the property of the attachment debtor was seized under the writ, and that, if those facts appeared in the original record it would amount to this: that the court had issued process in a case in which it had jurisdiction, and had seized property and, after seizing such property, proceeded to judgment; and the only fact then wanting in the record would be, that the court did not spread upon its record a finding that the garnishee was indebted to the attachment debtor. Would the want of such finding make the judgment a nullity in this action?

We think that if it was entirely proper for the court to spread that finding upon the record, that then, under the facts that we are now supposing, it would amount to nothing more than an error which could be raised only upon proceedings in error, and is not a matter upon which the judgment can be collaterally attacked.

In *Payne v. Mooreland*, 15 Ohio, 443, it is said:

"If the jurisdiction of the court once attached, subsequent irregularities would render the judgment voidable only, and it would remain valid until reversed, and cannot be impeached collaterally. What, then,

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gives the court jurisdiction in a proceeding in attachment? The filing of the proper affidavit, issuing a writ, and attaching the property."

It would seem that all this the court did do. The affidavit was filed, the writ was issued and properly served, and property was actually attached as is shown by the judgment in this case; and the only thing wanting was, for the court to so find that it had attached property, and order the garnishee to pay into court.

In the same case, the court say this:

"We rest the case nakedly, upon the ground, so far as the proceedings in attachment are concerned, that there was a judgment of a court of competent jurisdiction, unreversed, conferring the power to sell the land in question, which cannot be impeached in this collateral way; that the defects and irregularities complained of, should have been remedied by writ of error, or motion."

National Bank of New London v. Railroad Co., 21 Ohio St., 221, 229, is a case to the same point.

The facts, then, appearing by the record before us, taking the entire record, that the affidavit had been filed, the writ issued, and property actually attached, if the record does not show that the court made a finding that it had in its hands property of the defendant and ordered the garnishee to pay the same into court, that such a defect would not oust court of jurisdiction.

Does the silence of the record import that the court did not find the facts necessary to give it jurisdiction to proceed to judgment in the case in the manner in which it did?

It is contended on behalf of the plaintiff in error that these facts must appear of record and, when they do not so appear, as a matter of law the court had no jurisdiction in the action to render the judgment.

This, we think, is not the law. If the record is silent on the subject, as it is in this case, as to whether the garnishee was ordered to pay money into court, which would imply that the court had found that it had reached property of the defendant and had entered that upon record, it will be presumed that the court made such finding.

It is the general rule, that where a court of general jurisdiction is to exercise its powers upon the state of facts to be proved before it, the proof is presumed to have been made and the existence of the fact can not be denied.

And it is said in Maxsom v. Sawyer, 12 Ohio, 195, 207: "If A authorize B to do an act, B's authority must be proved; but when a court of general jurisdiction is required to exercise its powers upon a given state of facts within that jurisdiction, to be proven before it, from the action of the court, the requisite proof is presumed to have been given, and the existence of the facts cannot afterwards be collaterally questioned."

In Lessee of Glover's Heirs v. Ruffin, 6 Ohio, 255, it is said;

"In the case of an order for sale of real estate on petition for partition, under the act of 1810, the proceedings being *in rem* before a court of competent jurisdiction, it must be presumed that the court made the order, on a state of facts being proved that gave jurisdiction and authorized the exercise of it."

The same rule is laid down in Shroyer v. Richmond, 16 Ohio St., 455; Carper v. Richards, 13 Ohio St., 219, 227; Root and McBride Bros. v. Davis, 51 Ohio St., 29, 38; and in a case in Minnesota, to which our

attention has been called, *Stone v. Mayers*, 9 Minn., 803; and in that case, the court say :

"Whether the defendant, Jacob Mayers, had property in the state to give the court jurisdiction in the action mentioned in the complaint wherein the plaintiff recovered judgment against him, is not a question that can be raised in this collateral way. We regard the fact of that judgment having been so rendered, as conclusive upon that question except in a direct proceeding in the action itself for relief."

The cases cited from this state, are mostly to the effect, that if a certain state of proof exists and the record is silent as to what the court did, and, yet, further on in the case, the court rendered a judgment, it will be presumed that the court entered the proper order upon the state of facts shown to have existed.

It is claimed in this case, that the facts upon which the court might be presumed to have made the order, are not shown to exist, by the record. But the record is silent as to what was shown before the court, except that the answer of the garnishee was carried into the court as made up in the court. It is silent and properly so, as to any other proof the court might have had before it, as to the indebtedness of the garnishee to the defendant. It would have been entirely proper in that case, if the plaintiff was dissatisfied with the answer of the garnishee, to have obtained an order for him to have answered over, or for him to have made further disclosure, and, if this had been done, it would not be a matter to be shown by the record. And, in view of the law upon that matter, it is much more consistent to hold that the court had before it the proper facts, and did make the proper order although not shown by the record, than to hold that the court had no jurisdiction, especially in a matter of collateral attack; and the case of *Stone v. Mayers*, *supra*, is in point, as follows.

"It has been held that where the record in attachment proceedings fails to show an affidavit or a bond, it will be presumed that they were filed, and it is held that the same presumption in favor of the jurisdiction in attachment cases must be indulged as in other cases." 4 Blackford, 268; 84 Mo., 546; 5 McLean, 148.

The rule established by the Supreme Court of the United States, seems to be, that, when a superior court renders a judgment or decree for foreclosure and lien, or for the sale of property of a non-resident, on service by publication, without attachment, the judgment or decree is void unless the record shows the jurisdictional facts, but that if the proceeding is by attachment or *in rem*, it is not void unless the record affirmatively shows a want of jurisdiction. *Cooper v. Reynolds*, 77 U. S., 10 Wall., 808; 85 U. S., 18 Wall., 457.

And in 35 U. S., 10 Peters, 449, the court hold, that a judgment ordering the sale of lands attached, was not void because all the necessary steps did not appear in the record.

It has been held in some courts, that when a proceeding in foreign attachment is exercised, it is done under a special statutory power and that the jurisdiction must appear or the judgment is void. But the general holding of the courts is, that the rule in garnishment cases is the general rule.

We are cited to *Myers v. Smith*, 29 Ohio, 120. This case holds that the fact that property of the defendant, subject to garnishment, is in the hands of the garnishee, must be found before a suit in attachment can proceed to

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final judgment; but it does not hold that such finding must be spread on the record; nor does it hold that if no such finding is made, it would be a matter which would subject the judgment to collateral attack. If the general rule is followed in such a case, it would be presumed that the court had before it the proper evidence to make the necessary order and that the order had been made notwithstanding the silence of the record. These questions did not arise in that case. And, while the rule laid down by the court is, undoubtedly, the law, yet the real questions to be solved in this case are not involved in the case in *Myers v. Smith*, *supra*.

It is claimed that the judgment is wrong, in that it is not sustained by the evidence; and the question, being tried upon evidence, was that the defendant below claimed that another company was carrying on the business from and after February 2 1895, and that the goods that it purchased from and after that date, were not bought from the defendant in the original action, but from entirely another defendant; whereas the plaintiff below claimed that the goods were all bought from the defendant in the original action. And it appears that a contract was entered into on or about February 2, 1895, by which this new company was to carry on the business but the question is contradictory as to when it did actually commence to carry on the business, and that contradiction is carried to that extent that it would be improper for us in this case to interfere with the conclusion reached below; and that is true of all evidence bearing upon that question and as to all questions of fact tried by the court below.

We find no error in the record before us, and the judgment of the lower court is affirmed.

NEGLIGENCE.

[Licking Circuit Court, March Term, 1898.]

Adams, Douglass and Smyser, JJ.

* **TOLEDO & OHIO CENTRAL RAILWAY CO. V. ANDREW BEARD, ADMR.**

1. **APPOINTMENT OF ADMINISTRATOR CANNOT BE COLLATERALLY ATTACKED.**

Questions involved in the appointment and qualification of an administrator are conclusively determined by the order of the probate court and cannot be collaterally attacked.

2. **EVIDENCE OF REPAIRS AFTER ACCIDENT INADMISSIBLE.**

In an action against a railway company for personal injuries, the admission of evidence of repairs to or changes in cars made after the accident is incompetent, and if admitted constitutes prejudicial error.

3. **ACT 87 O. L., 149—DEFECTIVE CARS—CASE NOT WITHIN.**

The use of a flat car, for hauling stone, without side boards or end boards or standards, to prevent the stone from falling off and wrecking the train, is not the use of a defective car or a car with defective appliances, within the meaning of the act of April 2, 1890, 87 O. L., 149.

4. **RULES APPLIED TO ASSUMPTION OF RISK.**

Where it appears that decedent brakeman had worked about the flat cars referred to when they were put into the train and that he had exactly the same opportunities for knowing the condition that such cars were in as any other employee, he must be held to have assumed the risk of injury therefrom, although the accident was not one which he could have anticipated from the manner in which the cars were loaded.

* Affirmed by Supreme Court without report, December 18, 1898, 59 Ohio St., 615.

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5. USE OF APPLIANCES GENERALLY USED SUFFICIENT.

As long as an individual or a railway company uses in its business the same appliances that are in use generally in the same line of business, it cannot be held that such individual or company is guilty of negligence.

6. REQUEST FOR SPECIAL FINDINGS.

Requests for special findings of fact to be answered by the jury under sec. 5201 Rev. Stat., are in time if submitted before the jury retires. *B. & O. R. R. Co. v. McCamey*, 5 Circ. Dec., 631, approved and followed.

HEARD ON ERROR.

Kibler & Kibler, for plaintiff in error.

J. A. Flory, for defendant in error.

ADAMS, J.

The case of Toledo & Ohio Central Railway Company against Andrew Beard, as administrator of Henry Wesley, deceased, is here on error to reverse a judgment recovered by Beard, as administrator, against the railway company, under the statute, for damages caused by the killing of Henry Wesley while employed as a brakeman on a train of the railway company, on June 7, 1893.

The petition sets out at length the appointment of the administrator by the probate court of this county; that the defendant is a railway company; that at the time of the accident, and ever since, it has been a corporation duly organized under the laws of Ohio, owning and operating a railroad running from Toledo, Ohio, through Licking county to the town of Thurston; that it ran and operated the necessary locomotives and cars over its road as a common carrier of freight and passengers. Without attempting to set out at length this petition, I may abbreviate it by saying that it alleges that Henry Wesley, while employed as a brakeman on a freight train of this defendant company, on June 17, 1893, was killed in an accident to the freight train on which he was employed as brakeman; that it had in that train a certain flat car that was not properly equipped and constructed so as to carry freight upon it in a safe manner; that this flat-car was defective and insufficient by reason of the fact that it had no side boards, or end boards, or standards to prevent whatever was loaded on the car from falling off or being jolted off; that this brakeman was under the control of the engineer and conductor on that train; that it was their negligence, and the negligence of the superior officer, in not furnishing a safe car, and in taking this car loaded with stone into the train; that the railway company failed to adopt and enforce suitable rules for the protection of this brakeman; that by reason of all or some one of these careless and negligent acts and commissions of the defendant, its officers and agents, this car having been taken into the train, the car being loaded with stone, that one of these stones fell off of the end of the car upon the track; that that caused a wreck of the train; that this brakeman, riding on a car behind the flat-car carrying this stone, was thrown beneath the car which was wrecked, and killed. Alleges that he was twenty-two years of age; in good health, unmarried, and left his father, three sisters and a brother as his next of kin. There is a prayer for \$20,000 damages.

The amended answer denies all acts of negligence upon the part of the railway company; alleges that the death of Henry Wesley was caused by his own negligence and carelessness; that the defendant was without

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fault in the premises; it admits the employment; admits that he was killed in the accident; admits that it was a corporation; says that Henry Wesley was at no time during his life, or at the time of his death, an inhabitant of Licking county; that he left no estate or property to be administered in such county of Licking, and no property or assets has since come into said county; that the application for the appointment of the administrator of Henry Wesley was not made by any creditor; that no issue was determined as to any of these facts by the probate court prior to or in connection with the appointment of the plaintiff as administrator, and that the plaintiff is not the legally appointed and qualified administrator of Henry Wesley.

The reply, in effect, is a general denial of the new matter set up in the answer.

On these issues, the case was tried to a jury, and resulted in a verdict for the plaintiff. Motion for new trial was overruled, and a bill of exceptions was taken, setting out all of the evidence and the charge of the court. There are numerous assignments of error for which the railway company asks that the judgment below be reversed.

The first question is as to the right of this administrator to prosecute this action. That is, whether or not he is, as a matter of law, the duly appointed and qualified administrator of Henry Wesley. That question was made in various ways. It was made in the request to charge, and in exceptions to the admission and exclusion of evidence; and what I will say upon that subject, in brief, will dispose of all the questions as to the administrator, in whatever shape they arise in the record.

In a case in 18 L. R. A., 242, a case decided by the New York court of appeals, it is said: "The decision that a testator was an inhabitant of the county, made by a surrogate to whom a will is presented for probate, is conclusive against collateral attack independent of any statutory provision, at least where the surrogate had jurisdiction of the subject matter by reason of the fact that testator was an inhabitant of the state at the time of his death." In the notes in this report there is quite a collection of authorities on that subject.

An examination of the letters of administration and the order of the probate court appointing this administrator, we think, shows that the question of his residence was necessarily determined by the probate court in making this appointment. In *Shroyer v. Richmond*, 16 Ohio St., 455, the court say, at page 465: "Proceedings for the appointment of guardians are not *inter partes*, or adversary in their character. They are properly proceedings *in rem*; they are instituted, ordinarily, by application made on behalf of the ward, and for his benefit; and the order of appointment binds all the world. In such a proceeding, plenary and exclusive jurisdiction of the subject matter, has been conferred by statute on the probate court, and that jurisdiction attaches whenever application is duly made to the court for its exercise in a given case. It is not essential to the jurisdiction, that the ward be actually before the court unless, by reason of his right to choose a guardian, or for other cause, the statute so require. And when jurisdiction has attached, the court has full power to hear and determine all questions which arise in the case, whether in regard to the status of the ward or otherwise; and no irregularity in the proceedings, or mistake of law in the decision of the questions arising in the case, will render the order of appointment void, or subject it to impeachment collaterally. All questions neces-

sarily arising in the case, become *res adjudicata* by the final order of appointment, which binds all the world, until set aside or reversed by a direct proceeding for that purpose."

On that authority, and the authority in the 18 L. R. A., we think that the question as to the qualification and appointment of this administrator was determined by the probate court, and cannot be collaterally questioned in this case; and that was the holding that was finally made by the common pleas judge in this case, although he at first admitted evidence on both sides as to this question.

During the progress of the trial a postal card and two letters were admitted in evidence, over the objection and exception of the defendant railway company. This postal card and the letters were written by Henry Wesley to his sister. I will not take the time to read the postal card or these letters, because their contents are familiar to counsel. It is said that these communications were admitted in evidence because they might tend to show the state of affection between Wesley and his sister. It seems to us that, on the issue made here, that was not competent. That neither this postal card nor these letters were competent for that purpose, nor for any other. In fact, these writings did not tend, as we think, to show an affection between these parties. We think they were not competent for another reason: They were simply declarations made by this man Wesley in these writings. But, in any event, we think that while these letters and postal were incompetent, the weight of the evidence was slight, and they would not be very material except for the statement that they were admitted for the purpose of showing the state of affection between these parties.

On page 150 of the record, over the objection and exception of defendant, the plaintiff was allowed to prove certain changes that were made in similar cars by this railway company after this accident occurred.

It has been decided in *Cleveland Provision Co. v. Limmermaier*, 4 Circ. Dec., 240, a case decided in Cuyahoga county, opinion announced by Judge Hale: "In the trial of an action for damages for personal injuries through the negligence of defendant, repairs or changes made after the accident by the defendant are not to be construed as an admission by the defendant of prior negligence, and testimony as to such repairs or changes is incompetent to prove prior negligence." In the opinion, on page 241, he quotes from *Railroad Co. v. Hawthorne*, 144 U. S., 207, Justice Gray announcing the opinion, where it is said: "Upon this question there has been some difference of opinion in the courts of the several states; but it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

In *Bailey's Master's Liability for Injuries to Servant*, on page 525, there is a collection of the authorities in a note to the same effect; also in *Elliott's work on Roads and Streets*, page 647.

On these authorities we hold that there was error prejudicial to the rights of the defendant as to the admission of this evidence.

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There were numerous exceptions taken to the refusals to charge; errors assigned in the charge, and exceptions taken to the charge as given; and the claim is made that the court below should have sustained a motion to direct a verdict at the close of the plaintiff's testimony; and that the verdict is not sustained by sufficient evidence.

I will take up the requests to charge, the exceptions to the charge, and these questions somewhat together, because, in the view we take of this case, many of them can be grouped together and disposed of in that way.

On page 255 of the record, the court was asked to charge the jury: "That the mere fact that it is stated in the petition that the locomotive engineer and conductor were the superior officers of decedent (which statement is denied by the defendant) is not sufficient to make out such superiority, but the plaintiff must satisfy you by a preponderance of the evidence that such engineer or conductor actually had and used their power and authority over decedent in the matter in question, and that they had knowledge (which decedent did not have) that the flat car was improperly loaded or that the falling of a stone therefrom might reasonably have been prevented, and if plaintiff has failed so to satisfy you, your verdict must be for defendant." This request was refused.

The ninth request was refused: "A person accepting employment as freight brakeman upon a railroad, assumes the ordinary risk of danger and accident incident to the service, including the consequence of the negligence and carelessness of his fellow workmen in the service, not caused by the acts of those exercising authority over him, and for these the defendant is not liable; and unless you find from the evidence that the proximate cause of the accident was the careless or negligent act or acts of a superior while exercising his authority over him, and was not contributed to by any want of ordinary care on the part of Wesley, your verdict must be for defendant."

This case was tried in the court of common pleas on behalf of the plaintiff with this view of the case: That it was an action that was covered by sec. 2 of the act of April 2, 1890, 87 O. L., 149 and 150. That section is: "It shall be unlawful for any such corporation to knowingly or negligently use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective. If the employee of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, owned and operated, or being run and operated by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employee, or his legal representatives, against any railroad corporation for damages, on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation."

The trial court coincided with counsel for the plaintiff below in holding that this was an action brought under that section of the statute. With that view of the case, this court cannot agree. The facts in this case, as shown by the plaintiff's testimony, are simply these: While this man was employed on this local freight train as a brakeman, the train came near the station called Fulton, took into the train a car or

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cars, loaded with stone; that these were the ordinary flat cars; that they had no side boards, end boards, or standards; that these were heavy stone, stone of considerable size, spoken of in the argument here, if not in the record, as "dimension stone;" that they were loaded on this car. There is nothing in the plaintiff's testimony to show how those carloads of stone got into that train. It shows the fact that they were in the train; that one of these stones fell off the train and caused this wreck, but there is nothing in the plaintiff's testimony to show knowledge on the part of any of the employes of the railway company, either Wesley, or the conductor, or the engineer, as to how the cars were loaded, how they were put into the train, or that any of these men had any reason to anticipate any injury from the manner in which this car was loaded. Then it resolves itself into this (without any further showing as to what is the customary way of loading stone of that kind): It is negligence on the part of a railway company to take into its train, a flat car loaded with heavy stone; and is the fact that such flat-cars are used by a railroad company, without side boards or end boards, negligence? In other words, is the use of a flat-car, the use of a defective car, or a car with defective appliances, within the meaning of the statute? We do not think that it can be so held, either as a matter of fact or as a matter of law. It is said in *Mad River and Lake Erie Railroad Co. v. Barber*, 5 Ohio St., 541, in the second paragraph of the syllabus: "The conductor of a train of railway cars, although he undertakes his engagement in view of the nature, hazards and responsibilities of his employment, has reason to expect, and a right to exact, that reasonable care and diligence on the part of his employer, in furnishing him with safe and sufficient cars and machinery for the train, which is most common and usual in the business of railroad companies; and being presumed to contract in contemplation of this, he can require no more." There is nothing in this record to show that it is not the common and usual way of hauling stone by railway companies to load the stone on the ordinary flat car, and as long as an individual or a railway company uses in its business the same appliances that are in use by people generally in that business, it cannot be said, either as a matter of fact, or as a matter of law, that that individual is guilty of negligence, because he is exercising the care that the ordinarily prudent man does exercise, because he is going according to the custom in his business.

What I have said as to that will indicate that this court is of the opinion that there was no evidence on the part of the plaintiff to show that there was negligence on the part of this railway company in putting those cars so loaded into the train. The evidence of the defendant showed that this brakeman had worked in and about these cars when they were put into the train; that is, he made the couplings at both ends of the cars when they were fastened to the other parts of the train. It is apparent from this record and the nature of things that Wesley had exactly the same opportunities for knowing the condition that those cars loaded with stone were in as any other employe of the company had; and if he knew that, then he assumed those risks. It was said in argument, in answer to the claim that he had been guilty of contributory negligence, that he could not have anticipated any danger from the condition that those cars were in and the way that they were loaded. That is true. But it is equally true, on the other hand, by exactly the same rule, that no other employees of the railway company, or the rail-

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way company itself, could have anticipated an accident from the use of those cars, and the manner in which those stone were loaded.

In that view, we think there was no error in refusing to charge the requests that I have read; that there is error in the charge as given on page 266-7-8; and that these errors grow out of the view of the case taken by the trial judge and by counsel for defendant in error, that this was an action under the statute for damages for the use of a defective appliance; and that the same idea accounts for the action of the trial judge when these requests to submit special interrogatories were finally brought to his attention.

It is said on page 269, where counsel called the trial judge's attention to these special interrogatories: "The court * * * refused to direct the special findings for the reason that they were not, nor either of them, pertinent, under the charge of the court." With the view that the trial judge took of the case, we think that is right; but with the view that we take of the case, if there was any ground for recovery here it would be on the ground that these cars were carelessly or negligently loaded, and that it was a matter of negligence and carelessness on the part of those servants who were superior to Wesley in the management of that train, and that their carelessness caused the injury. In that view of the case, we think that questions seven, eight, nine, ten, eleven, twelve and fourteen were proper questions to be submitted to the jury.

Counsel very earnestly argues that this court has misconstrued the section of the statute as to these special findings, and we are urged to reverse the holding that was made a year or so ago in this county in *Baltimore & Ohio Railway Co. v. McCamey*, 5 Circ. Dec., 631, where the court held that the questions in that case were proper questions to be submitted to the jury; that they were pertinent to the issues made by the pleadings and by the evidence; and where we held that these special findings were in time if they were submitted to the court after the close of the charge to the jury. Counsel have cited a number of cases where the holding has been the other way; that is, cases in other states. We think, to require a holding different from that in the *McCamey* case would be judicial legislation. It would be for the courts to put into the statute something that the legislature has not seen fit to put there. It may be, that in some cases this asking the jury to find specially, or to answer certain questions, may be abused; but if the abuse grows up the fault is in the legislation. It is the duty of the court to say what the statute means as it is written, and not to revise or amend the legislation because of supposed or anticipated abuses. We think, if these requests for special findings of fact come to the trial judge before the jury has retired, he can take the time then to determine whether they are proper questions. It is true that I am the only present member of the court who participated in the decision of the *McCamey* case, but, upon a reconsideration of all these matters, and an examination of the authorities, the court is still content with the holding made in the *McCamey* case. That is, that we must take the statute as it stands.

From what I have said, it follows that this judgment must be reversed for error in the admission of evidence, the letters and the postal card; the evidence as to changes or repairs; in refusing to charge requests six and nine; the errors on page 266-7-8 of the charge as given;

because there was no evidence offered by the plaintiff that would have warranted a verdict in his favor; because the judgment is not sustained by sufficient evidence; and because these special findings of fact or special interrogatories, were not submitted to the jury.

The cause is remanded for a new trial.

CORPORATIONS—DEBTORS AND CREDITORS.

[Cuyahoga Circuit Court, December 22, 1900.]

Caldwell, Marvin and Hale, JJ.

*KIT CARTER CATTLE CO. V. EDWARD M. MCGILLIN ET AL.

1. PREFERENCES BY CORPORATIONS—OHIO RULE—OTHER STATES.

The rule of *Rouse, Trustee, v. Merchants National Bank*, 46 Ohio St., 493, that "a corporation for profit, organized under the laws of this state, after it has become insolvent, and ceased to prosecute the objects for which it was created, cannot, by giving some of its creditors mortgages on the corporate property to secure antecedent debts without other consideration, create valid preferences in their behalf over other creditors, or over a general assignment thereafter made for the benefit of creditors" has reference to the relation existing between the corporation and its creditors, and affects the remedy of the creditors, relative to procedure. It is a construction of the general laws of Ohio, affecting powers of corporations in Ohio, and is not a limitation upon organic powers which the courts of another state, by the laws of comity, must recognize against creditors of that state.

2. RULE APPLIED TO PREFERENCES IN PENNSYLVANIA.

Under the foregoing rule, a preference, preceding an assignment for creditors, made by a corporation organized under the law of Ohio, but having subsequently removed its property and business to Pennsylvania where it became insolvent, to secure *bona fide* debts, to creditors non-resident of Ohio, through the medium of judgment notes, whereon judgments were taken in Pennsylvania and property seized and sold in accordance with the laws of that state, is not invalid under the Ohio laws. Therefore, where, by agreement between the judgment creditors in Pennsylvania, a trustee was appointed to purchase the property of the corporation at judicial sale, who continued the business until the judgments were paid in full, when the property was turned over to a stockholder, who was also a creditor, removed to Ohio, and acquired by another corporation, a fund realized from a sale by the latter to a third party is not subject to claims of creditors of the first corporation, or available at the suit of a trustee appointed by the probate court in Ohio, under a filing in Ohio of a copy of the deed of assignment made in Pennsylvania.

APPEAL.

Gilbert & Hills, for plaintiff.

Foran, McTighe & Baker; J. H. Clark; N. C. McNabb et al.,
for defendants.

HALE, J.

The case of the Kit Carter Cattle Company against Edward M. McGillin and others comes into this court on appeal by defendant William J. McGillin.

The plaintiff, after the trial below, dropped out of the case, and no claim is made here in his behalf. The issues which have been tried, are

* For decision of the court of common pleas (Neff, J.), see 10 Dec., 146.

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made upon the cross-petition of McNabb, assignee of the E. M. McGillin Company, and the cross-petition of the creditors of the company, suing in their behalf.

We have spent so much time in the reading of the extensive briefs and in the examination of the evidence, that we have not formulated any very extensive opinion in the case. I will state the facts necessary to the conclusions reached, and then the conclusions.

The E. M. McGillin Company was incorporated under the laws of this state, on December 26, 1891. The object and purpose of the corporation was to deal in general merchandise at wholesale and retail. After its incorporation, it prosecuted its business in the city of Youngstown until September, 1895; it then closed out its business in that city, and removed to the city of Pittsburg, in the state of Pennsylvania. It continued to prosecute the business for which the corporation was formed in the latter city until April, 1896. On April 10, of that year, at a meeting of the board of directors held in Pittsburg, a resolution was passed, authorizing the delivery of judgment notes to four of its creditors: one to W. J. McGillin, for the sum of about \$28,000; one to Shade & Company, for \$4,567.50; one to Arbuthnot, Stephenson & Co., for \$1,400; and one to Mary O'Neil, in trust for the National Bank of Pittsburg, and A. Mellon & Son, doing business in Pittsburg, \$20,000, aggregating in all about \$50,000.

All these notes, as I have said, were dated April 10, 1896; they were due one day after date; they were held until they became due, by the president of the corporation; and were then delivered into the hands of an attorney, and judgment in the courts of Pennsylvania entered upon these cognovit notes. A levy was made upon the entire property of the corporation.

After the levy, an agreement was made between these judgment creditors looking to the purchase of the property at the sheriff's sale, and the running of the business after the sale, that these judgments might be realized. The substance of that agreement was that one Mitchell, as trustee, was to attend the sale and purchase the property for and on behalf of these judgment creditors, and he was to see to it that the property did not sell for less than \$20,000. It was then agreed that, having purchased the property, the business should be presecuted by him in Pittsburg until sufficient was realized to pay off the judgment creditors, other than W. J. McGillin. When that was done, the trustee, who was to purchase this property, was to assign the remainder of the property over to W. J. McGillin.

This agreement was carried out. The trustee purchased the property, continued to prosecute the business in Pittsburg until July 13, 1896, carrying it on in the usual way, purchasing and replenishing the stock. On July 13, 1896, these creditors, the bank in Pittsburg, Mellon & Sons, and Schade, having realized the amount of their judgments, or the judgments that were taken in their behalf, the assignee, in pursuance of the original agreement, transferred all the remaining property over to W. J. McGillin, who ran the business for awhile in Pittsburg. He then removed all the property, including fixtures, formerly, belonging to the E. M. McGillin Company, and which had been assigned to him in the way I have named, to Cleveland. He caused to be organized the E. M. McGillin Dry Goods Company, and this property was made over to that company.

That company continued to do business here in this city in the usual way of running a dry goods business, until March 1, 1898, buying and selling, and using the property precisely as if he owned it. When the dry goods company sold out all the property, including merchandise and fixtures, to Samuel Weil, for the sum of \$52,000, after paying the debts of the dry goods company, there remained in the hands of the dry goods company, or belonging to it or somebody else, \$36,000.

Soon after the giving of the notes in Pittsburg as I have stated, the company made an assignment, a general assignment for the benefit of creditors, in Pittsburg. It filed no copy of the deed of assignment, in Youngstown, Mahoning county. But some of the creditors, believing that to be the home of the corporation, caused a copy of the deed of assignment to be filed in the probate court of Mahoning county. The probate court took jurisdiction of the subject-matter, and removed the assignee that had been appointed in Pittsburg, so far as he had the power to do, and appointed Mr. McNabb as trustee for the benefit of the creditors.

It will be seen, then, that all the property of this corporation at the time of the transactions that are questioned here, was located in the city of Pittsburg, in the state of Pennsylvania. The judgment creditors were all non-residents of Ohio, except Schade; two of them resided in Pittsburg, Pennsylvania.

The notes were given ostensibly for antecedent debts which the corporation, The E. M. McGillin Company, owed at the time.

The trustee, having been appointed by the probate court of Mahoning county, prosecutes this action in behalf of the creditors of the E. M. McGillin Company, to gain possession of the amount remaining from the sale made by the dry goods company in March, 1898, claiming it to be the property of the E. M. McGillin Company.

Not questioning, or stopping to question, the regularity or legality of the appointment of the trustee by the probate court of Mahoning county, it is best, perhaps, to consider the rights and claims of the creditors of the E. M. McGillin Company as against these judgment creditors. Whether that is done upon the petition of the assignee or the petition of the creditors, it makes no difference. Certain rights must be examined into and determined as between these two claimants.

The proposition largely relied upon by the assignee in behalf of the creditors, is based upon the proposition of law announced in *Rouse, Trustee, v. Merchants National Bank*, 46 Ohio St., 493, the syllabus of which is:

"A corporation for profit, organized under the laws of this state, after it has become insolvent, and ceased to prosecute the objects for which it was created, cannot, by giving some of its creditors mortgages on the corporate property to secure antecedent debts without other consideration, create valid preferences in their behalf over the other creditors, or over a general assignment thereafter made for the benefit of creditors."

It is claimed that this rule of law became and was a part of the organic law of this corporation, which must govern it. And it may be conceded that if this transaction which we are investigating, that took place in Pittsburg, had taken place within this state, it would have been an attempt to make an unlawful preference in the favor of one creditor against the others, and could be at least questioned by the creditors, and at their instance held to be invalid. But this transaction did

not take place in Ohio. It took place in the state of Pennsylvania; and the claim is made that because this was an Ohio corporation, the same result must follow, although all the property of the corporation was in Pennsylvania at the time, and although the notes were given in Pennsylvania, the judgments taken in the courts of Pennsylvania, and the property seized in that state and sold in accordance with the laws of Pennsylvania.

This result is said to follow from the fact that the charter of the corporation forbade the acts to be done that were done by the corporation; that the organic law of the corporation conferred no such power upon the corporation; and the question is, can this claim in behalf of the creditors be sustained?

While it is conceded that these preferences could not be sustained under the laws of this state, we think it equally clear that under the laws of Pennsylvania the preferences were legally made, and could not there be questioned by the creditors. Indeed, some of the creditors, in whose behalf this claim is made in this case, sought, in proceedings under the laws of that state and in the mode therein provided, to question the validity of this transfer and were there defeated.

Does the organic law of the corporation control? Is the rule of law announced in the *Rouse, Trustee, v. Merchants Natl. Bank*, *supra*, case a part of the organic law of this corporation, and does that control?

By the law of comity existing between the states, a corporation, chartered in one state, may prosecute its business in a sister state. This law of comity exists at common law, independent of statute; but most of the states have dealt with this question by statute, and have prescribed the limitations and conditions by which a foreign corporation may transact business within its state.

In a general sense, it is undoubtedly true that a corporation can make no contract and do no act either within or without the state in which it is created except such as are authorized by its charter. A corporation, organized to do banking business in Ohio, could not go into Pennsylvania and do a general merchandise business, and the like. But corporations in Ohio are chartered under general laws, and under sec. 3236, Rev. Stat., must specify the purposes for which such corporation is formed, and its business must be such as therein expressed, whether prosecuted within or without the state.

While by the law of comity this corporation was enabled to prosecute its business authorized by its charter, in Pennsylvania, we think it must do this, subject to the laws and regulations of that state.

The trust doctrine, announced in *Rouse, Trustee, v. Bank*, *supra*, does not relate to an affirmative, active power of the corporation, but has reference to the relation existing between the corporation and the creditors, and affects the remedy of the creditors, relative to the procedure and not to the organic power. Under the doctrine of this case, certain acts of the corporation, relating to the distribution of its property in this state to its creditors after insolvency, are forbidden, but such prohibition is not binding upon the courts of other states, and does not affect the rights of the creditors to secure and collect their claims by any and all methods known to the laws of that state. The law of comity which permits this corporation to extend its business into another state, does not deprive courts of the latter of their jurisdiction to adjudicate and determine the rights of creditors to property within that state, over which it has dominion. The prohibition upon the powers of the corpor-

ation, announced by *Rouse, Trustee, v. Bank, supra*, is not the organic power of the corporation which the courts of a sister state by the laws of comity must recognize as against creditors of that state. It is a construction upon the general laws of this state and affecting the powers of the corporation, given by the courts of this state, which the sister state is not bound to recognize.

So we hold upon this proposition, against the assignee, and that the judgment cannot for this reason be attacked by the creditors.

These propositions are supported, to some extent, by a large number of cases which were fully digested in the briefs on both sides: 105 Pa., 209; 51 N. J. Eq., 541; 170 Pa. St., 1; 161 Pa., 17; *Memphis City v. Dean*, 75 U. S., (8 Wall.) 64, 68.

It is, perhaps, needless to refer to these cases as there are a perfect forest of them referred to in the briefs which we have examined. But our conclusion is as I have announced.

Now, again it is claimed that notwithstanding these preferences might be sustained in Pennsylvania, if rightly done and carried out, the judgments were collusive and fraudulent, and the whole transaction was collusive and fraudulent, and, therefore, not binding upon the creditors of the corporation, and that they may enforce their rights here.

To sustain this proposition, it has seemed to us that it was necessary to establish one of two propositions:

First: That the judgment notes given, were without consideration; or, second: That, in suffering the judgments to be taken in behalf of a few of the creditors by the corporation, there was an unlawful preference to the prejudice of the other creditors, tending to hinder and delay the collection of the debts. One of two of these must exist.

That these judgments were suffered by the corporation to give a preference to some of its creditors, cannot be doubted. The corporation was insolvent, at the time had ceased to prosecute its business, and undertook, in that situation, to prefer some of its creditors to others. But, by the discussion so far, it will be seen that we have held that as to the property in Pennsylvania, this could be done although this was an Ohio corporation; that this was accomplished by the courts of that state and in a manner not to be questioned by the creditors of the E. M. McGillin Company. Some force must be given to the fact that the courts of Pennsylvania have sustained these preferences, and it was carried out only by the judgment of the courts of that state. If we turn to the question, whether there was a consideration for these notes, we find it practically conceded, that all of the notes except the one given to W. J. McGillin, were for actual *bona fide* indebtedness then existing and due. Examining the claim of W. J. McGillin upon the weight of the proof submitted to us, we can but find that his claim also was a valid claim against that corporation.

So that all these notes upon which these judgments were taken, were given by the E. M. McGillin Company in the state of Pennsylvania to secure antecedent debts of the corporation which it owed, *bona fide*.

It will not do to say that the giving of a note, a judgment note, by an insolvent, for an antecedent debt, is a fraudulent transaction. It may be done by an individual and done everywhere in this state and elsewhere. It can be done in this state by an individual, and not by a corporation, because of the doctrine announced in *Rouse, Trustee, v. Merchants National Bank, supra*, to which I have referred; and, if all there is to predicate actual fraud upon, is, that these notes in Pennsylvania

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were given for an antecedent debt, the proposition can not be sustained.

Finding, then, as we do, that these notes were given for a full consideration, to secure the existing indebtedness, there was no fraud or collusion in the transaction, independent of the question made based upon the fact that this corporation in Pennsylvania could not prefer a creditor.

It will, therefore, be seen that the proper disposition of the case depends largely, if not wholly, upon the correctness of our holding upon the first proposition.

Beyond the fact of preference, there was no fraud or collusion in these judgments. We think it will not do to adjudicate a transaction to be fraudulent, which was and is valid by the laws of the state where it was had and which has been sustained and sanctioned by the courts of that state.

It will be seen, and we intend to lay stress upon the fact that this preference was worked out through the courts of Pennsylvania, where the property was located and where the whole transaction took place, and where the sale was made, and where such preference was legal under the Pennsylvania laws. If we are right about this proposition, we are right about the disposition of the case.

This is our best judgment: That the creditors can not in this proceeding question this preference that was made in Pennsylvania.

The decree will be entered, dismissing the cross-petition. Counsel will prepare the decree accordingly.

CORPORATIONS—SUMMONS.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

BUCKET PUMP CO. V. EAGLE IRON & STEEL CO.

1. SERVICE ON AGENT OF CORPORATION.

In order to render service of summons, under sec. 5044, Rev. Stat., upon the agent of a corporation valid, it must be made to appear that no chief officer of the corporation *could* be found in the county and that the service was upon the *managing* agent of the corporation. A return to the effect that the writ was served upon G, "*agent* of said company, no chief officer *being found*," is not sufficient.

2. TERM "MANAGING AGENT."

A letter from a corporation designating a certain person as "our Cincinnati agent," without evidence showing that such person had control or supervision over the affairs of the corporation or any portion thereof, is not sufficient to bring such person within the term "managing agent" as used in sec. 5044, Rev. Stat., above referred to.

HEARD ON ERROR.

C. W. Baker and Willard B. Stier, for plaintiff in error.

D. D. Woodmansee, contra.

GIFFEN, J.

The only question in this case for determination is whether the defendant corporation was properly served with summons in this county. The return is as follows:

Pump Co. v. Iron & Steel Co.

"Served the within named defendant, The Eagle Iron & Steel Company, a corporation, by delivering a true copy of this writ, with all the endorsements thereon, personally to Frank C. Graham, agent of said company, no chief officer being found."

The provision under which service was had is found in sec. 5044, Rev. Stat., and is as follows:

"A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees, or other chief officer; or if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent."

It does not appear from the return that no chief officer *could* be found *in the county*; nor that service was had on a *managing* agent. If these were the facts, we think the return could be so amended as to show them. It is admitted that no chief officer could be found in the county; but it is denied that Frank C. Graham was the *managing* agent of the company, and unless he was such agent the motion to set aside and quash the return was rightly sustained.

"Managing agent" has been defined to be "an agent having general supervision over the affairs of a corporation." Anderson's Law Dictionary; Upper Mississippi Transportation Co. v. Whittaker, 16 Wis., 233. It implies control of the business of a corporation or at least some part thereof. It was because of such control, exercised by an express agent over the local business of the company, that the Supreme Court held in American Express Co. v. Johnson, 17 Ohio St., 641, that he was a managing agent.

The testimony shows that Mr. Graham solicited orders for goods, and when a proposition was accepted he submitted it for approval by the defendant, and that the contract sued on, although negotiated by him, was finally closed by plaintiff and defendant.

It is true that the defendant in its letter of March 28, 1899, to Mr. Charles W. Baker, designates Mr. Graham as "our Cincinnati agent;" but that is no more definite than the return itself, and there is no other testimony showing that he had control or supervision over the affairs of the defendant corporation or any portion thereof.

Judgment affirmed.

MUTUAL LIFE INSURANCE.

[Lucas Circuit Court, January Term, 1893.]

Scribner, Bentley and Haynes, JJ.

*SUPREME COMMANDERY KNIGHTS OF THE GOLDEN RULE v. EVERDING ET AL.

1. PLEADING—NAMES OF PARTIES—CAPTION SUFFICIENT.

It is sufficient, under Ohio practice, if the names of the parties to a suit are stated in the caption of the petition, and in the body of the petition they may be classed as plaintiffs and defendants without being again named. Where there is a qualification to be made, as where the parties are minors, after having named the parties in the caption, it should be averred.

2. AMENDMENT TO CONFORM PLEADINGS TO PROOF.

Where testimony not in accordance with the pleadings is admitted without objection the court may allow the pleadings to be amended to conform to the proof.

* Dismissed in Supreme Court at costs of plaintiff, June 18, 1893.

Lucas Circuit Court.

3. OBJECTION TO AMENDMENT—TIME SHOULD BE ALLOWED.

Where the admission of testimony not in accordance with the pleadings is objected to, the court may allow an amendment to the pleadings, but if the opposite party makes a showing that he has been taken by surprise, or will be prejudiced by the amendment, he is entitled to time in which to make his pleadings and prepare for trial.

4. BURDEN OF PROOF UNDER IN INSURANCE CERTIFICATE.

Where, in an action against a mutual benefit association, the petition alleged that the plaintiff received the certificate, etc., and that the defendant association had become bound to pay \$2,000, under a condition in the certificate to pay that amount if the class to which the insurance belonged was full, otherwise to pay \$1.00 for each member of the class, and the defendant admitted that plaintiff received the certificate and that it would have been bound to pay, providing insured had not made certain representations and had not failed to pay certain assessments, and denied that there were two thousand members of the class at the time, without stating how many there were, the burden of proving that there were not two thousand members is upon the defendant.

5. PRESUMPTION WHERE PERSON DISAPPEARS.

Where a person disappears, there is no presumption either way, that he is alive or that he is dead, until seven years have elapsed, when, if he remains unheard of, the law presumes that he is dead.

6. BENEFICIARY ENTITLED TO RECOVER.

Where a member of a mutual benefit association had paid all dues and assessments levied up to the time of his disappearance, and his beneficiary tenders, in proper time, payment of assessments made subsequently, such beneficiary, in action brought after seven years, during which time assured has not been heard of, and when the law presumes that he is dead, is entitled to recover the insurance.

7. RULE AS TO BENEFICIARIES.

It is sufficient in life insurance if there is such a relation at the time the policy is issued that the party would be entitled to be a beneficiary then; and such relation having existed then, no matter what occurs afterwards, such relation is not terminated. Thus the right of a wife as beneficiary in an insurance certificate is not terminated by a subsequent divorce and a marriage to another man.

8. ASSOCIATION CANNOT REFUSE ASSESSMENTS FROM BENEFICIARY.

Where it appears that a member of a mutual benefit society had paid all dues and assessments up to the date of his disappearance, the officers of such association have no right to refuse to receive an assessment, made after his disappearance, from his beneficiary (his wife in case at bar), on the ground that, insured having disappeared, they wished to get further news concerning him, what had become of him, etc., and also wanted further orders from the superior officers.

9. BURDEN OF PROOF FOR REFUSING ASSESSMENT.

Where a person insured has disappeared and as a defense to the tender of an assessment by his beneficiary it is claimed that insured was dead at the time the tender was made, the burden of establishing that fact is upon the insurance association.

10. RECORD IN DIVORCE PROCEEDINGS NOT ADMISSIBLE.

There is no presumption from the fact that divorce was granted to the abandoned wife three years after her husband disappeared, that the husband was then living or that he was dead. Therefore the record of the divorce proceeding is incompetent as evidence in an action under a certificate of insurance.

HEARD ON ERROR.**HAYNES, J.**

This is a petition in error filed for the purpose of reversing the judgment of the court of common pleas of Lucas county. The case was

brought in the court below by Margaret Everding, Carl H. Gram, William Arthur Gram, an infant, by his next friend, Margaret Everding, and Albert Gram, an infant, by his next friend, Margaret Everding, plaintiffs, against the supreme commandery of the order of the Knights of the Golden Rule, defendants. In their petition the plaintiffs aver, first, that William Arthur Gram and Albert Gram, set out in the caption above, are each minors, and are each under the age of twenty years; that this action is prosecuted by Margaret Everding, next friend of said William Arthur Gram and said Albert Gram, for the benefit of said minors respectively.

It then proceeds to set out that the defendant company is an association in the nature of an insurance association, and that one Charles F. Gram, who was formerly the husband of Margaret Everding and the father of these children by the name of Gram, became a member of Castle Oliver, so-called, at Toledo, Ohio, of the Knights of the Golden Rule, of the third class, and they aver that on July 1, 1882, he was then such member of such order and in good standing and entitled to all the benefits of the order. They then set up that the defendant company, on April 7, 1880, executed to them a certificate made in accordance with the rules and regulations of said order and through said Castle Oliver, and they set forth a copy of it and attach it to the petition, and aver that the said defendant thereby became obligated to pay to said Margaret Everding, at that time Margaret Gram, Carl H. Gram, William Arthur Gram and Albert Gram \$2,000, together with accrued assessments, provided there were sufficient members of said class so that the assessment should realize that amount in excess of amount reserved by the rules of said order for expenses, and plaintiff alleges the fact to be that there were sufficient members in said class to pay the member's benefit, and that there is due them from said order the sum of \$2,000 and interest from July, 1882.

Plaintiffs further allege that on July 1, 1882, said Charles F. Gram disappeared and has never since been seen by them, or anyone, to their knowledge, and that said Gram has been missing for over seven years last past, and plaintiffs allege that on said day said Charles F. Gram died. Plaintiffs allege that proof of his said death and proof of the good standing of said decedent in the third class of the order at said date has been duly furnished to said order and supreme commandery, and that the benefit certificate set out as exhibit "A" has been tendered to said order and supreme commandery, and payment thereof demanded and refused. Plaintiffs say that said formal proof of death was furnished on or about the (blank) day of September, 1889. (The word "September" there, it is said, is written over the word "May." It is pretty clear and distinct, although we can see the "Y." I speak of this in passing, for it will come up further on.) Plaintiffs further say that on or about July 10, 1882, they notified said castle and caused said supreme commandery to be notified of the disappearance of the said Charles F. Gram, and that said order and castle then agreed to take the matter of the disappearance of the said Charles F. Gram under advisement and refused to accept and receive payment of the only assessment which was then payable, which assessment was not payable at the time of the disappearance of said Gram, and have since refused to pay the amount due on the said certificate, alleging as a reason that said Gram was not dead.

To that there was a demurrer: First, that there is a misjoinder of parties. Second, that the petition does not set forth facts sufficient to constitute a cause of action against defendant.

The demurrer being overruled, the defendant below filed an answer to the petition as amended, as is stated here. That answer was filed November 12, 1890. Suffice it to say, that, having admitted the existence of the order and the issuance of the certificate, they deny the death of the plaintiff and aver that he had failed to perform the conditions of the certificate, in that he had failed to pay certain assessments, and that by reason thereof he had ceased to be a member. They say also that there were not two thousand members in the third class.

"Defendant further answering says, it has no knowledge, except the statements in said petition, that Margaret Everding ever was the wife of Charles F. Gram, nor that Carl H. Gram, William Arthur Gram and Albert Gram are his children, that they are the only children, or that they are minors under the age of twenty years. * * * Defendant admits that the certificate of benefit would, upon the conditions set out in the certificate, after the death of said Charles F. Gram, entitle Margaret Gram and his children to the benefits provided for in said certificate after the death of Charles F. Gram, provided the declarations and representations of said applicant for such certificate were truthfully made, and that said Charles F. Gram should continue up to the time of his death a member in good standing in said order and in said Castle Oliver No. 25, and upon the full compliance with the laws of said order in force at the time of his death, and the payment of all dues and assessments levied and required to be paid by him to the Knight benefit fund of this class, and he had not committed suicide, and upon due notice and proof of his death and proof of his good standing in the third class of the order.

They admit that he would be entitled to receive the benefit of this certificate if he had complied with the conditions which we have mentioned. But they aver: "That said Charles F. Gram obtained said benefit certificate upon declarations which are false and untrue, and that he had not complied with all the rules and regulations of the order; that he has not paid all the dues and assessments made upon him; that for that reason long prior to July 1, 1882, he had not been in good standing in said Castle Oliver and has been under suspension from membership in the order of the Knights of the Golden Rule prior to said date. Defendant denies that said Gram died on July 1, 1882, or that he has died at any time since said date. Defendant denies that proof of the death of said Charles F. Gram, or of his good standing in Castle Oliver has been made or furnished to defendant; denies that there are or ever have been two thousand members in good standing in said third class. And defendant denies each and every allegation in said amended petition not expressly answered or denied, as therein alleged."

To that there was a reply. The case came up first upon demurrer to the petition. That was overruled. The petition, after averring the existence of the obligation and the issuing of the certificate, had averred that the party had died at the date certified, to-wit, in July, 1882. It averred that proof had been made to the defendant of the death of the party, and it made its claim for the sum of \$2,000. It is true as is stated, and it is not denied, that the petition did show at that time that the proofs were filed in May, 1889; that would be within seven years from 1882. The court overruled the demurrer; and it seems to us that they overruled it rightly, as far as the main question is concerned, because there was a distinct averment of his death at a particular time, and

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that the other allegations were sufficient to show an obligation on the part of the defendant to pay, and a proof of loss filed before the commencement of the suit. It is only when you strike out the allegation of death in 1882, that the filing of the proof in May becomes a matter of any consequence in this suit; because having stricken out that allegation, then the claim can be filed with the company within the seven years.

But going back to the first point which was raised in the demurrer, and which was here argued, and that is, that the suit is not properly brought in the name of the proper parties to the suit. The benefit certificate which is authorized by the company, and which is in accordance with the rules of the company, provides:

"This certifies, that the Order of Knights of the Golden Rule has been conferred upon Comrade Charles F. Gram, and that he is a member of the order in good standing in Castle Oliver No. 25, located at Toledo, state of Ohio. And in consideration of the representations and declarations made in his application for this certificate, which application is on file in the supreme secretary's office, and is made a part hereof, and the payment of the admission fee of one dollar, and in consideration of the payment hereafter to the knight benefit fund of this class of the order, of all assessments as levied and required by the supreme commandery, the full compliance with all the laws of this order now in force or that may hereafter be enacted, and the being in good standing under said laws, the sum of two thousand dollars, together with accrued assessments, will be paid from the knight benefit fund of the third class of this order, by the supreme commandery Knights of the Golden Rule, to his wife, Margaret Gram, and his children, as said comrade has directed in his application for this certificate, or as he shall hereafter direct in an application for a change thereof under the laws of the order, upon due notice and proof of his death, and proof of his good standing in the third class of the order, at the time of his death and the surrender of this certificate, but not otherwise.

"Provided, however, that if there shall not be sufficient members in this class to pay the maximum benefit, there shall only be paid a sum equal to one dollar for each member in good standing in this class at the time of the death of said Comrade Charles F. Gram, less ten per cent. to the expense and reserve fund, as provided by law, together with the full amount of said comrade's accrued assessments paid by him in this class: And provided further, that any violation of the above-mentioned conditions, or of the requirements of the laws now in force, or hereafter enacted, governing the order, or this class, shall render this certificate, and all claims under it, or upon the order, null and void, in which event the supreme commandery shall not be liable for the above sum or any part thereof."

Now the suit is brought in the name of Margaret Everding, Carl H. Gram, William Arthur Gram, an infant, by his next friend, Margaret Everding, and Albert Gram, an infant, by his next friend, Margaret Everding. The averment of the petition is that the two last-named are infants, and that the suit is brought by Margaret Everding as their next friend. It is claimed that the caption of the petition is no part of the petition, that we must refer to the body of the petition for the parties, and some work on pleading is cited. The custom, in Ohio has been, and the understanding has been, and the practice, working under the

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code has been, ever since its adoption, that the statement of the parties named in the petition as plaintiff constitutes them plaintiffs and is a sufficient statement of the names of the parties who are plaintiffs. If there is any qualification to be made in any respect, it should be properly followed by an averment, as is done here, that they are minors and bring suit by their next friend. The plaintiffs alluded to are the plaintiffs who are named above, and Bliss in his work quotes some of the decisions of other states holding that that is a sufficient statement of the names of the plaintiffs. Our own experience has been, during all of the time we have been at the bar, that it is customary to commence a suit in this way, and we think it is proper so far as the names of the plaintiffs are concerned that they are put once at the head of the petition, as required by the code, and that it is not necessary afterwards to name them, but the parties may be simply classed as plaintiffs or defendants.

There is back of that, however, a question of more importance that has been argued at greater length, but I think I will refer to it further on. Sufficient to say, that, on these other grounds, the court did not err in overruling the demurrer.

We will turn next to the question of the amendment to the petition. Upon reading the record of the case it shows that the whole case was tried, and the parties proceeded to offer their evidence in regard to the time when the proofs were filed with the defendant company, upon the assumption or theory that the time in issue was the time fixed, September, 1889. The record shows that the court had no knowledge that any other or different time was named in the petition or had been. The court says, at the time of the making of the question: "Objection was made at no time to the admissibility of evidence relating to the proof of September, 1889, on the ground that the making of such proof had not been alleged in the petition." And an examination of the record shows the correctness of that statement, and the court was not aware that it was not alleged in the petition until counsel for plaintiff asked leave to amend his petition in that regard. And it appears that the parties went on to offer proof in regard to the filing of this September proof as alleged, Mr. Fuller giving testimony that he filed it at the office at such a date, and Mr. Irving giving testimony in regard to the matter which tended to show, at least, proof to the contrary. There was objection made to the proofs at this time, on the ground that they were not in proper form, and there was considerable discussion upon that question and quite a number of questions asked by the court, and the result was that while counsel were objecting that they were not in proper form, yet the evidence showed that at the time when they were said to have been filed at the office of the company, by Mr. Fuller, in September, 189— that they made no objection whatever to the form of the proof, but simply said in reply that Gram was not a member of the company in July, 1882, nor after that time. After the evidence was all in, and after the court had permitted these proofs to be offered in evidence and counsel had commenced the argument of the case, then counsel for plaintiff made an application to be allowed to amend the petition by interlining that the proofs were filed in September instead of May, as was stated. The court allowed the amendment and it was interlined by writing "September" over "May," and it was admitted by the record that the word "May" before that time had been written, but it was practically obliterated.

Counsel for defendant below are very earnest in their objection, and in arguing the objection, that the court had no right to allow this amendment, or perhaps I should state it a little differently by saying that it was an abuse of the discretion of the court below to allow it to be done at all. We have had occasion to examine this question heretofore, in a case in Wood county, and at that time there was a very full examination of the law upon the subject, and the rule laid down by the Supreme Court is, that in a case of this kind, where testimony has been offered, without objection, that is not in accordance with the terms of the pleadings of the parties, the courts may then allow an amendment to be made in the record to conform to the evidence. They may, if objection be made at the time the testimony is offered, that it is not in accordance with the allegations of the pleadings of the parties, then allow the amendment to be made; but if the opposite party makes a showing to the court that he has been taken by surprise, or is prejudiced by the amendment, then the court shall give him time in which to make his pleadings and prepare himself for trial, and we followed those decisions in the holdings which we made in Wood county. Now, this evidence having gone in without objection, no claim being made that the party was misled in regard to it in his testimony in defense, the court permitted the pleadings to be amended, and in doing that there was no abuse of the discretion of the court, in our view, and we think that it was, in the language of the statute, "in furtherance of justice."

There is another question that is discussed here, and that is the question of the burden of proof upon the conditions. It will be observed, as has already been read, that there was given to the party a certificate wherein the company certified that he was entitled, and whereby they agreed to pay to his wife Margaret Gram and his children, the sum of \$2,000, with the proviso attached to it: "that if there shall not be sufficient members in this class to pay the maximum benefit, there shall only be paid the sum of one dollar for each member in good standing in this class at the time of the death of said Comrade Charles F. Gram, less ten per cent. to the expense and reserve fund." The allegation of the petition was, as I have already read, that the party had received this certificate, and the defendant had become bound to pay \$2,000. The defendant admitted that he had received the certificate, and that it would have been bound to pay providing Gram had not made certain representations and had not failed to pay certain assessments. And it denies that there were two thousand members of this class at the time. It does not state how many there were.

We are of the opinion that the court of common pleas did not err in holding that the burden of proof in this matter was upon the defendant, in view of the pleadings in this case. The question might also arise, and probably it was one of the questions raised by the parties on demurrer: that there should have been a distinct allegation of the full number of the class; but they did aver that they were entitled to that sum in that class. In *Fox v. Lima Natl. Bank*, 11 Dec., 127, which is a court of common pleas decision, gives a very full list of cases, and it is there held that the case belongs to that class of exceptions that are within the knowledge of the defendant exclusively; that it is a condition which relieves the party from the payment of that which he has promised by an absolute promise to pay. If there is a promise to pay \$2,000,

the company exempts itself from paying that amount upon the death of the party by a proviso that if there should be less than that number in that class, then they shall pay only one dollar for every member of that class, and that exception should be pleaded by them, should be set out by them, and should be proved by them. There is a large number of cases cited. There is *Hall v. Scottish Rite*, 6 Circ. Dec., 384, decided in Cleveland, a decision of Judge Baldwin, in which an opinion is given upon allegations of this kind. There had been allegations that at the time the party became a member of the order there were a number of members equal to the number of dollars mentioned by the certificate. The court charged the jury that the burden of proof was on the plaintiff to show that at the time the party died there was the full number of members in that particular order which would entitle him, at the given rate, to the full sum claimed in his petition. The court, by a large citation of authorities, held that the common pleas had erred in this respect. Probably there must have been some misquotation in the record itself; at any rate, the circuit court held that the court below had erred in this respect. We think the weight of authority is very clear, that the defendant was bound to prove this exception; that it was bound to show and had the means of showing, if there was not that number at the time the party entered, and more especially if there was not that number at the time he died, or was supposed to have died, which would enable him to have had the full sum of \$2,000.

Another question is raised, and I suppose it was argued on the demurrer, as I have already said, but it was raised afterwards in the pleadings, upon the right of Margaret Everding to sue. She was the wife of Gram at the time he became a member of this order; she was the wife of Gram at the time he left, in July, 1882, he having disappeared on the first day of July, 1882, and according to the testimony, has not been seen since. She waited three years after he left, and then filed a petition for divorce in the court of common pleas of this county, and obtained a decree of divorce. She had been a resident of this county for two years at least, and perhaps was at the time the pleadings were filed, although she had gone over sometime during the third year to Detroit, to stay with her family; perhaps she had gone there to live. I don't consider it very material, right here, whether she had or not. At any rate, she had come in and got a divorce, on the ground of absence and after she obtained that divorce she had married again and became the wife of this man Everding, and with him she was, at the time of the suit, and is now, I suppose, living, at Detroit, Michigan, and counsel for the association proceed upon the theory that she must have had, at the time the trial was had, and all the time, an insurable interest in the life of Charles F. Gram, and object to this suit because, having become divorced, she ceased to be a member of his family, ceased to be his wife and became the wife of another, and that therefore her insurable interest had terminated, and she had no right to this money. Now the certificate, as will be remembered, is issued payable, in case of his death, to his wife, Margaret Gram, and his children. Some of these certificates are made payable to the members of the family, and some in one form and some in another. Now, this question comes here and has been argued upon demurrer, and is before the court. We think this question is decided by *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S., 457, decided in 1888, where there is a very full citation of authorities and a very full decision of the

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case. That was a case where there was a life insurance made upon a man and his wife, payable, I believe, to the survivor. Afterwards they became divorced and she intermarried with another party, and was the wife of another party at the time of the commencement of the suit. The first husband died, and thereupon suit was brought for the recovery of the amount of the insurance, and this very question was raised and was argued by counsel. The case went up from Cincinnati and was argued by Johnson, of Hoadly & Johnson, and the Supreme Court gave a decision upon the case and treat the law as well established and give citations, treating it as a case so clear that it did not need a large amount of argument. Life insurance proceeds, not upon the theory held in regard to fire insurance, where there must be an insurable interest continuing in the party holding the insurance down to the time of the loss, but the court say it is sufficient that there was such a relation at the time the policy was issued, that the party would be entitled to be a beneficiary at the time the policy issued, and that having existed at the time the policy was issued, no matter what occurred afterwards, the assured interest in the policy could not be terminated; that the party being a beneficiary, the contract continued to be an obligation to pay a certain amount of money on the happening of a certain event, and that Court held that the divorce of the party and the intermarriage of the party made no difference whatever, and that she was entitled to recover and receive the benefit. It is so decided by leading cases on insurance, and we think this is a correct statement of the law of the case.

This certificate reads that there shall be paid to Margaret Gram, who was then his wife, and designates her as the particular person to whom this sum was to be paid in connection with his children, and the suit is brought in her name and in the name of the children, and we have no doubt but they are the proper persons to bring the suit, and are the proper persons to recover if anybody is entitled to recover, the amount of this certificate.

There was a question discussed in regard to the payment of the assessment; a question as to whether this man was a member of this lodge or council; whether the policy was still in force which was being sued upon. It appears from the testimony that after Gram had become a member of the castle he paid up his dues from time to time, and that the last dues which he paid was on June 17, being the June assessment, which was due on the first of June, 1882, being a few days before he went away. It further appears that there was issued to the secretary of the castle, from the home office, as we should say, that is, from the supreme commandery, in proper form, an assessment for July, and that that was received by the secretary and sent out by him to Gram, at what time I do not know, but I believe he sent them on the first, and this came to the house after Gram had disappeared, as I understand. By the rules of the company, he had thirty days to pay that assessment in. These assessments were found among his papers. On July 10, Mrs. Gram went to the office of the company and offered to pay \$3.00. The officers declined to receive this, from the fact that he had disappeared and they wanted to get further news from him, what had become of him; and also wanted further orders from their superior officers, the general commandery. However, they never made any application to the supreme commandery, and there was nothing said about that from that time forward down to this, and no further assessments were ever made or demanded of Gram.

These assessments would be due, then, on the first day of July by the rules of the company. But also, by the rules of the company, if a party did not pay them upon the first day of July, he might pay them at any time within thirty days thereafter. By the rules of the company also the party would be suspended on the first day of July. But, without any further examination, or anything of that kind, by the rules of the company, he might within the next thirty days, pay the amount of the assessment and be fully reinstated and taken back as a member; his suspension should not really take effect, practically, until the expiration of thirty days, while he had the right to pay.

Now the question is made whether or not he was a member of the order and the certificate was in force at the time the suit was brought. There has been considerable discussion upon the question of this seven year limitation and a good deal of learning expended upon that in the authorities which have been cited. The presumption of law is, that after the expiration of that time from his disappearance, taking, of course, into account the circumstances under which he disappeared, if he has not been heard from he is presumed to be dead. The question is as to the status of the presumption during the seven years.

There is a very instructive case upon that question in 72 Wisconsin, page 170, and that seems to give all the law upon the subject down to the present time. The holding of that authority is that there is no presumption upon the question one way or the other. It is contended here that the plaintiff should prove that the person was living on July 10, at the time this money was tendered. On the other hand, it was claimed that the defendant company should prove that the party was dead before that time. The court state that there was no presumption that the party had died until seven years had elapsed, and then the law presumes that the party is dead. Now we are of the opinion that Mrs. Gram had the right to tender that money. She was the beneficiary in that certificate or policy, and she had a right to tender it on behalf of her husband, so as to keep that policy alive, if peradventure the man might return. They refused to take it simply for the reason that he had gone away, and they not knowing whether he was dead or not. We think that the proof, if any proof was needed, should have come from them that the party was dead at the time the tender was made, and the charge of the court proceeded upon that assumption. The case went to the jury which found for the plaintiff, and the court sustained that finding, and we think it properly did so. That is one of the leading points in the case.

Judge Pike: "Does the court make any finding on the refusal to allow the introduction of the record of the divorce suit?"

The Court: "We see no error in that. The question was discussed there, and the question proceeded in the discussion as to what she might have done or set up, and had something to do with the proof that he was dead. We do not understand that if she had admitted that he was living, or dead, that it would have changed the presumption of law. The fact of the divorce was admitted, and was before the jury. There was no presumption that the man was living or dead. This woman could not marry again during the seven years without subjecting herself to a liability to be prosecuted for bigamy, for, as long ago as 1880, I think it was, a court in Massachusetts held that where a woman had married within five years, although she had heard that her husband was dead, she was held not entitled to marry until after the seven years. This

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woman would have been subject to a prosecution for bigamy if she had married within that time without a divorce. It was proper for her under the divorce laws of the state, and we think it is the same in Michigan, to make an application for the purpose of clearing herself of the marriage relation which existed, and she proceeded upon the presumption that he was still living as she properly should. There was no presumption of law as to his death until seven years had expired from the date at which he had disappeared. We do not see how the fact of the divorce cuts any figure in the case in regard to that presumption. Either party might have offered evidence for the purpose of showing the fact that he had died at any time within the period of seven years, as they might have offered evidence for the purpose of showing that he did not die at all. As has been said, there was in the case no presumption except the presumption of law. He had gone away and had not been heard of. Nobody knew whether he was alive or dead. We have read the charge and the requests to charge, and we are clear in the opinion that the court gave the law as fully as the plaintiff or the defendant was entitled to have it, and that there was no error in declining to give further charges asked by the defendant below. After a very careful examination of the record, we are clearly of the opinion that the judgment of the court of common pleas should be affirmed, but there was reasonable cause for bringing the case before this court.

The plaintiff in error excepted to the action of the court in affirming the judgment below.

WILLS.

[Wayne Circuit Court, September Term, 1900.]

Adams, Douglass and Voorhees, JJ.

AQUILA WILEY, EXECUTOR, V. WILLIAM T. BRICKER ET AL.

1. WILL—DEVISE TO CLASS—TIME OF DISTRIBUTION.

Where a legacy is given by will to a class of individuals in general terms, and no period is fixed for the distribution, such time for distribution is the death of the testator, and only members of the class then in being are entitled to share the legacy. But where the time of distribution is postponed by the terms of the will to some period subsequent to the testator's death, all of such class *in esse* at the time fixed for the distribution are entitled to share therein.

2. SAME—DEVISE TO CLASS—PRESENT BEQUEST.

Where a devise to a class is a present bequest, the beneficiaries who are *in esse* at the death of the testator take vested interests in the fund, but subject to open and let in after-born members of such class who shall come into being before the time appointed for distribution.

3. SAME—DEVISE TO CLASS—PERIOD OF DISTRIBUTION.

Where the distribution of a devise to a class is postponed by the terms of the will until the attainment of a given age by the members of such class, the legacy applies only to those who are living at the death of the testator, and who shall come into existence before the first of such class attains the age named, this being the period when the fund is first distributable with respect to any member of such class.

4. SAME—DEVISE TO CLASS—RIGHTS OF AFTER-BORN CHILDREN.

Where, under the terms of a will, the members of a class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in after-born children, they take their vested interests in their shares, subject to the distribution of such shares as the members of the class are increased by future births, and, on the death of any of the children prior to the period for the distribution, their shares go to their respective representatives.

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5. SAME—DEVISE TO CLASS—TIME OF DISTRIBUTION.

Where a will provides that the children of the testatrix's brother J. take the remaining half of a certain residue, said residue to be shared by them equally, and to be paid to them respectively as they arrive at the age of majority, the shares of said children to be kept at interest by the executor of the will until so paid; when at the death of the testatrix, said J. had only three children living, but after the testatrix's death and before the oldest of said three children arrived at the age of majority, two other children were born to said J., said two children are entitled to share equally with said three children in said residue; the division to be made when the eldest of the three becomes of age, and the share of such eldest child, to be then paid to it; the shares of the others to be kept at interest by the executor, until said children respectively arrive at the age of majority, when their respective shares will be due and payable to them.

APPEAL.

A. Durbin Metz, for plaintiff.

Mahlon Rouch, for defendant.

VOORHEES, J.

Plaintiff as executor of the last will and testament of Ada M. Bricker, deceased, brought an action in the court of common pleas of this county, under Sec. 6202, Rev. Stat., asking direction of the court respecting the estate and the construction of the eighth item of her will, which is in words following:

"Item 8th. I give and bequeath to my sister Harriet E. Bricker and my brother Joseph P. C. Bricker, each one fourth of the residue of my estate; and to the children of my brother John T. Bricker, remaining one-half of such residue; said bequest to the children of my brother John T. Bricker to be shared by them equally, and to be paid to them respectively as they arrive at the age of majority, the shares of said children to be kept at interest by my executor until so paid."

At the time of the execution of the will and the death of the testatrix, said John T. Bricker had only three children, namely, William T. Bricker, Albert T. Bricker and Mary T. Bricker; William T., the eldest, became of age on December 19, 1899; and the testatrix, Ada M. Bricker, died prior thereto, to-wit: on October 26, 1887. Since the death of the testatrix, and before said William T. Bricker became of age two other children were born to the said John T. Bricker, namely, Ellen and Margaret Bricker.

The contention, and the only contention, arises under the eighth item of the will, and is between the children of John T. Bricker, who were born prior to and were living at the time of the execution of the will, and prior to the death of the testatrix, and the two born after her death, and before said William T. Bricker, the eldest child of John T. became of age.

The former contend that they are entitled to the bequest mentioned in said eighth item, exclusive of the two children born after the making of the will.

The bequest in this case, is to the children of the testatrix's brother, John T. Bricker, without naming them, or in any way designating them as by number, or children then living.

The general rule, that a will speaks as of the death of the testator, is subject to the qualification that, when a testator expressly refers to a condition of things as existing at the time of the execution, it will speak as of that date. *Board of Ed. v. Ladd, Admr.*, 26 Ohio St., 210-213.

Under this rule of construction or exception, if the testator devises property to children as a class, whom he describes as now living, meaning at the execution of the will, only those who are living at that date will be entitled to take, to the exclusion of the heirs of those who have died before the execution, and of children who are born subsequently thereto. And a devise to children who are specifically named, is a devise to them as individuals and not as a fluctuating class. 2 Underhill on the law of Wills, section 552.

Where the gift is simply to the children of the testator, or to the children of A, and it is not preceded by a prior life estate, but is stated in general terms to be payable when the beneficiaries attain twenty-one years of age, such children only will take who are in being at the death of the testator, or who come into existence before the eldest child, who is also living at the death of the testator, shall attain twenty-one years of age, including in each case a child *en ventre sa mere*, and the issue of a child deceased between the death of the testator and the date of distribution. *Ib.*, section 554.

"Where a legacy is given to a class of individuals in general terms, as to the children or grandchildren of a person named, and no period is fixed for distribution, the time for distribution will be the death of the testator. *Viner v. Francis*, 2 Cox C. C., 190; *Devisme v. Mello*, 1 Bro. C. C., 537; 2 *Jarman on Wills* (6 Ed.), 1010, and the cases cited. * * * But, where the distribution is by the terms of the will deferred to some time after the testator's death, the gift will embrace not only all the children or members of the class living at the death of the testator, but all those who shall subsequently come into existence and are living at the time designated for the distribution. If the bequest is a present bequest, the beneficiaries who are *in esse* at the death of the testator will take vested interest in the fund, but subject to open and let in after-born children who shall come into being and belong to the class at the time appointed for the distribution, and, where the distribution is postponed until the attainment of a given age by the children, the legacy will apply only to those who are living at the death of the testator and who shall come into existence before the first child attains the age named, this being the period when the fund is first distributed with respect to any member of the class."

Where the members of a class take vested interest in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in after-born children, they take their vested interest in their share subject to the distribution of those shares as the members of this class are increased by future births, and, on the death of any of the children previous to the period for distribution, their shares will go to their respective representatives. *Tucker v. Bishop*, 16 N. Y., 402; *Thomas v. Thomas*, 149 Mo., 426, s. c. 73 Am. St. Rep., 405.

The rule as to ascertainment of the class to take a gift to be paid at a certain age, or to such as attain a certain age, is concisely laid down in *Theobald on Wills*, 143, 144, and cited in 2 *Jarman on Wills*, (5 Am Ed.) p. 712, note 13:

"First—If any member of a class attain twenty-one in the testator's lifetime, the class is fixed at the testator's death (not including a child *en ventre* at the testator's death).

"Second—If not, all born at the testator's death and coming into existence before the eldest attain twenty-one, are admitted."

"It has also been established," says Jarman, *Ib.*, "that where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply to those who are living at the death of the testator, and who come into existence before the first child attains that age, *i. e.*, the period when the fund becomes distributable in respect to any one object, or member of the class. * * * Thus, where a legacy is given to the children, or to all the children of A, to be payable at the age of twenty-one, or to Z for life, and after his decease to the children of A, to be payable at twenty-one, and it happens that any child in the former case at the death of the testator, and in the latter at the death of Z, have attained twenty-one, so that his or her share would be immediately payable, no subsequently born child will take; but if at the period of such death no child should have attained the age of twenty-one, then all the children of A, who may subsequently come into existence before one shall have attained that age will be also included. (In short, whichever event happens last marks the period of distribution and for ascertaining the class.)"

"The judicial disposition," says Schouler on Wills, (2 Ed.) sec. 530, "is to let in subsequent issue and near relations of a class as generously as possible where the terms of the will justify a distinction. That distinction is found when the aggregate fund to the class is not distributable at once, and the question who shall compose the class may conveniently be postponed; or, in general, where the total amount of the gift does not depend upon the number of participants admitted to share it. Hence the English rule, confirmed by many American precedents, that the devise or bequest of a *corpus* or aggregate fund for children as a class, where the gift is not immediate, vests in all the children in existence at the testator's death, but so as to open and let in children who may come into existence afterwards at any time before the fund is distributable."

Another rule of presumption (*Ib.*, sec. 531) in this connection is, that where an aggregate fund is given to children as a class, and the share of each child is made payable on attaining a given age, or on marriage, the period of distribution is the time when the first child takes his share and those born later are excluded. *Whitbread v. Lord St. John*, 10 Ves., 152; *Clark v. Clark*, 8 Sim., 59; *Dawson v. Massey*, 2 Ch. Div., 753; *Hubbard v. Lloyd*, 6 Cush., 522, s. c. 53 Am. Dec., 55; *Handberry v. Doolittle*, 38 Ill., 202; *Andrews v. Partington*, 3 Brown Ch., 401.

In *Ringrose v. Bramham*, 2 Cox, 384, in speaking of the difference between an aggregate sum to a class and a specific sum to each individual of a class, where a gross sum of three hundred and fifty pounds sterling was given to children, to be paid to them in equal shares at twenty-one, the court said: "There was no inconvenience in postponing the vesting of those shares until some one of them attain that age, so as to let in the children born in the meantime, because there was nothing to do but set apart the sum of three hundred and fifty pounds sterling, and the residue of the testator's personal estate might be immediately divided; for whether more or fewer children divided the three hundred and fifty pounds sterling, still they could have but three hundred and fifty pounds sterling amongst them. But here there are distinct legacies of fifty pounds sterling to each of the children, and therefore, if I am to let in all the children of these two persons born at any future time, I must postpone the distribution of the testator's personal estate until the death of the parents for I can never divide the residue until I know how many legacies of fifty pounds sterling are payable."

Recurring again to the eighth item of the will of Ada M. Bricker, the language is: "I give and bequeath to my sister, Harriet E. Bricker, and my brother, Joseph P. C. Bricker, each one-fourth of the residue of my estate; and to the children of my brother, John T. Bricker, the remaining one-half of such residue; said bequest to the children of my brother, John T. Bricker, to be shared by them equally, and to be paid to them respectively as they arrive at the age of majority, the shares of said children to be kept at interest by my executor until so paid."

It would seem from the authorities that the period of distribution fixed by the testatrix is the majority of the oldest child of John T. Bricker. The gift is a present one, but the time appointed for distribution, according to the authorities cited, would be the coming of age of the eldest child. This would fix the time for division, but the shares then to be ascertained are to be paid to the children respectively as they arrive at the age of majority, the shares to be kept at interest by the executor until so paid.

While, therefore, the three children living at the time of the death of the testatrix took vested interests, they were subject to open and let in any and all after-born children of said John T. Bricker who should come into being and answer the description when his eldest child arrived at its majority. As the record discloses three children of John T. Bricker, namely, William T., Albert T., and Mary T. Bricker were living at the death of the testatrix; and said William T. became of age on December 19, 1899, after the death of said testatrix. Before William T. became of age, two other children were born to said John T. Bricker, and it is contended by counsel for the three first named that these last born children are not entitled to share in said legacy given to the children of said John T. Bricker.

The general rule for the construction of a will is, that the intention of the testator is to be collected not from any particular or detached clause of the will, but from the whole taken together, and the general intent is to be preferred to a particular one.

It is contended by counsel for the three children, who were living at the time the will was executed, and at the death of the testatrix, that the testatrix, by using the expression "said bequest to the children of my brother, John T. Bricker, to be shared by them equally and to be paid to them respectively as they arrive at the age of majority, the shares of said children to be kept at interest by my executor until so paid," intended that the three children then living alone were to receive the entire legacy, as there had to be a division, and the amount ascertained before it could be put at interest. In other words, that by the division and direction to put the shares at "interest until paid," could not have contemplated that after-born children were to share in the legacy. But it will be observed that the shares of the children of John T. Bricker are to be paid to them, as they arrive at the age of majority, and the time for distribution under the authorities cited is when the oldest child becomes of age. This would fix the amount or division. The shares are not to be paid to the children at that time, but only when they arrive at age, furnishing a reason for the testatrix directing that the share of each child should be kept at interest until paid. The possession or enjoyment of the gift is postponed beyond the time when the eldest arrives at age, namely, when each of said children respectively attain his or her majority.

In *Andrews v. Partington*, 3 Brown in Chancery, *supra*, Lord Thurlow, the Lord Chancellor said: "Where a time of payment was

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pointed out, as where a legacy is given to all the children of A, when they shall attain twenty-one, it was too late to say that the time so pointed out shall not regulate among what children the distribution shall be made. It must be among the children *in esse* at the time the eldest attain such age."

The general rule being then so well established, we hold that the two children born to John T. Bricker after the death of the testatrix, but before William T., the eldest son, became of age, are entitled to share equally in the distribution of the legacy given to the children of John T. Bricker under the eighth item of the will of Ada M. Bricker; that the division should be made as of the date that William T. became of age, and to be divided in five shares. William T. is entitled to receive the one-fifth on arriving at age, the shares of the other children are to be kept at interest by the executor until they respectively arrive at age, when each will be entitled to receive his or her share with its accumulated interest.

This is the decree of the court.

WRONGFUL DEATH.

[Seneca Circuit Court, May Term, 1900.]

Price, Norris and Day, JJ.

ELIZABETH RONKER ET AL. V. I. L. ST. JOHN.

1. WRONGFUL DEATH—RULE AS TO PROXIMATE CAUSE.

To warrant recovery of damages for death caused by wrongful act, the act assigned as the cause must be the proximate cause, with no act of decedent intervening or standing next and nearest to death. When the act of decedent intervenes and breaks the casual connection between the wrongful act complained of and the death, the act assigned cannot be said to have been the proximate cause.

2. RULES APPLIED—SALE OF POISON TO DRUNKEN MAN.

Where a druggist sold strychnine to an intoxicated man, and neglected to put upon the package the label required by statute, as a notice and warning of its contents, and the purchaser, while still intoxicated, took the strychnine, from the effects of which he died, the act of selling the poison and neglecting to label it were not, either the one or the other, or both, the proximate cause of death; the proximate cause was the act of the man himself in taking the poison, and for which the druggist is not responsible in damages.

HEARD ON ERROR.

A. Skransewsky and *E. E. Williams*, for plaintiff in error.
McCauley & Weller, for defendant in error.

NORRIS, J.

Plaintiff in error, as the administratrix of the estate of John Ronker, commenced her action in the court of common pleas of this county to recover against the defendant, I. L. St. John, under sec. 6134, Rev. Stat., for causing the death of said Ronker by defendant's wrongful act, neglect and default.

After making formal averments in her petition, she tenders as the facts upon which she bases her right to recover, that Ronker, her decedent, was at periodical times in the habit of becoming intoxicated, which fact was well known to the defendant. That on May 12, 1899, in

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the city of Tiffin, defendant was engaged in the business of selling drugs and medicines, and filling prescriptions. On that day Ronker, while in a state of intoxication, applied to the defendant for a certain poisonous drug known as strychnine. The defendant then well knew that Ronker was intoxicated, and he negligently sold the said poison to him. That he sold the strychnine to him, and negligently and unlawfully failed to put upon the package in which the poison was enclosed, a label having thereon in red ink the name by which the drug is commonly known, the warning emblem of the skull and cross bones, the word "caution" and "poison," and the names of two of the most readily obtainable and effective antidotes to the poison as the law provides. That Ronker, while in said intoxicated condition, after procuring the poison as recited, took the same, and from its effects he died.

Plaintiff says that by reason of said unlawful and negligent sale of said drug to Ronker while he was so intoxicated, and the failure of the defendant to label the package as required by law, and all this with full knowledge upon the defendant's part of Ronker's habits and condition, and that he was not capable of knowing the effects of the deadly drug while in said state of intoxication, defendant has been guilty of causing the death of said Ronker, to her damage in the sum of \$10,000, which she seeks to recover.

To this petition the defendant filed his general demurrer, "that the allegations of the petition are not sufficient to constitute a cause of action against him." This demurrer the trial court sustained, and the plaintiff not desiring to amend her petition or to plead further, it was adjudged that the petition be dismissed and the defendant go hence without day, and the plaintiff pay the costs.

The plaintiff seeks to reverse the judgment of the common pleas, and assigns for cause, in substance, that the judgment of the trial court is contrary to law, and that the court erred in sustaining the demurrer to her said petition.

The acts of negligence charged in the petition and upon which plaintiff relies to fix liability of the defendant are, that defendant sold the poison to Ronker, while he, Ronker, was in a state of intoxication, of which condition defendant then had knowledge; and that defendant failed and neglected to place upon the package the cautionary label required by the statute.

Selling the poison to Ronker while he was in the condition described in the petition, with knowledge upon defendant's part that he was intoxicated, could not of itself have caused Ronker's death, and failing to put the label upon the package which the law required, did not of itself directly contribute to that result; and neither the one, nor the other, or both, as here pleaded, could have resulted in Ronker's death, or even injury. While the selling or act of sale under the circumstances recited and the failure to place the label on the package may have been, both in commission and omission, wrongful acts, yet the petition discloses that there intervened the act of decedent himself, which stands next and nearest to his death. That the proximate act, that which was the closest and proximate cause, and without which death would not have resulted, and in the absence of which the sale and failure to label would have been harmless so far as affects the consequences for which plaintiff seeks to recover, was the taking of the poison, self-administered by Ronker, not

induced by defendant, not compelled by him, not with his knowledge or advice or consent, but the voluntary or involuntary act of Ronker himself, in which defendant had no part.

While the petition makes averment that the defendant knew Rouker was so intoxicated that he did not know the effect of the drug, the pleading falls short of making averment that Ronker's condition at the time of the sale was such that he did not in fact know the effect of strychnine when introduced into the human stomach. Neither does it make declaration that when he took it he was not aware of his act. But be that as it may, the act of the defendant of which plaintiff complains could in nowise, as stated in this petition, be held answerable as the proximate cause of death.

The case at bar bears no semblance to the illustration of putting a razor in the hands of an infant, or of a drunken man in front of a locomotive with the eye of the engine driver upon him. In either of the instances quoted a reasonable man would anticipate but one result: to the infant the natural and probable consequences would be bodily harm; to the drunken man on the railroad track the inevitable result would be, unless the locomotive was stopped, that the machine would pass over the drunken man's body. In these illustrations the inevitable consequences are present and apparent. But not so here. This petition does not put St. John in a position in which a reasonably prudent man under similar circumstances would have anticipated the result. It does not follow as a consequence, and it is not to be expected, nor foreseen, nor suspicioned, from the fact of intoxication alone, that an intoxicated man who gets possession of strychnine will take it. It is not an act which so often occurs as to warn a prudent man to beware of its probability. This petition says that deceased was in mental condition to apply for the purchase of that drug in the ordinary matter in which business of that character is transacted; so he was not entirely devoid of mental equipoise. He knew what he wanted, and bought it. So that a label would not have extended his information as to what he was buying or had bought.

Aside from the fact that Ronker was intoxicated, and might carelessly dispose of or place the package so as to injure others, there was nothing to call upon defendant to anticipate evil consequences from the sale or from the failure to label the package; but this danger and the evil result of these possible acts of deceased, which defendant ought to have guarded against, is not the injury complained of here.

Deceased was intoxicated and used the poison against his own life, and because he did so plaintiff seeks to hold defendant liable. If death had not ensued, but injury merely to Ronker, could he have maintained his action and have recovered? Was he not guilty of negligence in putting himself in condition to thus hurt himself with the means thus placed in his hands by the defendant, because without his own act in becoming intoxicated and in administering poison to himself, as pleaded by this petition, no injury would have resulted to him from the act of the defendant?

We are of the opinion that the acts of the deceased, his own negligent acts, were the proximate cause of his death, and that they were independent acts, not dependent upon the sale or the failure of the defendant to label, but were substantive acts and proximate acts which intervened and broke any possible causal connection between the acts of

the defendant and the death of Ronker, and rendered the sale and failure to label remote acts.

With this view we find no error in the record to the prejudice of plaintiff in error. The judgment of the common pleas is affirmed at costs of plaintiff in error, and the case is remanded for execution.

BANKS—NEGLIGENCE OF OFFICERS.

[Allen Circuit Court, March Term, 1900.]

Price, Norris and Day, JJ.

GUS KALB ET AL. V. AMERICAN NATIONAL BANK ET AL.

1. ACTIONS BY CORPORATIONS IN LIQUIDATION.

When the condition arrives which drives an incorporated company into liquidation, when it must marshal and collect its assets, and pay its debts, and wind up its business and adjust its affairs, its power to assert and defend its rights, is most strong, because the necessity is then most imperative. The last sign of vitality of an incorporated company is the power to maintain and defend an action; and the nature and purpose of the action is the test of whether or not the company has sufficient life to maintain it.

2. DUTY OF PRESIDENT TO SUE—WITHOUT SPECIFIC AUTHORITY.

When an incorporated company goes into liquidation, it becomes the special function of its president, for the purpose of winding up its affairs, to see that actions to that end are maintained and defended; and he may do this without specific authority of the board of directors.

3. MAY SUE TO RECOVER FUNDS LOST BY OFFICERS.

A corporation, by having gone into liquidation, having wound up its affairs and disposed of its stock and assets, is not thereby deprived of the right to sue to recover funds which it is claimed were negligently lost by its officers or servants.

4. ACTION RATIFIED BY CONDUCT.

An action being litigated and pursued by a corporation from one court to another, in itself refutes a claim that it was not the purpose of the board of directors to institute and maintain it, and amounts to an adoption of the act of that board in that regard, and ratifies it by conduct.

5. BANKING CORPORATION—RESOLUTION AS TO LOSS OF FUNDS.

A resolution passed by the board of directors of a banking corporation exonerating an officer of the bank from any liability for the loss of money which was stolen or which disappeared from the bank, does not amount to a relinquishment of the claim or estop the corporation from subsequently bringing suit to recover the money on the ground that it was lost through the negligence of the officials.

6. RULE AS TO DEGREE OF CARE AND LIABILITY FOR LOSS.

An officer of an incorporated company, entitled, as against everybody, to the care and control of its assets, and who accepts that service and employment, while he may not be an insurer, yet, when his duties are fixed and determined for him, in the accomplishment of that service, and the manner prescribed, and the place fixed, and the wherewithal provided by which he may safely perform that engagement, is held to the exercise of such care to effect it as an ordinarily prudent man, under the same or similar circumstances, would exercise; and if he fails in this, and loss directly results, he must make good such loss.

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7. CAUSE OF ACTION AGAINST OFFICERS OF A BANK.

A petition in an action by a banking corporation against its officers, the vice-president and cashier, setting forth the character of the plaintiff and its business, that it made ample provisions for the safe keeping of its funds, by vault and safe and locks and time locks, of approved strength and pattern, the official character and employment of defendants, and the acceptance of the duties and responsibilities by each of his respective office, that it was their duty, and the duty of each of them, to have charge of, and to keep the money of the bank, and to see to it that at proper times it was kept in the safe and vault and behind the locks and bolts and bars provided for its reception, and averring that they failed in this, that they did not use the equipment provided for the safety of the money and by the use of which it would have been preserved, and that by reason of this neglect to do so, the money disappeared and has never been returned or its loss made good, states a cause of action against such officers.

8. MEANING OF REASONABLE CARE—CHARGE TO JURY.

Reasonable care, upon the part of officers having the care of the funds of a bank, in the the matter of attending to the vault doors, is to lock them, and to see that they were locked. And to instruct the jury, in such case, that if the officers "acted in good faith about the affairs of the bank, and used reasonable diligence and care in and about the closing and locking of the door" that they would be relieved from liability, would have been improper.

9. VERDICT NOT AGAINST EVIDENCE.

Where the evidence shows that money disappeared from the vaults of a bank on a certain date, and it appears that the combinations and time locks were not broken or disturbed, and it is also shown that if said locks and combinations had been set, as it was the duty of the officers to set them, it would have been a physical impossibility to have secured the money without destroying or breaking the lock, as against the mere assertion of the officers that the doors were closed and the locks adjusted, a verdict based upon the conclusion that the officers negligently failed to perform that duty, can not be said to be against the weight of the evidence.

HEARD ON ERROR.

Cable & Parmenter, for plaintiffs in error.

Richie, Leland & Robey, and *Ridenhour & Halfhill*, for defendants in error.

NORRIS, J.

On December 24, 1898, the American National Bank of Lima was conducting a banking business under the national banking laws of the United States, in the city of Lima. The bank commenced its action in the court of common pleas of Allen county, against Gus. Kalb and N. L. Micheals, the plaintiffs in error here, and predicated its claim for recovery upon substantially these allegations of fact:

Its business was conducted in a building fitted out with vault and safe and strong box, in which to securely keep its valuables and money. To the vault was an outer and inner steel door. The outer vault door was equipped with a combination lock with time attachment; the inner door of the vault was furnished with two combination locks. The safe inside the vault was provided upon its outer door with a combination lock with time attachment; within the safe was a steel compartment or strong box, upon the door of which was also a combination lock. These combination locks, when properly applied to the function of keeping the doors closed and bolted, will only yield access to the various places which they thus guard, to one who knows the combinations and properly employs them. The time apparatus, when set and in motion has such control of the locks to which they are attached as to prevent the effec-

tual use of the combination while the timers are in motion, and makes it, during that period, impossible for one to gain access to the places they thus guard, however carefully and correctly they may manipulate the combinations. All these appliances provided for the safe keeping of the assets of this bank, were of standard make and quality and pattern.

Prior to December 24, 1898, Kalb was the cashier of said bank, and Michaels was the vice-president of said banking corporation, each upon salary, and with the duties of each fixed under said employment. Kalb, as cashier, and Michaels, as vice-president, had together the care and custody of the money of the bank; Michaels in this regard being the assistant of Kalb, and as such they had charge and control of the safe and vault, and of the apparatus for the safe keeping of the money. It was the duty of both, and the duty of each of them, to see that the bank's money was put in the place of security thus provided, and that all the guards afforded by the appliances for its safety should, at the proper time, be used and set in motion.

On December 24, 1898, \$18,252.72 of the money of the bank was thus in the custody of defendants, which to safely keep was thus the duty of defendants, and this sum so in their custody on December 24 at the close of that day's business, they did not have in said safe or vault or bank on December 27, the next business day after the twenty-fourth, and ever since have failed to produce and to restore to plaintiff said sum or any part thereof; and that the absence of this money from the vault and from the bank, and its loss, was occasioned by, and was the result of, the failure of Kalb and Michaels to place the same in the vault and to use the appliances provided by plaintiff for keeping it safely there, and that by reason of all this, plaintiff's cause of action arises against them, and it asks for judgment.

Kalb answers and objects to the jurisdiction of the court, because the stockholders of plaintiff, by resolution, declared the necessity of placing the bank in liquidation, and of winding up its affairs, and pursuant to this, its affairs were wound up and its business ended, all before the commencement of this action. And that this suit was instituted by the president of said bank and without any authority from the stockholders or board of directors, and that hence plaintiff has no capacity to sue, and the court is without jurisdiction.

Kalb says that before the filing of the petition, after the bank went into liquidation and ceased to carry on business, he, by purchase, became the owner of all its capital stock.

That he bought the stock at par and with all the assets of the bank, and assumed and has paid all the liabilities of the concern, and that no stockholder or officer of said institution had authority to bring or maintain the action. He admits that he was the cashier of the bank, and that money, the funds of said bank to the amount claimed in the petition, was taken therefrom. But he says it was done without his knowledge, fault or negligence.

The reply to Kalb's answer admits the action of the bank as to liquidation, and denies all else in the answer.

Michaels answers to the jurisdiction of the court and capacity of plaintiff to sue and maintain the suit, in substance as is pleaded by Kalb, and he pleads the liquidation of the concern, and the purchase of its

assets and stock by Kalb. He admits that he was the vice-president with duties as recited in the petition, and that the money of the bank, to the amount claimed, was under the care of himself and the cashier in the vault of the bank, and says that between December 24 and 27, 1898, said money was stolen from said vault, without his knowledge or neglect, by some person unknown to him; and because of this, the defendants have never produced or replaced the same; and he denies all else in the petition. The reply to this is a denial.

The issues thus tendered came on for trial to a jury in the common pleas, and when the plaintiff had introduced its evidence and rested its case, each defendant, for himself, filed his separate motion that the court arrest the evidence from the jury and direct a verdict in his favor. Each of these motions the court overruled. Thereupon the defendants introduced their evidence, and the case was submitted to the jury. The jury returned its verdict for the plaintiff against both defendants. Each defendant filed his motion for new trial. Before the court disposed of either these motions, Kalb asked leave of the court to so amend his separate amended answer, as to make it conform to the facts, as he claimed the evidence showed the facts to be. This amendment the court did not permit. Thereupon both motions for new trial were overruled, and the court entered its judgment on the verdict. A portion of the amount of the verdict has been remitted by the plaintiff.

Each defendant in his own behalf prosecutes error by separate petitions. Kalb in his petition, assigns as matter prejudicial to his cause:

That the court erred in overruling his motion for new trial.

Error in rendering judgment on the verdict.

Error in refusing him leave to amend his amended answer so as to conform to the facts produced in evidence.

Error in refusing to arrest the evidence and direct the jury to return a verdict in his favor.

Because the petition does not state facts to constitute a cause of action against him.

His motion for new trial also saves for review, the objection that the verdict is not sustained by the evidence and is contrary to the law of the case.

Error in the admission of evidence and the rejection of evidence.

Error in the charge as given, and in refusing to charge the jury as requested by him.

Michaels, by his petition in error, claims that the trial court erred as to his cause, and prejudiced his rights by:

Refusing to admit evidence offered in his behalf, and in receiving evidence offered by the plaintiff over his objection.

Error in overruling his motion to arrest the evidence and to direct a verdict in his favor.

Error in the charge as given and in refusing to charge as he requested.

That the verdict is not supported by the weight of the evidence.

That the facts set forth in the petition do not constitute a cause of action against him.

That the plaintiff is without authority to bring and maintain the action.

Error in overruling his motion for a new trial.

And that the verdict is irregular in form, and for a greater amount than claimed.

This last assignment of error, which is also claimed by Kalb as a reason for setting aside the verdict, may be disposed of by referring to the *remittitur* which was filed before judgment, and which was recognized by the court in determining the amount of the judgment.

We are not of the opinion that the criticism of the petition, that its averments do not support an action against defendants or either of the defendants, is borne out by an inspection of that pleading. It sets forth the character of plaintiff, and its business. That it made ample provisions for the safe keeping of its funds, by vault and safe and locks and time locks of approved strength and pattern. The official character and employment of defendants, and the acceptance of the duties and responsibilities by each of his respective office. That it was their duty, and the duty of each of them, to have charge of, and to keep the money of the bank, and to see to it that at proper times it was kept in the safe and vault and behind the locks and bolts and bars provided for its reception, and that it be unendangered and secure as near as it might be, from the hand of any person who had no right to its custody or possession. The petition says they failed in this; that the failure is attributable directly to their negligence; that they did not use the equipment provided for its safety, and by the use of which, the money would have been preserved. And that by reason of their neglect so to do, the money disappeared, and never has been returned or the loss made good, in whole or in part.

There can be no doubt that the officer of an incorporated company, entitled, as against everybody, to the care and control of its assets, and who accepts that service and employment, while he may not be an insurer, yet, when his duties are set and determined for him, in the accomplishment of that service, and the manner prescribed, and the place fixed, and the wherewithal provided by which he may safely perform that engagement, he is held to the exercise of such care to effect it as an ordinarily prudent man under the same or similar circumstances would exercise. And if he fails in this, and loss directly results from such failure, he must make good the injury which his negligence has thus occasioned.

We think the petition clearly states a case based upon this hypothesis; and hence that defendants' objection to it is not well taken.

It is urged that the action cannot be maintained by the plaintiff, and that plaintiff has no capacity to sue. That by resolution of the stockholders and by action of its board of directors, the plaintiff went into liquidation, wound up its affairs, and having thus accomplished the purpose of its corporate existence, it ceased to act in its corporate capacity, and this before the commencement of this action.

It is further urged that the determination to sue was by the vote of four of the nine directors of the bank, and that hence, even if the corporation at that time retained sufficient of its expiring vitality to approve, by its last breath, of the proceedings, it is not the act of the company, but of only an unauthorized minority of its board, and clothed none of its officers with power to institute and carry on the litigation.

We are not prepared to concur with this view of counsel.

Record minutes of the board of directors, of the action taken by the board in that behalf, and the record of the action of the board relating to the authority of Theodore Mayo, the president, to act in and about the bringing and maintaining of this suit, was offered in evidence, to sustain this proposition and defense, and was by the court rejected.

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That the bank had, by resolution, gone into voluntary liquidation, is admitted in plaintiff's reply to Kalb's answer, and of this admission both defendants have the advantage.

In the fitness of things it must be that the last sign of vitality of an incorporated company is the power to maintain and defend an action. The nature and purpose of the action itself is the test of whether or not the company has sufficient life to maintain it.

When the condition arises which drives an incorporated company into liquidation; when it must marshal and collect its assets, and pay its debts and adjust its affairs, and wind up its business; its power to assert its rights and to defend its rights, which is its distinguishing substance, as a legal entity, is most strong because necessity is then most imperative. The law does not an idle thing. It would be idle to create a corporation and suffer it to incur liabilities and acquire assets, and when the time came to adjust all, and end all, shut to it the only avenue through which the end can be attained. Under such conditions it appears to be an especial function of the president of a corporation, for the purpose of winding up its affairs, to see that actions to that end are maintained and defended. In support of this, for which I am indebted to brief of counsel, see *Morse on Banks and Banking*, 143; *Cook on Stocks and Stockholders*, 1078; 24 L. R. A., 719; 16 W. Va., 555; 39 S. W. R., 914.

That the resolution to bring suit was legally passed, even if it were necessary to confer authority to that end, is assured by sec. 26 of the by-laws of the company, which was offered in evidence, and not received by the court, and which provides, in substance, that "a majority of all directors is required to constitute a quorum to do business, and when a quorum is present a majority of a quorum shall be necessary to carry motions and resolutions." This directory consisted of nine members, and seven of them voted upon the resolution to proceed to the collection of the liability here in suit; four voted yea and three voted nay. It appears that eight members of the board were present when the resolution was voted upon; one declining to act with the board upon that occasion, refusing to vote on the resolution, leaving the seven members to transact the business of the board in that regard, and to act as the quorum. The seven did so act, and the resolution was passed by a majority of the quorum present and acting as a board, and voting upon that occasion.

So, if this proposition of defendants were well grounded, the minutes of the board offered in evidence would not tend to sustain it. They were offered and rejected, in which we see no error. As was well said, in substance, by the trial court: "The action itself here being litigated, and pursued by the plaintiff from one court to another, refutes the proposition that it was not the purpose of the board to institute and to maintain it, but is an adoption of the act of the board in that regard, and ratifies it by conduct."

It is claimed by the defendant Kalb, that the refusal of the court to permit him to so amend his separate amended answer, as to conform to the facts produced in evidence, was error prejudicial of his cause.

The matter sought to be interposed by this amendment was, in substance, that at a meeting of the board of directors, held before the commencement of the action, a resolution was passed exonerating defendant from any liability for the loss of said money. And that this resolu-

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tion of itself estopped plaintiff's action and recovery. And further, that he bought the stock and assets upon the condition that no suit was to be brought against him, because of the loss of said money. And that all stock retained by shareholders was so by them held only for the purpose of participating in whatsoever of said money might be thereafter recovered, should the same ever be found. That relying on said resolution, and upon said agreement, he bought said assets and stock. That without this he would not have so done, and that hence the claim cannot be asserted against him.

We do not regard the proposition insisted on by the amendment, that the shareholders did by that resolution in fact release and acquit defendant from liability, conformable with the evidence in the case. The resolution appears to have been a declaration of confidence in the integrity of the officers of the bank. It was to the effect, say the witnesses, for it was not spread upon the minutes of the company that, "they did not attach any blame to the officers of the bank." That is to say, they did not accuse and deem any of them guilty. But that resolution falls far short of an actual relinquishment and cession, and giving away the assets of the bank, if his claim be an asset of the concern. The resolution, instead of a final renunciation, was but the mere expression of opinion.

The other matter in the proposed amendment, that as a part of the consideration of the sale, they agreed not to bring suit for the collection of this claim, is refuted by every witness whose testimony tends to throw light upon the agreement. They all concede that it was expressly understood by those who retained their certificates of shares, and the answer itself so pleads, that they were thus held and kept by them for the purpose of participating in whatever might be realized from this claim, realized from the source where the liability existed, if any fund arose from it. So that we are not of opinion that there is error in withholding permission to file the amendment.

Coming now to the propositions of law which were requested to be given as a part of the charge, and first that of Kalb, which was requested to be given as a charge before the argument of the case to the jury. It is this:

"If you find from the testimony that Gus. Kalb acted in good faith and with ordinary care and prudence in and about the affairs of said The American National Bank, and used reasonable diligence and care in and about the closing and locking of the outer vault door on the night of December 24, 1898, then I charge you, that even though for some cause not accounted for by the evidence in this case the money was lost from said bank, that the said Gus. Kalb is not responsible for said loss, and your verdict should be in favor of Gus. Kalb, no cause of action."

"If you find that Kalb acted in good faith and with ordinary care and prudence, in and about the affairs of said American National Bank." We think that the proposition, coupled with that which I have just read, had no place in the controversy, and was properly refused.

Reasonable care when he attempted to lock the vault door, was to lock it. Reasonable care was to see that it was locked, and to be sure that it was locked; that was the reasonable diligence he was called upon to use in and about the locking of the door. And that he acted in good faith in and about the affairs of the American National Bank, would not

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even up negligence which directly caused the loss of this money if he was guilty of such negligence. And the same may be said of the proposition of defendant Michaels which is of the same tenor and effect.

As to the other propositions which the court refused to give in form requested, without taking time to dwell upon them, such of them and parts of them as is the law of the case, and responsive to the facts, are in substance given in the general charge.

The charge itself is an excellent one, fully covering the issues and meeting each phase of the controversy.

We have examined the record thoroughly and considered carefully each of defendants' exceptions to the admission and rejection of evidence, of some of which we have already made disposition.

The objection to the introduction of evidence based on the attack upon the sufficiency of the petition, are disposed of in our opinion of the merits of that pleading. And so of certain record evidence, the exceptions saved to the introduction and rejection of evidence are so numerous as to preclude notice of each as it occurs in the record.

Objection is made to the introduction of a part of page five, and all of page six, of the pamphlet marked "Exhibit A," which appears to be a prospectus of the bank and its business. While we cannot see how it assists the plaintiff in fixing the liability of defendants, yet neither do we see how its admission was prejudicial. It is an advertisement which assists nobody and harms no one.

We find no error in the hypothetical questions permitted. They assumed the condition detailed by defendant to have existed, when they left the bank on the night of December 24. They were propounded to, and answered, such of them as were permitted to be answered, by experts who were qualified to speak, and were addressed to matters vital to the issue.

Certain records of the minutes of said company were offered by defendants in support of the assertion that defendant Kalb is the owner of the claim upon which this action is founded, having purchased the same as an asset of the bank. The record was excluded as not tending to sustain this declaration. The evidence offered enumerates and names each asset of the bank sold to and purchased by him. The claim here in suit on account of which, it would appear from other evidence offered by the defendants, that certain shareholders had retained their certificates of stock that they might participate in it when recovered, is not one of the assets named as passing by that sale. We think the evidence properly rejected.

Defendants offered to show that certain witnesses were stockholders in said bank, and the extent of their holdings; this to affect their credibility, which evidence was rejected by the court. We think no prejudice arises here, because it many times appears in the record that these same witnesses are owners of stock which they retain, and that they will participate in the amount of recovery and are interested in the event of the suit.

And altogether we find no error in the admission or rejection of evidence. Neither do we find error in refusing the motion to direct a verdict.

Now, is the verdict supported by the weight of the evidence? It is not contended but that on the night of December 24, 1898, the money here involved was in the vault of plaintiff bank, \$16,000 in the strong box, and \$3,000, about, in a box on top of the safe in the vault. It is

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not disputed that the defendants were respectively the cashier and vice-president of the bank, the latter, as he admits, the assistant of the cashier.

It is established beyond denial that, as such officers, they were the custodians of the funds of that institution by virtue of their positions, the duties of which they had undertaken to perform. And if it had never been so before, they were such custodians upon that particular occasion, when they assumed charge and had control of that place of business and its contents. The primary object for which they were there, was to receive deposits from the customers of the concern, and they did transact that business. And having, as they supposed, performed their duties, they departed. The \$15,000 had been placed in the strong box, in the afternoon. The \$3,000 of deposits was placed by defendants on top of the safe which enclosed the strong box. Upon the strong box was a combination lock, upon the door of the safe in which was the strong box, was a combination lock with a time attachment. Upon the inner door of the vault were two combination locks. Upon the massive outer door of the vault was a combination with a time attachment. These they swear were all closed and locked when they left the bank. The safe and strong box had been locked at the close of regular business hours; this was not disturbed by them, and because it was locked, they put the deposits on top of the safe. The inner vault door Michaels closed and locked, and distributed the combination. The outer door to the vault Kalb closed and locked, distributed the combination, adjusted the timer to it, set for thirty-six hours and in motion. So all the devices and apparatus which plaintiff had provided for the safety of its funds were bent in that direction and brought into requisition by these defendants before they left the bank, they so swear.

Two days intervened before the next business day, Sunday and Monday, which was Christmas day. On Sunday no less than four witnesses, both defendants, Mr. Goldsmith, the president of the bank, and the janitor, were in the bank, and the vault door was shut; this as late as four o'clock on that Sunday afternoon. On Monday, morning about seven o'clock, the janitor discovered that the outer door of the vault was open, and further investigation disclosed the fact that the inner door of the vault and the doors of the safe and strong box were unlocked, and the money, all of it, had disappeared. The outer door of the vault, though open, was locked, the time lock was running and had about four hours yet to run at the time the janitor appeared upon the scene.

Now experts, learned, and skilled, and many men who make and sell, and men who for years have employed like devices in like institutions, for like purposes, men whose interests and vocation and business, require that they investigate and understand combination locks and time locks, and the protection they afford, and the safety they insure, all testify that had the precaution been taken, and the care exercised which defendants swear they did apply upon that occasion, without force no human hand could have reached that money for thirty-six hours after the timer on the outer door of the vault was started. There was no evidence of force or violence.

And so the evidence presents a physical impossibility upon the one side, and the assertion of a fact upon the other. They can not harmonize; they can not exist together, and that they did not, the open door and the absence of the money bears witness.

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The jury concluded that the defendants were mistaken in their assertion of fact, and so found by the verdict, and we are not prepared to say, that the verdict is manifestly against the weight of the evidence.

No error appearing upon the face of the record to the prejudice of plaintiffs in error, the judgment is affirmed at their costs, and the case is remanded for execution.

EMBEZZLEMENT.

[Muskingum Circuit Court, October Term, 1900.]

Adams, Douglass and Voorhees, JJ.

JOHN W. MITCHELL V. STATE OF OHIO.

1. EMBEZZLEMENT—INDICTMENT—CRIMINAL INTENT NOT NECESSARY.

Under Sec. 6842, Rev. Stat., an indictment charging that the defendant did unlawfully and fraudulently embezzle and convert to his own use certain personal property of value, without the consent of the owner, is sufficient without alleging that the same was done with intent to embezzle.

2. CRIMINAL INTENT NOT AN ELEMENT OF EMBEZZLEMENT.

Section 6842, Rev. Stat., does not in terms make criminal intent an element of the crime of embezzlement. It provides punishment for an agent, etc., who embezzles or converts to his own use, or fraudulently takes or makes away with or secretes with intent to embezzle, etc. It is not necessary, in an indictment for embezzlement under this section, to allege the act was done with intent to embezzle and fraudulently convert, etc. The intent therein referred to has reference only to the taking and secreting of the property, and it is necessary to allege such intent only where the indictment is for such fraudulent taking and secreting, etc.

3. INDICTMENT SUFFICIENT, WHEN.

An indictment, charging that defendant, being an agent and employee, did unlawfully and fraudulently embezzle and convert to his own use, etc., charges but a single offense, as agent and employee are terms not inconsistent with one another, and it is not bad for duplicity.

4. INDICTMENT—AN ACCOMPLICE COMPETENT FOR THE STATE.

Where separate trials are awarded to parties jointly indicted, each is a competent witness for the state upon the trial of the other; and the fact of being charged as an accomplice only goes to his credibility as a witness, and does not necessarily render his testimony incredible.

5. OMITTING TO CHARGE NOT ERROR—WHEN.

It is not error for the court to omit to instruct the jury on a question of law arising in the case, unless instructions are asked by counsel.

HEARD ON ERROR.

McHenry & O'Neal, attorneys for plaintiff.

Geo. K. Browning and R. L. Holland, attorneys for defendant.

VOORHEES, J.

Plaintiff in error is indicted, tried, and convicted, under sec. 6842, Rev. Stat., which provides among other things, that

"An agent or employee of any person (except apprentices and persons under the age of eighteen years), who embezzles or converts to his own use, or fraudulently takes or makes away with, or secretes with intent to embezzle or convert to his own use, anything of value which shall come into his possession by virtue of his employment as such

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agent or employe, is guilty of embezzlement, and shall be punished as for the larceny of the thing embezzled."

The indictment in a single count charges.

"That John W. Mitchell did, on the 20th day of September, 1897, at the county of Muskingum and state of Ohio, unlawfully and fraudulently embezzle and convert to his own use, certain personal property of value in this, to-wit, that the said John W. Mitchell, being on the said 20th day of September, A. D. 1897, the agent and employee of one Leonard Guist, he, the said John W. Mitchell, not being then and there a person within the age of eighteen years, and not being then and there an apprentice, eleven sheep (a more particular description of which said eleven sheep said grand jurors are unable to give) of the value of thirty dollars, the personal property of, and belonging to, the said Leonard Guist did unlawfully and fraudulently embezzle and convert to his own use, without the consent of the said Leonard Guist, his employer, and without the assent of any owner or owners of said personal property."

To this indictment, the plaintiff in error filed a general demurrer, assigning two grounds.

First. That the indictment is defective in matters of substance, in not charging that the defendant appropriated the property wilfully, feloniously, and with intent to steal or embezzle the same.

Second. That the indictment is defective for duplicity, in joining two offenses in one count in this: That in the description of the employment of the defendant at the time the offense of embezzlement was committed, he was the agent and employee of the owner of the property embezzled. Both agent and employee are named in the statute, as descriptive of persons who may commit the offense of embezzlement.

The common pleas court overruled the demurrer, holding that neither ground was well taken.

The defendant pleaded not guilty, and on conviction, he prosecutes error to this court, alleging that the court erred:

First. In overruling the demurrer to the indictment.

Second. That the verdict of the jury is not supported by the evidence, and is against the weight of the evidence, and contrary to law.

Third. That the court erred in its charge in not directing the jury as to the weight they should give to the testimony of the witness McIntire, who was indicted jointly with Mitchell, as an aider and abetter.

There being no common law offenses in this state, the crime of embezzlement was created by statute; therefore, in deciding the question submitted, we must be governed by the statute.

In setting out a statutory offense, it is sufficient to describe it in the words of the statute, with a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to show that the statutory offense has been committed by the party therein named, and to inform him as to what is intended. "The cases are few and exceptional," says Foster, J., in *Com. v. Raymond*, 97 Mass., 569, "in which an indictment which follows the words of the statute will be held to be insufficient."

The word "embezzle" has a well-defined meaning. In the Century dictionary, "embezzle" is defined as the act "to steal slyly; purloin; filch; make off with; to appropriate fraudulently to one's own use, what

is intrusted to one's care; apply to one's private use by a breach of trust, as a clerk or servant who misapplies his master's money or valuables."

Counsel for plaintiff in error contends that in every crime or public offense, there must be a joint operation of act and intent; and that words "with intent to embezzle or steal" should have been set forth in the indictment.

The intent which is mentioned in the text books on criminal law, as essential to constitute a crime, is not necessarily an evil or wrongful intent, beyond that which is involved in the prohibited act. Whatever one voluntarily does, he of course intends; and, whenever the statute has made that act criminal, the party voluntarily doing the prohibited act is chargeable with the criminal intent, and the section of the statute defining embezzlement (Sec. 6842, Rev. Stat.), does not make intent an element of the crime of embezzlement, and not being an element of the crime, it is not necessary to allege that the act was intentionally done as a constituent part of the crime. *Com. v. Ewell*, 3 Met. (Mass.), 190; *Bish., St. Crimes*, sec. 250.

Bishop on Criminal Procedure, Vol. I, Sec. 523, says:

"It is perhaps safe to say that in all cases where a statute creates an offense, and mentions some intent as an element therein, the indictment must follow these statutes in this particular, and specify the intent. On the other hand as a general proposition, if the statute is silent concerning the intent, there need be no intent alleged in the indictment."

The offense consists in the violation of the law, not in the intent or motive by which the party is actuated.

Sedg. St. Const., 80, and authorities there cited.

In *State v. Combs*, 47 Kans., 136, s. c. 27 Pac. Rep., 818, it is said:

"The second objection, that the information contains no allegations of intent, cannot be sustained. The charge, as stated includes the evil intent of wrongfully appropriating money, intrusted by Fearn for a special purpose, to his own use, and sufficiently characterizes the intent with which the offense was committed."

In *State v. Noland*, (Mo. Sup.) 19 S. W. R., 717, the court said:

"It is next objected that the indictment is insufficient for failure to aver the intent with which the defendant converted the money to his own use. * * * It has generally been ruled under similar statutes, that an indictment substantially charging the crime in the terms of the statute is sufficient."

In *Leonard v. State*, 7 Tex. App., 435, it is said:

"It is no part of the description of the offense of embezzlement, as in theft, that it was taken with the intent to deprive the owner of the property or its value, or to appropriate it to the benefit of the taker."

In *Holsted v. State*, 41 N. J. Law, 589, Beasley, C. J., speaking for the court, said:

"Nothing in the law is more incontestable than that, with respect to statutory offenses, the maxim that crime proceeds only from a criminal mind does not necessarily apply. The cases are almost without number that vouch for this."

The case of *State v. Hopkins*, 56 Vt., 260, was an indictment for embezzlement, and in passing upon the question of intent the court said:

"The remaining question in respect to the charge is the one relating to the intent of the respondent in doing the alleged act. Was it necessary that he should have acted fraudulently and feloniously, that he should have the intent to steal, that he should have a heart void of social duty, and been fatally bent on mischief? We think not."

The statute, sec. 6842, under which this indictment was drawn, says that

"An agent * * * who embezzles or converts to his own use, or fraudulently takes or makes away with, or secretes with intent to embezzle or convert to his own use, anything of value." etc. It is urged that there should, under the statute, have been an allegation in the indictment as to the intention with which the embezzlement was done.

The supreme court of Florida, in *Thalheim v. State*, 20 Southern Rep., 938, in construing a statute very similar to section 6842, uses this language, at page 449:

"The twenty-ninth assignment of error is that the court erred in overruling defendant's motion in arrest of judgment. This motion is predicated upon alleged defects in the indictment. The statute under which this indictment is drawn provides that, 'If any * * * agent * * * embezzles or fraudulently converts to his own use, or takes or secretes with intent to do so, * * * any property,' etc. It is argued that there should, under the statute, have been an allegation in the indictment as to the intention with which the embezzlement was done. We construe the phrase, 'with intent so to do,' to refer to the taking or secreting of property; construed with other portions of the statute, it was intended to provide a penalty for the taking and secreting of property by a party with the intent to embezzle it or convert it to his own use. The phrase does not refer to the act of embezzlement. To so construe it, we would have a nonsensical provision, making it criminal for a party to embezzle and fraudulently convert property to his own use, with the intent to embezzle it or fraudulently convert it to his own use." *State v. Combs*, 47 Kans., 136; s. c. 27 Pac. Rep., 818.

"Many authorities are cited by council to the effect that, where a statute makes the intent with which the act is done a part of the description of the offense, the indictment should allege the act was done with the criminal intent. These authorities have no bearing upon the present indictment. They would be applicable to an indictment for taking and secreting the property with the intent to embezzle it, and in such case, according to such authorities, it would be essential to charge the intent with which the act was done. But, as the indictment is for the embezzlement itself, it is not necessary to charge the intent with which the act was done. *Rap. Lar.*, section 383."

The charge in the case at bar is not one for secreting property with intent to embezzle, but the indictment charges the defendant with having unlawfully and fraudulently embezzled and converted the property described to his own use, so the reason of the court in *Thalheim v. State supra*, is in point on the question of intent.

In *State v. Cunningham* (Sup. Court of Mo.), 55 S. W. Rep., 282, the court says:

"No one can be convicted of a felony in the absence of an intent to do a criminal act, but such intent in case of embezzlement may be inferred from a felonious or fraudulent conversion; citing *State v. Nolan*,

111 Mo. 474, 19 S. W. 715; Dotson v. State, 51 Ark., 119, 10 S. W. 18; People v. Wadsworth, 68 Mich., 500, 80 N. W., 99.

A casual reading of the case of State v. Cunningham, *supra*, might seem to support the contention of counsel for plaintiff in error. But it will be observed that the court recognizes that a fraudulent conversion of property by one in whose custody it is as agent, is guilty of embezzlement. The criminal intent may be inferred from a fraudulent conversion.

This principle is recognized by the supreme court of this state, in State v. Kusnich, 45 Ohio St., 535. The criminal intent was sufficiently charged in that case by the allegation that the defendant fraudulently and feloniously embezzled and converted to his own use the property.

Without the citation of further authorities, we are of the opinion that the first ground of demurrer is not well taken, and the court did not err in overruling the demurrer.

Second. Is the indictment defective for duplicity?

The statute of embezzlement makes punishable the doing of certain things by persons holding different positions of trust, such as agent, servant, or employe, etc. Where, in one transaction, the person is described as occupying two or more positions of trust, which are not inconsistent, as agent and employe, he may be charged with violating the statute in both capacities without rendering the complaint double; and the charge will be established at the trial by proof that the defendant was either the one or the other, or both. State v. Connor, 30 Ohio St., 405, 407; Hale v. State, 58 Ohio St., 676; Watson v. State, 89 Ohio St., 123; Bishop on Stat. Crimes, section 244, 1 Bishop's New Crim. Proc., section 436.

Mr. Bishop, in his new Criminal Procedure, Sec. 586, says:

"To repeat what was explained in another connection, if a statute makes criminal the doing of this, or that, mentioning several things disjunctively, there is but one offense, which may be committed in different ways; and in most instances all may be charged in a single count. But the conjunction "and" must ordinarily in the indictment take the place of "or" in the statute, else it will be ill as being uncertain."

We are not aware of any technical significance the words "agent" and "employe" have that would render them repugnant or inconsistent; and either of them might characterize an embezzlement, and properly describe the party committing it. One can be an agent and employe of the same person, having in his care and control, as such, the same property, and could unlawfully and fraudulently convert it to his own use. So we think here, the pleader, from the whole indictment, intended to charge a conversion to defendant's own use, as agent and employe of Leonard Guist, of his property without his consent.

Hence there is no misjoinder of offenses, nor is the indictment bad for duplicity.

Therefore, the second ground of demurrer is not well taken, and the court did not err in overruling the same.

Third. This brings us to the consideration of the case as presented in the record by the bill of exceptions, and the inquiry will embrace several propositions.

The material and essential allegations of the indictment which were necessary for the state to prove, briefly stated, are:

Mitchell v. State.

First. That John W. Mitchell, on or about September 20, 1897, was a person over eighteen years of age; was not an apprentice, and was the agent or employee of Leonard Guist.

Second. That, being such agent or employee, and by virtue of his employment, he then had in his possession and under his care and control, the eleven sheep described in the indictment; that they were the property of Leonard Guist, and were of some value; that said sheep, so in his possession, were, in this county, about September 20, 1897, wrongfully, fraudulently, and unlawfully sold and converted by him to his own use, without the consent of the owner.

If these facts were established on the trial by that degree of proof required in criminal cases, and no other errors appearing, the judgment of the court below should be affirmed.

Our first inquiry will be: Was Mitchell the agent or employee of Guist? The agency or employment had reference to the management and control of stock, including sheep, on the farm of Guist in Muskingum county, this state. There is really no controversy as to the agency; Mitchell himself claims he had the right to the possession, care, and control of the personal property of Guist upon his farm; that his authority went to the extent of buying, selling, and dealing in stock upon the farm. So far as the question of agency is concerned, the proof is beyond all doubt. That the property described in the indictment, namely, eleven sheep, were Leonard Guist's, and were at the time charged in Mitchell's possession and under his control as said agent and employee, are facts equally well established by the proof.

It is not material to inquire as to the scope of Mitchell's authority to buy and sell property, including sheep for Guist; he does not claim he sold the sheep as the property of Guist. His contention is that the sheep in question belonged to him, and not to Guist. Hence the question of authority or want of authority to sell them as such agent or employee is immaterial.

The important question under these respective claims and facts is: Were the sheep that Mitchell sold to Haney as his own, at the time charged in the indictment, the property of Leonard Guist, and did he know they were when he so sold them to him?

From the testimony, as shown by the record, but one conclusion can be reached, and that is that the eleven sheep sold by Mitchell to Haney on or about September 20, 1897, belonged to Guist. Were they wrongfully and fraudulently converted by Mitchell to his own use? Mitchell, in attempting to account for his possession and ownership, and how and where he got them, made different and conflicting statements. On one occasion, he claimed he bought them from McIntire; at another time, he claimed he had gotten them over at Duncan's Falls, paid for them partly with a watch. The testimony in the record tends strongly to show the falsity of both claims. McIntire testified that he did not sell these sheep to Mitchell. Another witness testified that Mitchell told him he had bought the sheep at Duncan's Falls, and when he, Mitchell, is confronted with the statement, the only answer he makes is, he did not remember making such a statement. At the trial he did not claim, nor did he attempt to prove, that he bought the sheep at Duncan's Falls, as he had told the witness he had.

The well recognized rule of law as to possession unexplained of stolen property will apply here: That, where a burglary has been committed in connection with a larceny, and the stolen property immediately

or soon thereafter is found in the actual and exclusive possession of a person who gives a false account or refuses to give any account of the manner in which he came to the possession, proof of such possession and guilty conduct is presumptive evidence, not only that he stole the property, but that he made use of the means by which access to it was obtained. *Davis v. People*, 1 *Parker's Crim. Rep.*, 447, 451; *Burrell on Circumstantial Evidence*, page 456.

Fourth. It is contended by counsel for plaintiff in error, that the witness McIntire was an accomplice, aider, and abetter to this crime, having been jointly indicted with Mitchell, and, therefore, his testimony could not be regarded by the jury. The records show that McIntire, at the close of the testimony for the state, on his motion, was discharged. He testified on rebuttal for the state after he was so discharged. After he was discharged, he was no longer in contemplation of law an accomplice. But, suppose he had not been discharged, being an accomplice does not necessarily destroy his testimony; it only goes to his credibility. *Brown v. State*, 18 *Ohio St.*, 496, 497.

In *Brown v. State*, the court held:

"Where separate trials are awarded to parties jointly indicted, each is a competent witness for the state upon the trial of the other, without being first acquitted or convicted, and without a *nolle prosequi* being first entered upon the indictment.

The fact that such accomplice has committed perjury on a former examination, touching the same subject matter, even where he admits the fact upon his present examination, but where he has not been legally convicted of the perjury, only affects his credit and does not render him incompetent, or necessarily render his testimony incredible."

Fifth. It is further contended that there is error in the charge of the court, because the court did not instruct the jury as to what consideration they should give to the testimony of McIntire, the alleged accomplice. There was no request made by counsel that the court should so charge, and in the absence of such request, the court was not bound to charge upon a subject not necessarily involved in the issue submitted to the jury.

It is not error for the court to omit to instruct the jury on a point of law arising in the case, unless instructions are asked by counsel. *Taft v. Wildman*, 15 *Ohio*, 123; *Jones v. State*, 20 *Ohio*, 84; *Hills v. Ludwig*, 46 *Ohio St.*, 373, 377.

There being evidence tending to establish all the material elements of the crime of embezzlement charged against the plaintiff in error, with a careful charge by the court as to the law, resulting in a verdict of guilty, and finding no error in the record, the judgment is affirmed.

DEDICATION FOR PARK PURPOSES.

[Anglaize Circuit Court, April Term, 1900.]

Price, Norris and Day, JJ.

DAVID ARMSTRONG V. ST. MARYS (VIL.).**1. DEDICATION FOR PARK PURPOSES.**

A dedication, legal in form, of property to a municipal corporation for park purposes, and its acceptance by the city, vests the fee of the property in the municipality for the purposes for which it was dedicated. Sec. 2601, Rev. Stat.

2. CONDITION NOT ARISING FROM DEDICATION VOID.

A condition recited in a plat accompanying a dedication to a municipal corporation of land for park purposes, that "the land shall be kept in good condition for the purpose for which the grant was made, or the same to revert to donor" is not engrafted upon or a part of the dedication. The grant is independent of such condition and a violation thereof does not terminate the trust or carry the fee back to the original proprietor. In other words, a condition not arising from the dedication itself cannot be engrafted so as to bind the corporation.

3. CONDITION VOID FOR UNCERTAINTY.

If it were possible to engraft the condition in an accompanying plat, of the character above stated, upon a grant to a municipal corporation, a condition that the land should be kept in "good condition for the purposes for which the grant was made" would be void for uncertainty, where no standard is established for determining the meaning of "good condition."

HEARD ON ERROR.*Culliton & Smith*, for plaintiff in error.*D. F. Mooney*, for defendant in error.**NORRIS, J.**

This case comes into this court by petition in error. The action is to recover possession of real estate, and the claim for recovery is founded upon the following allegations of fact: On April 6, 1887, plaintiff was the owner of out-lot No. 17 in the village of St. Marys, and he caused the same to be surveyed into lots, streets and alleys, and dedicated the same in legal manner and form as an addition to said village. Said dedication was legally accepted by the village authorities. A part of the land so dedicated was a parcel donated to the village for a park. This dedication was, plaintiff claimed, upon the condition that said parcel of land was to be kept in good condition as a park, and held and used as a park; otherwise to revert to plaintiff as original proprietor.

He says that the land has never since its donation been used as a park, or kept in good condition as a park. That nothing has been done by the village, as contemplated by the terms of its donation; but it has been suffered to go without attention or improvement, and that the use for which it was intended and accepted has wholly failed. He says therefore the title has reverted to him, and he asks judgment for recovery of possession.

The answer by denying the salient averments of the petition, puts the alleged rights of the plaintiff in issue.

The controversy thus tendered was submitted to the trial court, without the intervention of a jury, and the result was a finding by the court in favor of the village of St. Marys.

Plaintiff filed his motion for new trial, which was overruled, judgment was entered upon the finding and he institutes this proceeding in error for reversal.

The matter of which he complains as prejudicial to his cause are:

First—That the court erred in admitting evidence offered by the defendant over his objection.

Second—Error in rejecting evidence offered by him to sustain the issue on his part.

Third—And that the finding and judgment of the court are against the weight of the evidence, and contrary to the law of the case.

We are of the opinion, that the dedication is in all respects legal in form, and that the execution and acknowledgment of the plat is applicable to all parts of it; as well to the condition recited in reference to the park, upon the violation of which plaintiff predicated his action, as to the other parts of it.

But, however legal and broad may be the execution of the plat, the acknowledgment can impart no virtue to it, or to a condition in it, which the law inhibits in a proceeding of that character.

The dedication and acceptance, with the plat properly recorded, vested the fee of the property in the village of St. Marys, to be held in trust for the purposes for which it was dedicated. Section 2601, Rev. Stat. So by it the title passed from the plaintiff to defendant village, and the dedication took effect.

It is contended, that the condition recited in the plat is engrafted upon the dedication, and becomes a part of it. And that the village held the property as a trust burdened with the condition, recited in the plat, "That the land should be kept in good condition for the purpose for which the grant was made, or the same was to revert to the donor." That the grant by dedication cannot be separated from this condition; that without it, the dedication is ineffectual, and that violation of it destroys and terminates the trust, and carries the fee back to the original proprietor.

We are not of the opinion that this position is tenable. A municipal corporation can only do the things which the statute empowers it to do. It may receive and hold, in trust for the public, real estate for the purpose for which this was dedicated, but when it has done so much, its power ceases, except in so far as the statute authorizes it to make the property fit for the purpose intended. And this, not by a contract or upon a condition, but by power independent of contract, and independent of condition; and not emanating from contract or condition, but from the statute, and in manner and by steps pointed out by it.

While the original proprietor might institute proceedings to compel the village authorities to take such steps by the very effect of the dedication itself, a contract or condition or agreement, would not assist him, or make him stronger in his remedy.

While the fee might again reach him by abandonment for twenty-one years, or by diversion of the use of the property dedicated, the violation of a condition which the dedication itself raises, would only save to him the right to enforce the execution of the trust itself.

Armstrong v. St. Marya.

If it were possible to engraft a condition upon a grant of real estate, in trust for a public use, of the character here claimed, we are of the opinion that the one at bar would be void for uncertainty.

"In good condition." How is it measured, and by whom is it to be determined, what shall be done to the park to make it as he intended?

If the manner in which he made it, is the standard to which the village is to be held, then to change it either for the better or for the worse would be a fatal violation. So that this cannot be accepted as the measure, and no other criterion is in sight, or can be. The only guide then would be the judgment and taste of the plaintiff, with liability to change and vary; so that in fact the condition is not a condition at all.

We are clearly of the opinion that the stipulation upon which plaintiff relies cannot be engrafted upon a grant by dedication for a public use.

We find no error in the admission or the rejection of evidence, and no error on the face of the record to the prejudice of plaintiff in error.

The judgment is therefore affirmed at costs of the plaintiff in error, for which execution is awarded, and the case is remanded, for execution.

DECREES.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

GEO. C. MILLER SONS' CARRIAGE CO. V. MILLER & SONS' CO.

DECREE FOR PAYMENT OF CLAIMS NOT STATED IS VOID.

A provision in the decree in a foreclosure suit for the payment of taxes and ground rents is void where no statement of any claim in favor of the treasurer or landlord appears in the pleadings; and the fact that the decree was entered by consent of the parties does not render it valid.

HEARD ON ERROR.

Howard Douglass and *Geo. W. Harding*, for plaintiff in error.

J. L. Logan, contra.

PER CURIAM.

The defendant in error commenced an action against the plaintiff in error to foreclose a mortgage upon a certain leasehold estate and averred in its petition that "its claim is in the nature of a second mortgage, that there is a claim and lien for \$40,000 on said premises, which is prior to and better than plaintiff's, and that said premises are not sufficient in value to discharge the said lien and this mortgage."

A decree was rendered in favor of plaintiff, the property sold for \$5,000, and, upon distribution, the sheriff was ordered to pay to the treasurer of the county the taxes, \$347.96, then a lien on said property, and to M. M. White, agent and trustee, \$1,714.12, "being the ground rent under the terms of the lease herein to April 1, 1897."

Subsequently the defendant filed a motion to set aside and vacate so much of the order of distribution as directed the payment of taxes and ground rent, and also filed an answer and cross-petition for the same purpose, on the grounds:

Hamilton Circuit Court.

First—That the court had no jurisdiction to make the order.

Second—Neither the treasurer, nor M. M. White, trustee, to whom the money was ordered paid, was a party to the suit.

The court undoubtedly had jurisdiction of the defendant and of the subject matter, to-wit, the proceeds of sale of the leasehold; but it is claimed that there was no statement of any claim in favor of the treasurer, or M. M. White, trustee, and that an order for payment of such a claim is null and void.

Spoors v. Coen, 44 Ohio St., 497, is relied on, the last proposition of the syllabus being as follows:

"The judgment of a court upon a subject of litigation within its jurisdiction, but not brought before it by any statement or claim of the parties, is null and void, and may be collaterally impeached.

It may be conceded that no statement or claim of the taxes or ground rent appears in the pleadings; yet the fund being before the court for distribution, and the judgment debtor being a party defendant, it is urged that there could be no valid objection to the court making such distribution as the parties might agree to.

The plaintiff, in its reply to the answer and cross-petition of the defendant, avers that the defendant consented and agreed to the decree of confirmation and distribution, and that its counsel endorsed such consent upon the original entry. This presents an issue of fact which was heard upon evidence, no part of which is brought before this court by a bill of exceptions. But, assuming that such consent was fully shown, does that render valid a judgment otherwise void? Whether consent be given or not, the judgment is the act and decision of the court, and if the court is without authority the parties can not confer it.

In *Rosebrough v. Ansley*, 85 Ohio St., 107, the first proposition of the syllabus is as follows:

"A judgment for a sum greater than the amount due upon the cause of action as stated in the record is erroneous; and the previous consent of the parties that such judgment might be rendered does not cure the error."

And at page 111, McIlvaine, J., says:

"No one would contend that a judgment would be sustained on the ground of consent if the record showed that no cause of action existed against the party consenting; and we think it is equally fatal to a judgment under our practice, if no statement of the cause of action appear on the record."

In the case before us there is no statement or claim for taxes or ground rent, except as appear in the order of distribution.

The prayer of the petition is that the proceeds of sale be applied to the payment of plaintiff's judgment, and yet the taxes and ground rent are ordered to be first paid. Although the general rule is that a reviewing court will not reverse a judgment at the instance of a party consenting thereto, still we think this case comes within the exception stated in *Rosebrough v. Ansley*, *supra*. The fact that neither the treasurer nor M. M. White, trustee, were made parties to the suit is immaterial. Had the plaintiff stated their interest in the property, and the court had so found, the defendant could not afterwards question it. The want of any statement or claim is the material omission.

Judgment reversed and cause remanded.

ACTIONS TO ENFORCE STATUTORY LIABILITY.

[Lucas Circuit Court, November 5, 1900.]

Haynes, Parker and Hull, JJ.

THOMAS L. JOHNSON ET AL. V. HORACE CARPENTER, RECEIVER, ETC.**DISMISSAL OF ACTION BEFORE JUDGMENT—VACATION OF SUCH ORDER.**

An action to enforce stockholders' statutory liability, being for the benefit of all creditors, is not within the rule that an action brought by a trustee need not be prosecuted but may be dismissed by such trustee at any time before judgment. So long as an action for enforcing statutory liability is not prosecuted to final judgment, and the liability of the parties has never been ascertained, and no steps are taken to ascertain who the creditors are, the suit is pending for the benefit of all, and if unadvisedly dismissed by the court, any creditor coming in and making a proper showing (in case at bar, that applicants had no knowledge that the order of dismissal had been made, that they were creditors and desired to have the suit proceed), may have such cause reinstated. (Parker, J., dissenting on the ground that the action might be dismissed by plaintiff at any time before judgment; that the action having been dismissed before creditors seeking vacation of the order came in, certain rights, by virtue of the order of dismissal, became vested and could not rightfully be disturbed without reasons given, even under the power of the court over its journal during the term; that an order affecting the order of dismissal should have been secured by proceedings in error.)

HEARD ON ERROR.

Squire, Sanders & Dempsey; Swayne, Hayes & Tyler, for plaintiffs in error.

Scribner & Waite and Marshall & Fraser, for defendant in error.

HAYNES, J.

In this case an action was brought by the Holcomb National Bank of Toledo against divers persons as stockholders of the Wheeling & Lake Erie Railway Company, defendant, for the purpose of enforcing a stockholder's liability. Summons was issued and served upon sundry of these defendants, others were permitted to come in and file answers and cross-petitions; others were non-residents of the state and if they were in the state when the suit was commenced, had left without being served. Sundry of the creditors came in and filed cross-petitions setting up generally the same facts as the plaintiff, the number of stockholders and matters of that kind, and asked for the enforcement of the stockholder's liability. Finally, on a certain day in the term, the parties came and discontinued the suit—dismissed it as to the plaintiff and as to the cross-petitions, as it was said, by consent of all these parties, the entry, dated April 21, 1898, being as follows: "By consent of the plaintiff and all cross-petitioners herein this cause is dismissed without prejudice at plaintiff's cost. Ordered that no record be made."

Subsequently, on July 27 in the same year, there came one, or perhaps more of the creditors, and filed a motion to set aside that entry, claiming that they had no knowledge that it had been made; that they were creditors and desired to have the suit prosecuted, and thereupon the court made an entry of that date as follows: "The court grants said motion and orders that the same be set aside and vacated for the reason that said entry of April 21, 1898, was inadvertently entered by the court, in that it was entered without the knowledge of the nature of

the case upon the part of the court at the time of making the same, and that said entry of dismissal without prejudice was prejudicial to the rights of said Horace M. Carpenter, as receiver, as well as the other creditors of said The Wheeling & Lake Erie Railway Company; and it is ordered that said cause be continued on the docket for further hearing."

Thereupon that defendant, with sundry and divers others were permitted to come in and file answers and cross-petitions. Subsequently he went out and was supposed to have been settled with, but some others still remained. At the time this entry of July 27, 1898, was made sundry parties were present, and many others of the plaintiffs in error were present by their counsel, objecting to that entry and that order showed that they were before the court. The motion set up that the entry was made out of the ordinary time of making motions; that the rules of court required that notice should be served and should be heard on a certain Monday, but that this was heard on a day in mid-week—referring to the original entry.

It is said that these parties had no right to dismiss this action and that the court had no right to dismiss it with their consent, but that the case was of such a nature that it should have remained in court for its enforcement so long as there were any creditors who had any claims that they were desirous of enforcing.

The case has been very earnestly argued and we have been cited to quite a number of cases and in our search we have found a good many more upon some of the general questions of the case. It is a case such as we generally term a close case, and the court themselves are not agreed as to whether this action of the court of common pleas should be approved or disapproved.

The contention is, that in a case where a suit is prosecuted by one on behalf of many persons who are interested—persons who are so numerous that they cannot be brought into the record—that the one party is not obliged to prosecute that suit, but may at any time dismiss the case and go out of court. Now there are a large number of authorities in favor of that proposition; we have examined a great many, but this action was originally not an action of that nature precisely. We have a section of the code which allows parties, as they did in the practice in chancery, where there were numerous parties interested, to bring suit on behalf of all, but this is not quite that case; this case is one where there is a statutory liability, and the rights of the parties depend upon the statute and the right of action given by the statute.

This action is for the benefit of the creditors and in which all have an interest, and the fund which arises from the action goes to the joint and equal benefit of all the creditors according to their classes, and it appears to a majority of this court, that an action of that kind stands on a different footing from the class of cases that I have before mentioned. We think that is recognized by the Supreme Court of this state. It seems to us that if an action is commenced by one, the other creditors not only are to receive the benefit of that, but may receive the benefit without going into the case at all, except to prove their claims at the proper time and file them before the proper officer appointed by the court.

It has been held that an appeal by one is an appeal for the benefit of all and that a petition in error filed by one is a petition for the benefit of all, and it seems to us that if one party should undertake to commence

a separate suit, when a suit was already pending, that, upon motion, an order of abatement would be entered, or certainly it would be joined with the other suit and one suit should serve the purposes for which a suit was brought for the benefit of all, and no other party ought to be allowed to make costs and expenses by commencing and prosecuting a separate suit.

That being the case, it seems to a majority of the court that so long as this case had never been prosecuted to final judgment and the liability of these parties had never been ascertained, and no steps had been taken to ascertain who all the creditors were and have them bring in their claims, that that suit is still pending for the benefit of all creditors and that if it had been unadvisedly dismissed by the court and stricken off the docket, that any creditor coming in and making a proper showing might have the cause reinstated and prosecuted to final judgment.

It might happen if there were no power now to reinstate, that the suit might be dismissed after the statute of limitations had expired and that creditors would be barred from commencing new suits. The filing of cross-petitions by every creditor is unnecessary in order to protect the ordinary rights of parties and should be discouraged, as tending to increase costs, but if the court should hold there is no power to reinstate in a case like that at bar, it would behoove every creditor to file a cross-petition in order to keep himself in court.

There are, of course, some objections to it. One of the most forcible, to me, is, that many of the parties to the suit might not be where they could be notified and might not have attorneys in court.

So far as this case is concerned, the only parties complaining here were present at the time the order was made and excepting to it, so that they had notice of its pendency. The decision of the Supreme Court of this state in regard to the right of the court over its judgments, within the term, has been brought before that court in more than one case, and, as the majority of this court understand it, that court holds that a court during such term have full power over their entries that have been made in cases and may set them aside. We have held in a case before this court that they ought not to be permitted to do that and their own motion, wilfully and without reasonable cause.

Upon very careful consideration of the case the majority of the court are led to the conclusion that the judgment in this case should be affirmed and that the action of the court was proper, and it is therefore so ordered.

PARKER, J., dissenting.

I desire to state, very briefly, the grounds upon which I feel obliged to dissent from the conclusion of the majority of the court.

It cannot be questioned but that a court has very wide and extensive powers and discretion over and with respect to its journal during the term, and I do not question but what the court here had jurisdiction and power to make the order complained of, and yet it seems to me that that does not determine the question of the rights of the parties—that this jurisdiction and power should be subordinated to the rights of the parties litigant. The action having been dismissed before these intervenors came in to file their cross-petitions, if that was rightfully done, then there were certain rights by virtue of that order and judgment, dismissing the action, which became vested in both plaintiff and defendant, that could not be rightfully disturbed or taken away from them

without legal reasons, even under this power of the court over its journal during the term. In other words, if the court made a wrong order during the term with respect to orders previously entered upon its journal, during the term, that was prejudicial to any of the parties, they ought to have a right and opportunity to prosecute error on that account. But, as Judge Haynes has said, we differ as to the extent of the discretion of the court in dealing with its journal during the term. The opinion of the majority of the court seem to me to be that the court cannot be held to have done anything wrong or erroneous with respect to its orders made during term, no matter what it may do in the way of modifying, overturning or wiping them out.

That the parties did have a right to dismiss their suit without consulting the interests of persons who were not parties, it seems to me is well settled by the decisions. Section 455 of Beach on Modern Equity Practice reads as follows:

"Where a complainant files a bill on behalf of himself and all others of the same class, he retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure. But after a decree he cannot thus deprive the other persons of the same class of the benefit of the decree if they think fit to prosecute it. Nor can such complete control of the suit be exercised by the original complainant alone if there be other complainants."

"Other complainants" would doubtless include those who come in by the way of cross-petition. But here there were none at the time this action was dismissed. There are a great many authorities cited in support of this text, and they all appear to sustain it, and we cannot find any authority to the contrary. It seems to me that this kind of action, prosecuted by one on behalf of himself and of all others similarly situated, to enforce a stockholder's liability, is an action of the general nature and character referred to in this text book and covered by these decisions which are given in support of the text. It is said that the rule should not apply in Ohio, because after an action has been instituted by one creditor on behalf of himself and all others similarly situated, the hands of other creditors are tied, so that they may not institute an action of like character and therefore they have such a direct interest in the suit then being prosecuted as that they should be heard before any action is taken in the case which might operate to their prejudice, and I supposed, when the case was presented, that that was true in Ohio: that after such an action had been begun by one creditor another creditor would not be permitted to maintain an action of a similar character. It seems to me as if that ought to be so, and yet we cannot find any decision in which that is distinctly held. There are two cases cited, *Wright v. McCormack*, 17 Ohio St., 86; *Umsted v. Buskirk*, Ib., 113. In the former it is held that where suit is instituted on behalf of the plaintiff himself and all others similarly situated, a creditor cannot then institute such an action on behalf of himself alone; and we think that the court might have gone even farther and said that even before instituting such an action no creditor could institute an action to enforce a stockholder's liability on behalf of himself alone. I think it is true, that such action must take the form of an action on behalf of all the creditors interested, on behalf of himself and all others of like interests, because the statute provides that the fund shall be brought into court to be distributed among the creditors *pro rata*.

Johnson v. Carpenter.

After the order had been made dismissing this action, it seems to me that both plaintiff and defendants below had such a vested right and interest in that judgment of dismissal as that the court could not without good reason and in the interests of justice interfere with it. That any order affecting the dismissal must be made in pursuance of and consistently with well settled rules of law, and that therefore error may be prosecuted on account of the action being reinstated, if it was not done rightfully and in pursuance of law; and that both the plaintiff and the defendant would have rights arising out of the judgment of dismissal is held in effect in *McDougald v. Dougherty*, 11 Georgia, 570. I read a few paragraphs from the syllabus:

"Notwithstanding a bill is filed by a creditor at the instance of himself and all others who may wish to come in, still up to the time of the decree it is a suit only between party and party.

"The plaintiff up to the time of the decree, may make any disposition of the case, which he sees fit; and the defendant who is the debtor may tender satisfaction and compel him to accept it."

So that the right of the defendant in the matter appears to be a right to tender satisfaction and compel the acceptance of it and have the suit dismissed; and therefore it seems to me it could not be reinstated and he could not be brought back into court without his consent and that such order would amount to error, to his prejudice.

CONTEMPT.

[Hamilton Circuit Court, 1900.]

Smith, Swing and Giffen, JJ.

SALLIE I. CASSILY V. JOHN CHURCH CO.

1. CONTEMPT—VIOLATION OF ORDER BY STRANGER.

A person cannot be punished as in contempt for violation of an order issued in a case to which he is a stranger and of which he has no knowledge.

2. ACTION TO TEST VALIDITY OF SEIZURE NOT CONTEMPT.

An action to test the regularity of proceedings under which property is seized by an order of court and held by the sheriff is no longer regarded as an infringement of the prerogative of the court, but is favored as a ready and convenient method to test the legality of the first seizure.

3. RULES APPLIED.

Under these rules, and the holding in *Sifford v. Beatty*, 12 Ohio St., 189, that the seizure of the goods of B, under process against C, does not vest in the court out of which process issued, any jurisdiction over said goods and that an action to replevy same may be maintained by B, plaintiff in an action in replevin to recover goods held by a sheriff under order of sale issued in an action to foreclose a chattel mortgage, who was not a party to and had no knowledge of the foreclosure suit, is not guilty of contempt of court.

HEARD ON ERROR.

Shay & Cogan, for plaintiff in error.

Nathaniel Wright, for the John Church Company.

GIFFEN, J.

The plaintiff in error was adjudged guilty of contempt of the court of common pleas upon a charge that she caused a writ of replevin to issue from the court of a justice of the peace for property in the posses-

sion of the sheriff under an order of sale issued in an action to foreclose a chattel mortgage. She was a stranger to the suit, and there is no allegation that she had knowledge of the order of sale or of the authority under which the sheriff held the property.

Formerly any attempt to interfere with goods in the custody of the law, or held by an officer, or by any legal process, was regarded as a contempt and punished severely; but this rule has been greatly modified, and an action to test the regularity or legality of the proceedings is no longer regarded as an infringement of the sacred prerogative of the court, but is favored as a ready and convenient method to test the legality of the first seizure. *Cobby on Replevin*, secs. 299 and 300.

There is no statement in the charges of contempt that the mortgagor was the owner of the property seized, nor does the court so find, and unless it did belong to her the seizure was illegal.

In *Sifford v. Beatty*, 12 Ohio St., 189, it is held:

"That a seizure of the goods of B, under process against C, does not vest in the circuit court (United States) out of which the process issued, any jurisdiction over said goods, and that an action to replevy the same may be maintained by B in the courts of the state."

And in speaking of the rule "that among equal or concurrent jurisdictions, that is exclusive which first attached," *Peck, J.*, says, at page 198:

"The cases in which such collisions have occurred are either proceedings strictly *in rem*, where the *res* and not its *ownership* is in controversy, or seizures upon execution or in attachment for the debts of the *owner* and where the process seeks to subject *his interest therein* and cases where the possession and management of specific real or personal property has been delegated by a court to its receiver; and in all these cases the maxim before alluded to has been applied; but it will be seen at a glance that an unlawful effort to subject the property of B, to the payment of the debts of C, does not fall within either class."

The doctrine of that case seems to be in conflict with a number of cases cited by counsel, notably *Covell v. Heyman*, 111 U. S., 176; but it is nevertheless the law of this state.

Section 5640, Rev. Stat., provides that a person may be punished as for a contempt for disobedience of or resistance to an order of court; but how can he be said to disobey or resist an order of which he has no knowledge and which is not addressed to him? He could have only a constructive notice of the proceedings in the pending suit.

The general rule is that a person can not be punished as for a contempt for the violation of an order issued in a cause to which he is a stranger (7 Am. & Eng. Enc. of Law, 2d Ed., p. 68).

Judgment reversed.

DOWER—ATTORNEY FEES.

[Fairfield Circuit Court.]

Adams, Douglass and Voorhees, JJ.

MARY C. WATSON ET AL. V. MARION WATSON ET AL.**1. ANSWER PRESENTING CONTEST TO ASSIGNMENT OF DOWER.**

An answer in a suit for assignment of dower, setting up an agreement claimed to have been made by plaintiff with defendants whereby the latter should hold the premises without assignment of dower for a certain length of time, unexpired at the time suit was brought, constitutes a resistance to plaintiff's right to assignment of dower within sec. 5718, Rev. Stat., providing that if resistance is made to the petition of the person claiming dower, and the court find that such person is entitled to dower, the defendant shall be required to pay all costs of suit; otherwise that plaintiff shall pay one-third of the costs.

2. "COSTS" IN SEC. 5718, REV. STAT., DOES NOT INCLUDE ATTORNEY FEES.

The word "costs," as used in sec. 5718, Rev. Stat., providing that if resistance is made to the petition of the person claiming dower, and the court find that such person is entitled to dower, the defendant shall be required to pay all costs, otherwise that plaintiff shall pay one-third of the costs, does not include attorney fees.

3. ATTORNEY FEES NOT AUTHORIZED BY SEC. 5711, REV. STAT.

Nor does sec. 5711, Rev. Stat., relating to actions for dower revived in the name of plaintiff's executor or administrator, authorizing, if dower is adjudged, the assignment thereof "after deducting one-third of the necessary expenses," authorize the recovery of counsel fees in ordinary actions for the assignment of dower. The expenses referred to in this section are expenses attending the assignment of dower by commissioners under sec. 5715, Rev. Stat.

4. NOR BY SEC. 5778, REV. STAT., IN SUITS FOR DOWER.

Section 5778, Rev. Stat., providing that "the court, having regard to the interests of the parties, and the benefit each may derive from a partition, and according to equity, shall tax the costs and expenses which accrue in the action, including reasonable counsel fees which shall be paid to plaintiff's counsel * * *," can not, by analogy, be construed to authorize payment of counsel fees to plaintiff in an ordinary action, contested, for assignment of dower.

HEARD ON ERROR.**VOORHEES, J.**

The plaintiff's action is a suit for the assignment of dower under the statutes, and the petition is in the usual form. The defendant's answer admits the facts stated in the petition and pleads further:

"But they say that they and plaintiff have agreed by oral contract made in April, 1900, that they might hold all of said lands without assignment of dower therein for and during the year extending from April, 1900, to April, 1901, and that they should pay plaintiff a rental of \$155.00 therefor, payable semi-annually; and that pursuant to said agreement they hold possession of said lands."

The only questions presented by the record and the agreed statement of facts are, first, as to the taxation of the costs under sec. 5718, Rev. Stat.; and second, is the plaintiff entitled to recover, as part of her costs or expenses, attorney fees.

It is conceded in the argument and we would so hold, that the answer is a resistance to the plaintiff's right to have assignment of dower; and if

established it would defeat her action, because if there was an agreement giving those parties the right to have possession of the whole of the premises for the year ending April, 1901, her action would have been prematurely brought. Therefore, that being the case and the issues thus presented under sec. 5718, she would be entitled to recover all her costs in the suit. The section seems to be plain and without any obscurity so as to require construction.

If this had been an action under the statutes for the assignment of dower without an answer being interposed in the way of resistance, it would be very clear that the plaintiff would have to pay one-third of the costs of the suit and the legal owners of the land two-thirds.

So that disposes of the first question that we have in this case, holding as we do that the answer, having presented the question above referred to, was a resistance to the plaintiff's right to have dower assigned in those premises between April, 1900, and April, 1901.

That leaves, then, the only question remaining, what is to be understood by the payment of the costs of the suit? And the remaining contention in the case arises upon this question.

It is contended on behalf of the plaintiff that "costs," as contemplated by the statute, means, in addition to the court costs, expenses necessary in bringing the suit which would also include the attorney fees of the plaintiff. This is the main question of contention between the parties. Our first inquiry will be, what is to be understood by the term costs in its common law or technical sense? We think that it is settled by the Supreme Court in *Pope v. Pollock*, 46 Ohio St., 367. I will read a portion of the decision on page 371, which we think gives a clear and comprehensive definition of costs as it would be understood at common law.

"But in Ohio the successful party in an ordinary action recovers only the fees of witnesses and court officers, having his own personal expenses in preparing the case, in attending the trial, and his attorney fees for preparation and for trial, to be paid without reimbursement. Taxed costs are not here regarded as affording full compensation for expenses incurred, for in cases where damages may be recovered for malicious injury, fees of counsel as well as court costs, are included in compensatory, and not punitive damages."

Now, as we have already remarked, at common law, without the aid of a statute, the successful party in a suit could not recover expenses he was subjected to in making his defense by way of attorney fees. He can not be reimbursed for this.

That leaves us to the consideration of the question, does the statute in a case like this, afford fees to the counsel who may bring the suit for the assignment of dower in an ordinary action (not a suit in partition); that is the nature of this action; a suit simply for the assignment of dower for the widow. In such case as that, is the plaintiff entitled to have reimbursed to her as a part of the expenses of her suit the attorney fees of counsel who may bring her action? To answer this question in favor of the plaintiff, we must do so, if at all, by the language of the statute; otherwise, if it is not so provided, then the plaintiff would not be able to recover such expenses.

Now it is claimed that sec. 5711, Rev. Stat., affords a rule of construction which would bring this case within its provisions, so that the plaintiff, in addition to the ordinary costs, should recover expenses; and it is claimed that expenses would include attorney fees.

Section 5711, Rev. Stat., reads as follows :

"When plaintiff dies before the assignment of dower, or before entry of the final judgment, the action may be revived in the name of the executor or administrator; the court shall proceed to hear and determine, if not before decided, whether plaintiff would have been entitled to dower in such action; if it be found that plaintiff would have been so entitled, the court shall adjudge in favor of such executor or administrator a sum equal to one-third of the rental value of the real estate to which it is found the plaintiff would have been entitled to dower, from the time of filing the petition until death, after deducting one-third of the necessary expenses; * * *

The contention of the plaintiff here is all "necessary expenses" here would include attorney fees. We do not so understand the statute, nor do we think it contemplates expenses of that sort. The expenses here referred to are the expenses contemplated in sec. 5715.

Section 5715, Rev. Stat., so far as material, is as follows :

"The commissioners shall, after they have set off and assigned dower, make a just and true appraisal of the yearly value after deducting necessary expenses, of the real estate in which the widow or widower is entitled to dower, estimating such value from the day of filing the petition to the day of assignment of dower, and make return of such appraisal and assignment, and the court shall adjudge the payment of one-third of the whole sum so returned, to the widow or widower, out of the real estate not covered by the dower, upon which judgment execution may issue. * * *

Now in arriving at the amount that is to be ascertained from the filing of the petition up to the time the dower is assigned, which is to be determined by the yearly rental value of the property, deducting the necessary expenses that would pertain to and attach to the annual rental of the premises, we must refer to sec. 5712, Rev. Stat., which reads as follows:

"Where dower is adjudged, the court shall appoint three judicious, disinterested men of the county in which the action is pending, who are not of kin to either of the parties interested, to be commissioners, and issue its order to the sheriff of that county, commanding him that, by the oaths of the commissioners, which may be administered by him, he cause to be set off and assigned such dower to the plaintiff, in the manner set forth in the judgment.

Dower is to be first set off; then they are to proceed and ascertain what she would be entitled to in the way of rental, from the time of bringing the action until the time of assignment of dower; that is what sec. 5711, Rev. Stat., refers to; the expenses that are to be deducted from the sum so ascertained.

So we do not think that either of the sections that have been cited to us by counsel, as referring to expenses, contemplates the payment of attorney fees as part of the expenses of the court.

Then it is claimed that by analogy that sec. 5778, Rev. Stat., which is the partition statute, can be made to apply to the case here.

"The court, having regard to the interest of the parties, and the benefit each may derive from a partition, and according to equity, shall tax the costs and expenses which accrue in the action, including reasonable counsel fees, which shall be paid to plaintiff's counsel, unless the court award some part thereof to other counsel for service in the case for the common benefit. * * *

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If the contention of counsel is correct, it would not have been necessary to use the words "Shall tax the costs and expenses which accrue in the action including reasonable counsel fees." If reasonable counsel fees are to be understood in using the language of the former section, it was unnecessary for them to repeat here "As fixing the expenses that might be taxed including reasonable counsel fees."

It is to be presumed that the legislature, in using the word "expenses," understood what it meant, and if expenses included reasonable counsel fees it would have been unnecessary to have followed it with those words. That is the construction in referring to counsel fees as being part of the expenses awarded. The statute should be somewhat closely examined in order to get this proper construction.

Now the court "having regard to the interests of the parties and the benefit each may derive from the partition, and according to equity, shall tax the costs and expenses including reasonable counsel fees." If there is no contest in a partition suit, the attorney who brings the action for the plaintiff is entitled to have his fees paid out of the proceeds, but if there is a contest, even in a partition suit, the rule would be different.

How can it be claimed in an action such as this, that the defendants are benefited by the action? It is different, as far as they are concerned and especially in a case like this, where a contest subjects them to the payment of costs, and therefore, in order that this section could have an application in the language of the statute, the partition must be for the common benefit of all the parties, before there can be any taxation of costs against the defendant.

Now we think that the *National Bank v. Railroad Co.*, 62 Ohio St., 564, 567, supports this view, but we will cite first *Young v. Stone*, 55 Ohio St., 125, as perhaps the better illustration of the principle for which we are contending.

In the opinion in *Young v. Stone*, *supra*, on page 133, the court say: "Whether, regard being had to the character of the services, the court had power under sec. 5778, Rev. Stat., to make an allowance of any sum to the attorney for services in the litigation between the representatives of the whole blood and those of the half-blood, of Silas S. Stone, deceased; or (2) if so, had it power to make any allowance, when it appeared that the attorney and his clients had an express written agreement as to what his compensation should be for all services to be rendered in the matter.

"(1) The statute under which the allowance was made reads as follows:

" 'The court, having regard to the interest of the parties and the benefit each may derive from a partition, and according to equity, shall tax the costs and expenses which accrue in the action including reasonable counsel fees which shall be paid to plaintiff's counsel unless the court award some part thereof to other counsel for services in the case for the common benefit of all parties; and execution may issue therefor as in other cases.' Section 5778, Rev. Stat.

"Now it is evident, we think, from the language of this section in connection with its history, that the services of the 'plaintiff's counsel' in partition proceedings for which the court may make an allowance and cause the same to be taxed along with 'the costs and expenses which may accrue in the action,' are such services as are rendered 'for the common benefit of all parties' in the case. The statute as first enacted, 29 Laws, 254, section 16, simply included the costs and expenses that

may accrue in the action. These of course could not be otherwise than for the common benefit. It was afterward, in 1880, so amended, as to include a 'reasonable counsel fee' to be paid the plaintiff's counsel, 'unless the court award some part thereof to other counsel for services in the case for the common benefit of all the parties.' The latter clause, 'for the common benefit of all the parties,' is a controlling one in the construction of the statute. Services for which an allowance may be made to other counsel and taxed as part of the costs, are required to be of like character with the costs, expenses and the counsel fee authorized to be taxed in favor of the plaintiff's counsel in the case. So that no counsel fee, whether to the plaintiff's counsel or otherwise, can be allowed by the court and taxed as costs in the case, under this section, unless the services were rendered for the common benefit of all the parties. The services rendered are to be such as may be taxed as costs and expenses and apportioned to the parties according to their respective interests. The allowance made in this case, and taxed to the one-sixth interest owned by Mrs. Young, her husband and Carlisle, was not for such services. They in no way benefited or affected the next of kin of Margaret Stone, deceased.

"But it is claimed that the language, 'The court having regard to the interest of the parties and the benefit each may derive from a partition, and according to equity,' conferred power on the court to make the allowance it did, and to charge it upon the interest of Mrs. Young, her husband and Mr. Carlisle, in the property as partitioned, as the equitable contribution they should make to the services rendered by Mr. Russell in defeating the claim made by the half-bloods. The statute does not warrant this construction. Without doubt the court may determine the proportion of the costs, expenses and counsel fees of the character above stated, that should be taxed to each party, regard being had to the interest of each in the subject of partition; but the costs, expenses and counsel fees so apportioned, must have been made for the common benefit of all parties to the action, and must not include compensation for services rendered by counsel in litigation between some of the parties to the suit, and others who are adversaries in interest. Compensation for such services is a matter of agreement between the counsel and his clients, express or implied; and the court, in such case, has no more power to fix the compensation the plaintiff should pay his counsel, than it has in an ordinary civil action. Such has been the construction placed by the courts of other states on their own statutes similar to ours; and also conforms to the rule observed in equity. In *Grubb's Appeal*, 82 Pa. St., 1, it was held that it was 'indispensable aid only that was contemplated—such usual and accustomed services as the exigencies of such cases should render necessary. The compensation of counsel for services in the trial of contested cases was not the end in view.' In *Fidelity Insurance Co.'s Appeal*, 108 Pa. St., 842, it was held that: 'The fees should be graduated according to the circumstances of each case, the nature and extent of the services necessarily rendered for the common benefit of all the parties in the case. It (the compensation) does not include the expenses of adversary proceedings resulting from a defense to the demand for partition, or from any other cause.'"

Now, giving the construction to the section of the statute that the Supreme Court has here, we think in this case, where it is in the nature of an adversary proceeding, and, by reason of that adversary proceeding, defendants have subjected themselves to the payment of costs, it surely

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does not contemplate that it includes the payment of counsel fees in that contested suit.

Therefore our opinion is that the plaintiff's counsel is not entitled to have payment of his fees taxed against the defendant.

STREETS—DEDICATION.

[Lucas Circuit Court, November 5, 1900.]

Parker and Hull, JJ.

TOLEDO V. HENRY CONVERSE ET AL.**1. COMMON LAW DEDICATION—INTENTION TO MAKE.**

In order to constitute a complete and valid common law dedication of land to the public, on the part of the owner, it must appear that he clearly and unequivocally indicated by his words or acts an intention to dedicate. The making of a plat showing a triangular piece of land, at the intersection of streets, and coloring it the same as the streets are colored, and which is without lot number, but which is not within the dimensions of streets as shown by said plat, and the fact that for many years no taxes or assessments were paid (none being demanded) on said triangular piece of land, are not sufficient to indicate conclusively or unequivocally an intention to dedicate.

2. EVIDENCE OF PURPOSE TO REJECT INTENDED DEDICATION.

And where the city, having taken no formal action in accepting the property above referred to, subsequently accepts dedication of streets and alleys shown on said plat, and in the improvement of streets excludes the triangle from the improvement, and subsequently, for improvement of a street upon which it abuts (said property having been omitted inadvertently from taxation or assessment for many years) makes an assessment for such improvement, this is evidence not only of a purpose not to accept, but of a purpose to reject such property if a dedication was intended.

3. FAILURE TO ESTABLISH ADVERSE USE AND OCCUPATION.

Where the city in making street and sidewalk improvements clearly located such improvements and in such a way as to exclude, and indicate an intention to exclude, the property referred to, the fact that persons may have driven outside the lines of the street and upon the property in question, or that pedestrians, under similar conditions, have gone over said property, for a number of years, does not constitute adverse use and occupation such as will defeat the title of the owners or constitute acceptance if a common law dedication was intended.

4. FAILURE TO PAY TAXES DOES NOT CREATE ESTOPPEL.

Property owners are not estopped from claiming ownership of such land by having omitted to pay taxes or assessments thereon for a long period of time where no taxes or assessments were demanded. Property owners are not required to hunt up city authorities and seek to pay or tender payment of taxes or assessments in order to escape estoppel against ownership.

APPEAL.

M. R. Brailey, City Solicitor, for the plaintiff.

Hamilton & Kirby and *R. S. Holbrook*, for the defendants.

PARKER, J.

This case is here on appeal. It was submitted to Judge Hull and myself, Judge Haynes declining to sit in the case because of some interest he had had, years ago, as a lawyer, in a controversy respecting some of the lines of the property in question. This action is brought by the city of Toledo against Converse and others to restrain them from exca-

vating on a certain triangular piece of land lying between what was Smith street, now Empire street, and Adams street, in the city of Toledo, which the defendants claim to own and which the city claims was formally dedicated to and accepted by the city for street purposes. On the trial of the case certain facts were admitted, and the following is a statement of a part of those facts :

"It is admitted by and between the plaintiff and the defendants herein that there is a regular chain of title from the general government down to Francis J. King and Charles B. Philipps, and that the title to the premises here involved was in the said Francis J. King and Charles B. Philipps and that under the legal title thereto, on September 17, 1855, a plat thereof was made and signed which was recorded in 1855. It is conceded by the defendants that on September 17, 1855, Francis J. King and Charles B. Philipps signed a certain plat of certain property in the city of Toledo, including the premises herein, recorded in vol. 2 of plats, on page 81, wherein said King and Philipps platted certain premises and therein dedicated to public use certain streets and alleys. It is admitted that the statements made by A. E. Wilson in his abstract, as to the existence or non-existence of ordinances, is what said Wilson would swear to if he were sworn and testified as a witness, and it is agreed that said abstract shall have the same force and effect as the testimony of said Wilson if he were sworn and testified to the same. It is admitted by all parties hereto that since the dedication of said property, or rather since the signing of the plat by Francis J. King and Charles B. Philipps, that no taxes have been paid by said Philipps and King, or any parties claiming to own under them, on this property in question. It is also admitted that neither Philipps nor King, nor any parties claiming under them, have paid for any of the improvements made around said premises, on either Adams street or Vermont avenue or Empire street—formally Smith street; it is admitted that no general taxes or special assessments have been paid on this property, and that improvements have been made from time to time; that Adams street has been paved twice in the meantime and Vermont avenue has been paved and sidewalks have been built on Vermont avenue, Adams street and Empire street by the city of Toledo. It is admitted that in 1879, an assessment was confirmed for paving Adams street with cedar blocks, said pavement passing the premises in question, and that no special assessment was made against the property in question; that the same was confirmed August 29, 1879. It is also admitted that there was an assessment for the Adams street pavement confirmed in October, 1879, the present stone paving, which pavement passed the premises in question, which assessment is found in vol. 1 of paving assessments, page 192 of the city records and that an assessment of \$69.56 was levied against the premises in question, but that the same has never been paid—June 1, 1891. It is admitted that no claim for damages for the opening of Vermont avenue was ever filed with the city of Toledo."

There are some other admissions to which I may make reference, farther along.

The tract of land in controversy consists of an irregular piece 18.52 feet on Adams street, 24.52 feet on Vermont avenue, 82.76 feet on Empire street, and having a length of 88.64 feet at its base, that being the line between the tract in controversy and lot 21 of Philipps' addition to the city of Toledo. When this plat which has been referred to was prepared and filed for record, in 1855, Vermont avenue had not been opened,

and therefore these lines on Smith street or Empire street, and Adams street, were extended until they came together, so that the whole track lying to the westerly of lot 21 was of a triangular form.

From the plat introduced it appears that the tract consisted of about ten acres which was divided into lots, streets and alleys, one of the streets being an extension of Adams street and one being Smith street. The plat sets forth that the streets, other than Adams street, have a width of sixty feet. This would include Smith street, and on that street is marked a width of sixty feet. This triangular piece, however, was colored upon the map the same as the streets; it was not numbered as a tract or lot, but the lots which were numbered lying immediately adjacent to it, and running towards the east, begin with lot 21 and then follows 20, and so on.

It is conceded in argument that the only positive or affirmative act on the part of the persons who laid out this tract and dedicated the streets and alleys, indicating a purpose to dedicate this triangular piece as a part of the streets, was this act of making out the plat in this form, with this coloring of the triangular part in question the same as the street. This, it will be observed, is not at all consistent with the width of the street as given upon the map, though it is said that in cases of that kind the indication given by the coloring of the map would control the width of the street, especially since no numbering as a lot is given to the triangular piece.

It is conceded that the council of the city has never, by any resolution or ordinance, accepted this whole plat or the streets as dedicated. Some seven years, I think, after the plat had been recorded, the council, by resolution or ordinance, accepted such part as had been dedicated for streets and alleys lying to the south of Adams street, perhaps to the south of the north line of Adams street, but there has been no farther acceptance by any positive act of the council. The plat covers territory both to the north and south of Adams street and this triangular point is north of Adams street and there has never been any positive action, by way of ordinance or resolution, accepting the proposed dedication of streets and alleys north of Adams street.

But it is contended on behalf of the city that the purpose of the original proprietors to dedicate this for street purposes is clear; that though the city had not accepted it by such formal action, it has occupied and used it in such a way as to amount to an acceptance that would be binding upon both the city and the proprietors; that the city has occupied it adversely for a period of twenty-one years, which would give the city a title; and (I don't know as that should be stated as a separate claim), in connection with this common law dedication, it is said that the original proprietors should now be estopped from claiming this triangular point or any part of it because of what has been done as stated, and because of taxes and assessments not being levied upon it or required of the proprietors, either for general revenue or because of improvements made along the line of the property in question.

It is conceded that the defendants have all the title of the original proprietor.

It seems to us that the evidence of intent to dedicate it is not quite clear. I have mentioned that the width of the street is given as sixty feet, and the width of Adams street as sixty-six feet; and that would leave just such a triangular point of land not within either street that is not a part of either or both streets.

A case has been brought to our attention since the argument of this case, that in many respects in its facts is like it. I refer to *Steinauer v. Tell City*, 146 Indiana Sup. Ct. Rep., 490. I shall not read from this to any great extent, for I assume that counsel here are reasonably familiar with the authorities handed up. In that case the controversy was about a triangular tract of land left between two streets and upon the subject of the evidence of the purpose or intent to dedicate, the court has this to say:

"In order to constitute a complete and valid dedication of land to the public, it must be shown that the owner of the land clearly and unequivocally indicated by his words or acts to dedicate the same, and there must also be an acceptance thereof by the public."

The words "an intent" are necessary to complete the sense of his syllabus, but it so appears in the body of the opinion. On page 490 the court say:

"Under all the circumstances, we do not think this is sufficient to reasonably raise the presumption the society intended to dedicate it to the public. There is no express finding by the court showing that the society intended to dedicate this ground to any purpose. Evidentiary facts tending to prove an intended dedication, or from which the same might possibly be presumed, are not of themselves such intended dedication."

There is something more in the opinion upon the subject of acceptance of a dedication, to which I may refer farther along. But assuming that a purpose to dedicate should be found and is sufficiently clear and unequivocal, let us look for a moment to the evidence as to the acceptance. It seems to us that it cannot be said fairly that there is such evidence of acceptance by occupation and use on the part of the city as would perfect a dedication and shift the responsibility for the proper care of this piece of land on to the city, and relieve the original proprietors or their grantees therefrom. The statute requiring that there should be an acceptance of a dedication is for the protection of the city, as is held in *Wisby v. Bonte*, 19 Ohio St., 238: from which I quote.

"Section 63 of the municipal corporation act is not intended as a limitation upon the general powers of the corporation for opening and improving streets, but as a restriction to prevent proprietors, who may lay out grounds into lots within the limits of the corporation, from vesting in the corporation the title to streets and alleys, and thus charging the corporation, without its consent, with the duty of keeping them open and in repair."

Of course, that is a very important matter to a city, because if the property which the proprietor undertakes to dedicate for a street or alley is not kept in proper condition of repair, a traveller may be injured and the city may be required to respond in damages. The topography of this piece of land appears to have been rough and uneven; it lay from three to five feet above the level of the streets upon either side of it, somewhat higher above Empire street (formerly Smith street) than it was above Adams street, because Empire street descended rapidly from Adams street; and this ground was uneven and had hills and hollows in it. Now, if the city had leveled that and made it conform to the streets, and had paved it, as it afterwards did with respect to a part of it, that part which was afterwards taken for Vermont avenue, we have not much question but the proprietors would now be precluded from reclaiming it, if not because of an evident purpose to dedicate it, at least

because of their standing by and allowing it to be used in such a way as to estop them from now undertaking to reclaim it. But the city seems to have run the line of the curbing upon Adams street out to a point, leaving room for the sidewalk between the tract of land and the curbing, the curbing extending along Adams street until it met with the curbing extending along the south side of Empire street. The paving and curbing, upon Adams street was done some years earlier than the paving upon Empire street, but in both instances the city proceeded in this way: it not only set the curbing there, but it laid the sidewalks on either side of this point of land between the lot and the curb. Now this indicated very plainly the purpose of the city to exclude this triangular tract from both streets, and to not bring it into either street.

But the city might accept it and use it for street purposes though it did not pave it, and although there was no flagging laid upon it for sidewalks. It might use it as a little triangular park, along the side of the street, lying between these two streets. And it is said that this was done.

According to the evidence, as we understand it, along about 1884, some of the proprietors of lots near to this point of land, desiring to have it fixed up and improved, because it was unsightly, and in order to add to the attractiveness of their own property, or so that their own property might not be detracted from in consequence of this unsightly piece lying near by, made up a subscription and gave \$5.00 or more or less, each, toward a fund that they used in levelling off, grading and perhaps sodding this piece of land and they made some appeal to certain of the members of the board of park trustees and received some assistance from that quarter; how much is not clear; it does not appear to have been a great deal, but sufficient to plant some flowers and make provision for watering them and the lawn; but there does not appear to have been any formal action in the premises, even on the part of the park board, and we are not prepared to say that the individual members of the park board, acting alone, as it seems they did in this case, could have so bound the city by such conduct as that in the event of an accident happening to some one going over this tract of land, the city would have been responsible for its not having been kept in proper condition. A part of this improvement was the putting of an iron fence around the tract. Some four years later, if I have the time correctly in mind, Vermont avenue was laid out, and it ran north and south, cutting off the extreme point and leaving the base of the triangular part as I have described it. And here again the city indicated its purpose as to the quantity of this tract that it would take and use for street purposes, by establishing the curb for Vermont avenue.

Therefore the city had not levied any assessment upon any part of this point of land for any of these street improvements, nor had the point of land been upon the tax duplicate for taxation. That seems to have been in consequence of the authorities losing sight of it, as the proprietors seem to have done. It was not very valuable at the time it was laid off, and, in consequence of this map being in the condition that I have described, both the proprietors and the public taxing authorities seem to have lost track of it; but when Vermont avenue was laid out, the city seem to have discovered that here was a tract of land that they did not care to take into Vermont avenue. The city did not undertake to assume control of it or declare ownership of it, but proceeded to assess

a part of the cost of the Vermont avenue improvement upon this particular disputed tract of land.

Now that, we think, was such an unequivocal declaration of the purposes of the city of Toledo to not accept or claim the tract as that we must give the action its legitimate effect as evidence.

It is said in argument, that this was done through mistake on the part of the city authorities; but there is no evidence to that effect adduced; it was done, and we do not feel authorized to guess or assume that it was done by mistake. That, to our mind, is evidence of the purpose of the city, not only not to accept the dedication of this part of the triangular piece, but to distinctly declare its purpose to reject any attempted dedication.

It is said that the proprietors are to be regarded as estopped because they have not paid the assessments on account of the paving and the laying of the sidewalks upon Adams street and Empire street, but we do not understand that the circumstances were such as to give rise to an estoppel. They were not asked to pay anything. If there had been any assessment levied upon this lot and they had then declined to pay, upon the ground that they were not the owners, and had dedicated it to public use, if anything of that kind had occurred, of course it would have presented quite a different case; but here the authorities seem to have lost track of it and made no assessment upon it, and we are of the opinion that it was not necessary, to escape the effect of estoppel, for the proprietors to hunt up the city authorities and say to them, "We own a piece of property here and there has been an improvement made alongside of it and we think we ought to pay something on account of it, and therefore we make a tender of what we think is justly and fairly due to the city on account of that improvement." We do not think anything like that was necessary.

Some testimony tended to show that this point has been driven over and that foot passengers had gone over it for a number of years, and the city contends that such use not only indicated an acceptance for street purposes by the public, but that it amounted to such an adverse occupation and use as to have cut off the title of the original proprietors.

In view of what the city had done in locating the streets and setting the curbs, as I have described, we do not think that the fact that persons may have driven outside of the lines of the street onto this property amounts to such conduct on the part of the public, with the knowledge and approval of the authorities, as would bind the city so that it should be said that the city had accepted the dedication, as a common law dedication. There does not appear to have been a great deal of driving across this point; there is some dispute upon that subject, but as to where this driving occurred it appears to us quite clear from the testimony of Mr. Lyman that there was no driving or walking across this particular part of the triangle now in controversy at the times mentioned by the witnesses who testify to some walking or driving across some part of the triangle, because it stands undisputed that about 1867 or 1868, he constructed a house upon what he supposed to be the east line of his lot, he being the owner of lot No. 21; that about the time he built the house he also undertook to fence in lot No. 21, his lot being sixty-six feet wide on Adams street he extended this fence to the western line of his lot sixty-six feet. Then he crossed over to Empire street with his fence and extended the fence on Empire street along what he supposed to be the north line of his lot, and that fence stood

at the point where he located it until perhaps 1884, or later, when it was taken down or disappeared. But the fence stood there during the period of time covered by the travelling over this point as testified to by the witnesses. After this fence was taken down an iron fence was put up and there was no travel over any part of the point after that. It is made clear by the evidence adduced here that that fence extended to the westward about twenty feet too far, that he had made a mistake in the location of his lot and that his lines were about twenty feet to the eastward of where he supposed them to be, and where they are marked and established on the ground now. So that the fence enclosed substantially all of this particular part of the triangle, the title to which is now in dispute, and the driving and walking across the triangle could not have been across the part of the triangle with reference to which we have this controversy, and therefore no effect can be given to the testimony upon the subject of walking and driving across the point.

I believe I have covered substantially all the points necessary to mention in the case. We are not satisfied that there was an intention to dedicate this particular triangle; but, assuming that there was such an intent, there has not been an acceptance of such intended dedication by the city. There is no estoppel, and there has been no adverse use or occupation for a period sufficient to give title under the statute of limitations. What was true as to the triangular point in the case of *Steinauer v. Tell City*, *supra*, is true of this, and I read from that case:

"This strip has not been in any way improved as a street, neither has it been travelled nor used to any extent, as the finding discloses. There being an absence of use sufficient to constitute an acceptance, there must be proof of an acceptance on the part of the public authorities of Tell City by some formal act of theirs, showing an unmistakable intention to accept the land dedicated, and for the purposes for which it was intended by the dedicator to be used, etc." Citing *People v. Underhill*, 144 N. Y., 316.

It is not necessary to say that the city cannot hold this part of the triangle for any other purposes than for street purposes, and what I have said makes it unnecessary to discuss whether or not the purposes for which they propose to improve it would amount to a holding of it for street purposes. The finding and decree will be for the defendants and they will be quieted in their title and the costs will be adjudged against the city and the injunction will be dissolved.

NEGLIGENCE—INTERROGATORIES.

[Lucas Circuit Court, November 5, 1900.]

Haynes, Parker and Hull, JJ.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. v. PETER L. ANDREWS, ADMR.*1. SUPPLEMENTING PROOF OF NEGLIGENCE—AFTER REVERSAL.**

In an action for wrongful death, resulting from injuries received by a brakeman while passing under a bridge, and while said brakeman, riding in the engine, under a rule permitting it, during inclement weather, was in the performance of his duties leaning out of the cab to watch the train, on the first trial of which judgment was given for plaintiff, which was reversed by the Supreme Court on the ground that the negligence of the railway company was not sustained by proof of circumstances (the manner in which deceased collided with the bridge) from which the fact that the injuries were sustained as alleged was not a more natural inference than any other, the circuit court held that the proof of such circumstances in case at bar, the second trial, was sufficiently supplemented to justify affirmance of judgment for plaintiff, notwithstanding the former holding of the Supreme Court. (Haynes, J., dissenting.)

2. RULE AS TO REFUSAL OF INTERROGATORIES.

The fact that answers to interrogatories which a railway company, in an action for personal injuries, requested to have submitted to the jury, had they been as favorable as possible to the railway company, would not have controlled the general verdict, justified the trial judge in refusing to submit such interrogatories.

HEARD ON ERROR.*Potter & Emery*, for plaintiff in error.*George B. Boone*, for defendant in error.**PARKER, J.**

This is an action brought by the administrator of a deceased person against a railway company to recover damages on account of the death of the deceased person, caused, as it is charged, by the negligence of the railroad company. The history of the case in the courts is, that there was a trial resulting in a verdict and judgment in favor of the plaintiff below and that judgment was affirmed by this court, but was reversed by the Supreme Court, and the case coming back was again submitted to a jury, which returned a verdict in favor of the plaintiff below, which verdict was set aside by the trial judge. The case was submitted to another jury, which returned a verdict in favor of the plaintiff below, for \$3,500, and a motion for a new trial, made on behalf of the railroad company, was overruled, and judgment was entered upon the verdict, and now error is prosecuted to this court to reverse this last judgment.

The case in its general aspects is not materially different from the case as originally presented to the Supreme Court, and the statement of the case appearing in *Lake Shore & M. S. Ry. v. Andrews*, 58 Ohio St., 426, may be accepted as a very fair statement, with the exception that in the last paragraph, on page 427, it is said that the fact of the collision of the deceased with the bridge was shown by marks upon the casing commencing *near* the end at which the train entered the bridge.

* Former decision of the circuit court, 8 Circ. Dec., 73 (Reversed 58 O. S., 426).

As the case is now presented, the majority of the court are of the opinion that the evidence fairly shows that the mark on the casing caused by the collision of deceased with the bridge, commences *at* the end of the bridge where the train upon which he was riding entered upon the bridge. When the case was before the Supreme Court it was reversed upon the ground that there was an absence of direct evidence of negligence in support of the verdict. I will read the syllabus:

"In the absence of direct evidence in its support, an allegation that one sustained injuries by reason of the negligence of the defendant is not sustained by proof of circumstances from which the fact that his injuries were so sustained is not a more natural inference than any other."

And the court was of the opinion that the theory of the plaintiff below as to how this accident occurred was not sustained by evidence which showed that that was the most natural inference to be drawn as to how the accident occurred. We also accept, as applicable to the case as it appears before us now, very much of what was said in the opinion announced by Judge Shauck in the case when it was before the Supreme Court, but we think that upon certain points the evidence is now more clear and more favorable to the defendant in error than it was then, and that while it is not widely different it is materially supplemented.

It is a case which may be regarded as a close case upon the facts and we were of the opinion when the case was before us upon the other record, that the evidence was sufficient to sustain the verdict; but the Supreme Court being of a different opinion, we would not presume to affirm another judgment upon the same evidence nor would we do so unless we thought there was a material difference sufficient to justify the case being again submitted to the Supreme Court upon the question of fact upon which the Supreme Court has announced an opinion. There having been three juries which were of the opinion that the theory of the plaintiff was sustained by the evidence, and one of the juries being of that opinion upon the evidence as at first adduced, the trial judge being of the same opinion, this court being of the same opinion, and now the evidence being, in the opinion of a majority of the court materially improved so far as the plaintiff's case is concerned, we believe we should affirm this judgment and allow the Supreme Court to again, upon this record, consider the question of fact upon which it has arrived at a different conclusion.

In the course of his opinion, Judge Shauck says that the theory of the plaintiff as to how this accident occurred is not supported by any evidence whatever; the theory of the plaintiff being that the deceased, while in the line of his duty, standing upon the locomotive and leaning out to look to the rear of the train to see whether the train was in good order, whether it had broken apart or was coming along properly, being unconscious and unaware of the nearness of the bridge, came in contact with the bridge and so was injured and killed.

Why Judge Shauck says that that theory is not supported by any evidence, is made more clear by what follows. He proceeds to say: "Barton was last seen alive shortly before the locomotive reached the bridge when he was standing on the gangway, or platform, between the engine and tender, with his lantern on the floor by his side. After the train had passed the bridge it was noticed that while his lantern was still there he had disappeared. No one saw him leaning over the engine or make any effort to see the rear of the train." So far, that may

be said of the case as it stands upon this hearing. Then he proceeds to say: "No other evidence in the case suggests the manner of his death except the marks on the casing. Certainly an allegation of fact may be established by circumstantial evidence, but the circumstances to have that effect must be such as to make the fact alleged appear more probable than any other. The fact in issue must be the most natural inference from the facts proved. Not only did the circumstances here disclosed fail to make it appear that Barton's death occurred in the manner alleged, but since the point at which his head struck the casing was certainly not more—it seems to have been less—than two feet above the level of the platform upon which he was standing when last seen, the natural inference is that he fell from the train. The circumstances fail to show that the death of Barton was due to the negligence alleged against the company. A recovery upon such evidence cannot be sustained, while it is held that the employer is not the insurer of the safety of the employee. A verdict for the defendant should have been directed as requested."

The case as it was presented to the mind of the judge who rendered that opinion, and presumably to the minds of the judges of the court who concur, was of marks appearing upon the bridge somewhat distant from the end of the bridge where the train entered. According to the evidence as submitted to us now, those marks were there, but there was another mark, a mark which according to the evidence in this record indicates very clearly and distinctly that the head of the deceased struck upon the end of the bridge. Before, that was not plain, and the little evidence pointing that way does not appear to have made any impression upon the minds of the judges of the Supreme Court; they seem to have concluded that the only marks they should take account of were the marks appearing at some distance from the end of the bridge where the train entered.

I should say that the evidence here is also more clear than it was upon the other record, that the injury which caused the death of the deceased was received at the back part and rather to the left side of the head, the skull being crushed. That fact would indicate, as it seems to us, a position consistent with the performance of this duty, which we find then and there devolved upon the deceased, of taking a position on that locomotive and leaning out so as to observe the rear end of the train, and if his head came in contact with the bridge, as is alleged that part of the head would strike upon the bridge. It being clear to our minds that he did strike at the end of the bridge it seems to us that if he had slipped and fallen and then struck, he would have at once gone down as far as the ties and then fallen through; that he could not have continued upon the locomotive and between the locomotive and the bridge until his body reached the far end of the bridge, as it appears to have done, from the marks upon the bridge. The fact that after he had received that severe blow upon the head he still maintained his position upon the locomotive, or between the locomotive and the bridge, gradually sinking lower so as to make the mark described upon the bridge's side casing from the rear end of it where the train entered to the far end where the train went out, indicates to our minds that instead of slipping and falling from the locomotive so that he would have gone down to the ties or to the ground, he was still clutching the handholds that he would take hold of in the performance of his duty in looking towards the rear end of the train; that unless he had

been clutching at those handholds during that brief period of time he could not have maintained that position to make that mark upon the bridge; slipping and falling from the locomotive and striking in that way upon the end of the bridge, he would not have had hold of the handholds and would not have maintained his position upon the locomotive.

Therefore we think, with all that, it could not now be fairly said that the theory of the plaintiff is not supported by any evidence whatever, nor do we think it would be fairly said that the most natural inference from the evidence is that he fell from the train before he struck the bridge. We think that the most natural inference from the facts proved is that he was in the line of his duty, having hold of the handholds, leaning from the locomotive and looking towards the rear.

In addition to the new evidence that I have mentioned, we have this other thing that is worthy of consideration, that while the witnesses before undertook to describe the position one would occupy in performing that duty, and their descriptions do not seem to have impressed the judges of the Supreme Court as being fair or reasonable, that is to say does not seem to have impressed them as being a reasonable account of the way in which this accident occurred, now we have, in addition to their oral description, this diagram presented here of the position that one would occupy according to the oral descriptions given, and this diagram shows that one occupying that position would strike the bridge with his head about as it is contended on behalf of the plaintiff below that the head of the deceased did strike this bridge on that occasion. While to some of us it might seem that that position was somewhat unusual, and perhaps an awkward attitude, as indicated by the diagram, yet we have the testimony of witnesses who say that that was a natural and proper attitude, and that testimony we are not at liberty to disregard; they certainly know more about it than we do, and for the reasons stated, we are of the opinion that we should not interfere with this judgment and verdict so far as the evidence goes.

Most of the other questions which were pressed upon our attention were considered by us when the case was here before. They have not been passed upon by the Supreme Court; that court did not find it necessary to pass upon them, and if it concurs in our opinion as to the facts, it may then pass upon them and agree or disagree with us, but our own opinions upon those various points have not been changed by the arguments made and the authorities cited. The majority of us are of the opinion that the Supreme Court of Michigan has not held that the constructing of a bridge of this form, and as narrow as this, would not be negligence under any circumstances.

As to the interrogatories which counsel for the plaintiff in error desired to have the trial judge submit to the jury, we have read them and considered them. They are not before me, but it is not necessary to read them. I will simply state that it is our opinion that if the answers had been as favorable as possible to the railway company, such answers would not and could not have required a different general verdict and therefore they would not have controlled the general verdict; and that criterion is sufficient to justify the trial judge in declining to submit those interrogatories to the jury.

Finding no error in the record, the judgment of the court of common pleas will be affirmed.

HAYNES, J.

I concurred in the judgment which was rendered before, and I have taken pains to go through this multitudinous record to ascertain the evidence which was submitted to the jury upon the last trial of the case. I find upon this particular point about the bridge and the marks upon it that the same testimony as offered was offered upon the first trial when the depositions were taken at Adrian, save with one exception; an additional juror has been sworn upon the jury who had not been sworn before and a justice of the peace who acted as coroner, whose desposition was re-taken; and I have read the testimony of those witnesses and I am utterly unable to see a single change in the testimony which has been given upon these questions which were questions upon which the Supreme Court passed, not a single change from what it was on the first trial. The marks commenced upon the casing about twenty-two inches from the top of the bridge and came through the whole length of the bridge, rubbing off the paint and leaving blood and marks upon the side of the bridge to the end of it, gradually growing more distinct. I do not care to discuss the questions of fact in the case. I have once differed from the decision of the Supreme Court upon that question, but I think inasmuch as the Supreme Court has reversed the decision of this court, it is my duty to vote for the reversal of the judgment in this case and leave it to the Supreme Court to say whether they will overrule their former decision or change or modify it in any respect.

In regard to the bridge, I do not think it is a very material question, but as I understand the decision of the Supreme Court of Michigan, they do hold that these Howe truss bridges, made in this form and of this width and shape, are proper and that it is not negligence on the part of the company to have any such bridges. But that is not very material at present, I take it, but I vote for a reversal of the judgment.

MUNICIPAL CORPORATIONS—ORDINANCES—LICENSES.

[Lucas Circuit Court, November 5, 1900.]

Haynes, Parker and Hull, JJ.

TOLEDO V. EUGENE BUECHELE ET AL.

1. REASONABLE CHARGE FOR SUPERVISION OF WORK OF LICENSEE VALID.

Inasmuch as the duty devolves upon health officers to make some examination of premises from which it is proposed to remove the contents of privy vaults, and afterwards to see that the work has been properly done and then to see that the premises are properly disinfected, an ordinance providing a reasonable charge for such supervision, to be paid by persons engaged in the work of cleaning privy vaults, in addition to the regular license fee, together with a charge for collecting and the service of issuing the permit, would be legal.

2. CHARGE FOR EXPENSE OF DISINFECTING PREMISES ILLEGAL.

But a charge for permits issued by the board of health to persons licensed and engaged in the work of cleaning privy vaults, which is made to cover the expense of disinfecting the premises, which should fall upon the owner or occupant, or the municipal corporation, is illegal.

3. PAYMENT INVOLUNTARY, WHEN—

The payment of such fees is involuntary, and the same may be recovered back where the party objects and protests generally against such exaction and is threatened at different times by the president of the board of health with

Lucas Circuit Court.

arrest and revocation of his license unless he pays for the permits; and it is not necessary, to make payments involuntary, that the objection and protest be made before the payment of each fee. *Toledo v. Buechele*, 10 Circ. Dec., 280, approved and followed.

4. CAUSE NOT BARRED IN ONE YEAR.

While the exaction of such fees by the board of health is an exercise of power in the nature of taxation, the cause of action is not governed by Sec. 5848, Rev. Stat., which is the statute of limitations (one year) relating to the recovery of illegal taxes and assessments; that statute relates to taxes and assessments levied by the authorities in the ordinary way, and not to such an unlawful exaction of fees. *Toledo v. Buechele*, 10 Circ. Dec., 280, approved and followed.

HEARD ON ERROR.

M. R. Brailey, for plaintiff in error.

J. S. Wertman and *E. P. Raymond*, for defendants in error.

PARKER, J.

The action below was by Eugene Buechele and Otto Buechele, partners, against the city of Toledo, to recover back certain fees exacted by the city of the plaintiffs below for permits to clean privy vaults. It is contended on behalf of the plaintiffs below, defendants in error, that this was an illegal exaction. It appears that after they had paid a license fee of ten dollars per year they were charged fifty cents for each permit for cleaning a vault, and this amounted for the period of one year and five months, to \$294.50. It is conceded on behalf of the city that just one-half of this was an illegal exaction. The ordinance upon the subject provided for a fee of twenty-five cents for each permit and it is conceded that a resolution afterwards adopted by the board of health, providing for a charge of fifty cents, was beyond the power of the board of health, but it is contended by the city that the charge should be sustained for the amount legally exacted, that is to say, for one-half of the amount which was charged and paid.

The petition, among other averments, contains this: "Plaintiffs say that said moneys nor no part thereof was ever paid by said city for deodorizing or disinfecting the premises for which said permits were granted and for which charges were so illegally made and unlawfully obtained."

The answer is a general denial and also contains certain special defenses, one of which is, that this was a voluntary payment made on the part of the plaintiffs below; another, that by the statute of limitations the claim is barred.

We are very clear that, from the evidence, it was not made out that this was a voluntary payment, but quite the contrary. It is also clear that the statute of limitations interposed is not applicable to a claim of this character. I will spend no time in discussing these propositions because they are identical with those passed upon by the court in *Toledo v. Hermann Buechele*, 10 Circ. Dec., 280, and the case here, as to the voluntary payment and the statute of limitations is the same as it was there, and we adhere to our opinion, then announced upon those subjects.

But we are asked to give further consideration to the question whether this is an illegal exaction, and I will speak of that briefly. The decision in the other case was based to a large extent upon the

decision by our Supreme Court in *Mays v. Cincinnati*, 1 Ohio St., 268, in which it is said :

"The power of taxation being a sovereign power, can only be exercised by the general assembly when and as conferred by the constitution, and by municipal corporations only when unequivocally delegated to them by the legislative body."

And it was held in that case that an exaction similar to the one in question could not be maintained and was not legal, because it was undertaking to raise revenue by a form of taxation under the name and pretense of license.

Now this holding as to the power of the legislature over the subject of taxation, has been very much modified by a decision to be found in *Baker v. Cincinnati*, 11 Ohio St., 534, and also in *Marmet v. State*, 45 Ohio St., 63; but so far as it applies to municipalities, we do not find that there is any modification of the rule laid down in *Mays v. Cincinnati*, that a municipality cannot exercise the power of taxation, whether under the guise of a license or otherwise, except when the power to do so is unequivocally delegated to it by the legislative body, and it is contended on behalf of the defendants in error that this is, upon the face of it, an attempt by the city to derive a revenue from this business and not simply to exact a license fee, which will cover the necessary expenses of the issuing of the permits, or of properly authorizing the business to be carried on and the necessary expenses of supervising or overseeing the business so that no harm shall result from it.

Upon the averment of the petition that no part of this fee was used to defray the expense of disinfecting the premises with respect to which the permits had been given, there was no evidence produced on this trial either on behalf of the plaintiff or on behalf of the city. In the other case which was before us there was evidence tending to show that the money was not so expended; but here we have none. Under such circumstances the question is involved as to where the burden of proof rests. The averment is in the petition, and ordinarily what is averred in the petition is a part of the plaintiff's case that he would be required to make out. On the other hand, the information upon the matter is peculiarly within the knowledge of the city. The evidence, if offered by the plaintiff, would be of a negative character. Positive or even competent evidence might not be available to the plaintiff, and, under such circumstances, it is sometimes held that the burden of proof is shifted to the other party.

But we do not feel called upon to pass upon this question as to the burden of proof. We have only this evidence upon the subject; that there was a provision in the city ordinances for such an expenditure of the fund derived from the exaction of these fees. Section 84 of a certain ordinance upon the subject reads as follows :

"No person shall remove the contents of any privy vault, except by written permission had of the board of health, for which permit a fee of twenty-five cents shall be paid by the applicant and the money so received shall in each instance be expended, under direction of the board of health, in disinfecting the premises for which said permit was given."

And that provision being contained in the ordinances, perhaps, in the absence of any evidence upon the subject, the presumption should obtain and be given effect, that the officers properly discharged their duty in expending the revenue accordingly.

Another section introduced in evidence was that providing for a license fee of ten dollars per year to be exacted every year:

"Every person, firm or corporation who shall empty, clean or remove the contents of privy vaults or catch-basins for hire within the city of Toledo, shall pay a license fee of \$10.00 per annum."

The license fee was regularly paid by the plaintiff below. The permit was so called upon its face, and it was a permit in each instance to remove the contents of a certain privy on certain premises, and, during this period of one year and five months, 589 of these permits had been issued to the defendants in error, at a charge of fifty cents each, which amounted to \$294.50. That was exacted in addition to the license fee of \$10.00 per year.

Now if it should be made to appear that this amount of expense would devolve upon the city in consequence of this business being carried on in the city by the defendants in error, that is to say, in consequence of their acts in the premises, as something incident directly and primarily to their conduct of the business, we are not prepared to say that such an exaction might not be lawfully made.

But the need of disinfecting the privy vaults is not produced, primarily, by any act of the persons who remove the contents. They perform a part of the work of removing that which is obnoxious; the city, by disinfecting the premises, performs another part. There seems to us to be no good or valid reason why the person who removes the contents of a privy should be obliged to pay this part of the cost of cleaning up the premises. If this imposition is legal, it is not apparent to us why the imposition of the costs of disinfecting the contents of privy vaults and other things provided for in the ordinance to be paid for by the owner or occupier of the premises, might not as well be imposed upon the person who removes the contents, or, indeed, why even the cost of removing the contents of the privy vault might not as well be imposed on one who engages in the business of removing such contents. If this charge were to meet the expense of removing or disinfecting something placed on the premises or on the street by the carter in the performance of his work, the exaction might be justified and might be legal.

An ordinance providing a reasonable charge for supervising their work and removing the bad effects for which they are primarily responsible and covering the costs of the issuing of the permits, may be legal. It seems that it does devolve upon the health officers to make some examination of the premises from which it is proposed to remove the contents of a privy vault or vaults, and after the removal it seems that the duty is imposed upon the board of health of seeing that the premises are properly disinfecting, and also that the work of the person removing the contents has been properly done, and we say that an ordinance providing for a reasonable charge for this supervision, it being a burden imposed to some extent upon the city by the work being done by persons engaged in this occupation, such a charge, if not exceeding what would be reasonable or necessary to defray this expense, together with a charge for collecting, and the service of issuing the permit, might be sustained; but it does not seem to us that a charge which is to cover the expense of disinfecting the privy vaults, the expense of which should fall upon the owner or occupier of the premises, or upon the city, can be imposed upon the person who performs a part of the duty of removing the contents and cleaning up the premises.

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For the reasons stated, and the further reasons given in the decision to which I have referred, the judgment of the court of common pleas will be affirmed. I do not know that I have stated what that judgment was, but I will say now that the court of common pleas following the decision of this court to which I have referred, directed a verdict for the plaintiff and judgment was entered upon that verdict.

HOMICIDE.

[Brown Circuit Court, August Term, 1900.]

Russell, Cherrington and Sibley, JJ.

JOHN H. DONALD V. STATE OF OHIO.

1. EVIDENCE OF STATEMENTS NOT PART OF *RES GESTÆ*.

Where defendant and his son were jointly indicted for murder by shooting, on the trial of the former, evidence of the son's statements, made at his home soon after the killing occurred, tending to show who fired the fatal shot, is incompetent, as what was said was not part of the *res gestæ*, and was properly refused.

2. RULE AS TO EVIDENCE IN CHIEF AND IN REPLY.

By the law of evidence, testimony competent in chief, by that fact is rendered incompetent in reply. The rule, however, is subject to the discretionary authority of a trial court to reopen a case in chief at any time before it is finally closed, and let such evidence in. But this should not be done when, without fault on his part, by reason of the discharge of witnesses, or otherwise, a party would be cut off from an answer to the new testimony, which he might have made if it had been regularly given. Yet, as in this case, if the record fails to show that a party over whose objection evidence in chief has been admitted, out of the usual order, was deprived of the right or cut off from the means of answer to it, such action is not in legal view prejudicial, even if technically irregular.

3. REPRODUCING TESTIMONY OF DECEASED PERSON.

Where the testimony of a deceased person, or a party in a former trial, is sought to be reproduced by the evidence of one who heard it, but only as to a particular portion, it is a sufficient qualification to testify to this, that the witness can recollect and state the substance of the part offered.

4. EVIDENCE DEPENDING UPON PROOF OF CONSPIRACY.

To make a case of error in refusing evidence, the competency of which depends upon proof of a conspiracy, that fact must appear with reasonable clearness, inasmuch as whether or not it has been established, is a matter peculiarly for the trial court. On that point, under the general rule stated, nothing is shown by the record here, to the prejudice of the defendant below.

5. ACTS OR DECLARATIONS OF THIRD PARTIES.

As showing a person's state of mind when killing another with whom he was in conflict, it is not competent to prove the acts or declarations of a third party at enmity with him, in no wise connected with the homicide, notwithstanding they manifest most vicious feeling, and are by one who sometime prior thereto had joined in a violent assault upon him.

6. DECLARATIONS OF CO-CONSPIRATOR—RULE AS TO.

Much latitude is left to a trial court in determining the *prima facie* proof necessary to admit evidence of the acts or declarations of a party as a co-conspirator with one who is being tried for an alleged crime; and if on that question, there is no failure of proof at any material point, the admission of such evidence, otherwise competent, will not be regarded as error. *Price v. Junkin*, 4 Watts, 85; *Nudd v. Burrows*, 91 U. S., 426.

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7. STATEMENTS OF CO-CONSPIRATOR WHICH WERE INCOMPETENT.

After evidence of a conspiracy between the defendant and his son to kill the deceased, against objection, the state was allowed to put in the son's declarations to a third party, in the father's absence, as follows: "Are you going to town to-day? There is going to be some shooting; if father don't kill a man I will." At another time: "I would as soon shoot Snyder as I would a rabbit." *Held*, error, as the statements were not in furtherance of a common purpose of the two to kill.

8. CHARGE TO JURY—REPETITIONS SHOULD BE AVOIDED.

The true objects in charging a jury are (1) to bring into view the issues in a case, and (2) by a pertinent statement of the law, show how a jury should apply the evidence in the various aspects which the trial may develop; and if that be done, in legal view a charge is complete. Hence, when a proposition once has been clearly given, it is the right of the court not to repeat it in varied form of expression, though equally correct; and to avoid possible confusion in the minds of the jury, it generally is wise to refuse to do so.

9. RULE AS TO CHARGE AS TO MEASURE OF PROOF.

It is error to charge without qualification that upon the requisite measure of proof by the state, of an unlawful killing by the defendant the burden is thrust on him to show, by the greater weight of evidence that it "was done, not of malice, but in the necessary defense of his person from death or enormous bodily harm," inasmuch as the apparent effect of such an instruction is to preclude him from the right to take life to protect against the reasonably grounded apprehension of such consequences.

10. SUBMITTING QUESTION WITHOUT EVIDENCE.

To submit to a jury in a trial of one for murder, by a charge to that effect, a question as to the defendant's guilt, upon the theory of "his aiding and abetting" another who may have done the killing, when there was no evidence upon that point, is misleading and erroneous.

11. MISLEADING AND ERRONEOUS CHARGE AS TO SELF-DEFENSE.

The trial court said to the jury "that the foundation of the legal right to take human life in self-defense, and that necessity must be real or the appearance such as to impress an honest man of ordinary firmness with the honest belief that such appearances are real. In this case, gentlemen, it is for you from all the circumstances in the case to say whether or not at the time the defendant fired the fatal shot, "if such you find the case to be, there was any necessity for so doing, and whether the circumstances were such as would have impressed an honest man of ordinary courage with an honest apprehension of danger of the loss of life or of receiving great bodily harm, either to himself or to one whom he had a right to protect." *Held*, that this is misleading and erroneous in putting before the jury as a test of the right to kill in defense against apprehended danger, not what in good faith and the careful use of his faculties reasonably was the appearance to the defendant, but what an "honest man of ordinary firmness," and "ordinary courage" might be supposed "honestly" to think of the situation in which the life was taken.

HEARD ON ERROR.**SIBLEY, J. (Orally.)**

The case of John H. Donald against the state of Ohio is in this court on a petition in error, seeking to reverse the finding and judgment of the common pleas. The plaintiff here, the defendant below, is indicted jointly with his son, William L. Donald, of the offense of murder in the first degree. A separate trial was had of the plaintiff in error and he was convicted of murder in the second degree. In the progress of that trial certain supposed errors intervened, and we are called on to pass upon the questions which are thus made.

All the testimony is set out in the most extensive record that I ever saw in a court of justice. We are fully aware that it is a case of importance, all cases involving a right under the law may be said to be

important, but we cannot disguise the fact that some are apparently of greater importance than others. Some cases are so in the mere circumstance that the trial of them involves a very large expense to the public; but with a consideration of that kind, neither a court of review nor the trial court has anything to do, so far as respects the rights of the parties to the controversy.

The defendant having been found guilty of murder in the second degree, the judgment against him is one of very great moment so far as he is concerned. His right, however, to have us pass upon the alleged errors presented by this record would be the same if he had been found guilty of a simple assault; yet the gravity of the finding and judgment, as well as the general character of the transaction out of which the guilt has been found, cannot but impress us with their importance to him, and also to the state, in the preservation of its order and the rights of its citizens.

The errors alleged may be conveniently classed for consideration into three general divisions. The first division relates to exceptions arising (1) out of the testimony of witnesses, apart from any question of alleged conspiracy; (2) to evidence offered by the state and admitted by the court on the theory of conspiracy between the defendant and his son; and (3) to evidence offered by defendant relative to acts and attempts of Charles B. Halfhill and persons other than the deceased (Snyder), to take the life of the defendant, such evidence having been refused.

The second division refers to the special charges given at the request of the state and excepted to by the defendant; and to the special charges requested by the defendant and refused by the court. The third general division embraces exceptions to what is contained in the general charge to the jury.

Before entering upon a specific consideration of the alleged errors, I make a general statement in relation to the testimony of witnesses to the transaction, out of which the various aspects of the controversy arise. It is clear that the defendant below, plaintiff in error, Mr. Donald, and the deceased, the one whom he is charged, jointly with his son, with having feloniously killed, came in sight of each other in the town of Higginsport, in this county, and that a rencontre between them followed, the outcome of which was the death of Snyder.

The first dispute of fact is as to who began the shooting. There is substantially no question that the conflict, after its inception, continued between the parties until Snyder was killed. It is further a matter undisputed that these two men had been for years in feud, and the enmity and state of feeling was such that either reasonably might expect that, on slight excuse, the other would kill him if he had a chance.

Upon the trial of the case, there was tendered in evidence, by the defendant, a statement by William L. Donald at his home, made immediately upon his arrival there, whence he and his father had gone at once after the firing of the fatal shot. This evidence was rejected by the court and the defendant excepted. I take it up first, as I wish to clear the case of the less important features of the controversy.

Now, we have not the slightest hesitation in saying that William's statement made at that time was wholly incompetent. It could not have been admissible, unless part of the *res gestae*, and the time had elapsed when it could be such, in our estimation. If it had been a declaration made at once, or right there at the place of the transaction, as explaining

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why he shot, assuming he fired the fatal shot, it would be admissible, but it had passed beyond that. He had left the scene of the killing and gone to his home, and the conversation there was mere narrative, hearsay, having no proper bearing upon the case.

The next thing to which I refer is the act of the court in admitting certain evidence in rebuttal. The rule, as we have always understood it to be, is, that anything competent in chief is thereby made incompetent in reply. This is the only principle so far as I know, by which you can discriminate evidence which, within strict rules, should not be given in rebuttal. Hence, what is admissible in chief is incompetent when it comes to reply. Now, we are pretty clear that this was properly evidence in chief, and should have been so given. But while the rule is as stated, there is a discretion in the trial judge to relax it and re-open the case for the purpose of admitting evidence that properly was in chief. And we think it a sound principle, that there ought not to be a failure of justice in the trial of a case because of a slip or omission in evidence; or if testimony is discovered after the evidence in chief is closed, important to the case the state is prosecuting, or in civil suits as well.

I presume all trial courts have re-opened cases for the purpose of letting in, during the reply, new evidence that properly and strictly would be in chief. But in connection with that, the rule always has been, as we have understood and seen it applied, that if the plaintiff re-opens, the defendant has a right to rejoin. Hence, if it happens that witnesses have been discharged and the defendant would thereby be debarred of the power to answer, the case would not be re-opened; such circumstances would be a limitation upon the discretion for that.

Now in this case, the record does not show that the defendant was denied the right to answer if he saw fit; and it fails to disclose that he was deprived, by the re-opening of the case, of the means of answering. So that sufficient grounds do not appear for saying the court below, in the exercise of its discretion to permit a relaxation of the rule, did anything prejudicial to the defendant. For ought that appears in the record, he was still able to answer the new evidence, and there is nothing to show that he was not permitted to do so. We think, therefore, there was no error in that action.

Exceptions were taken to the testimony of the stenographer, who testified to evidence given by the defendant, Donald, in a former trial. The sole question made was as to her qualifications to state from memory, not being able to find her notes, the substance of all the evidence that Donald had given on that occasion. The testimony sought to be made use of related to a single feature of the transaction that had been in controversy in the former trial. Inquiry by defendant's counsel was directed to the question whether she could remember and re-state the substance of all of Donald's testimony in that case. The stenographer said that she could not, but, with equal decision, stated that she could give the substance of his testimony upon the point in issue here—state the substance of all he said on the matter to which the examination would relate. On that statement the court admitted the testimony, and the question presented is whether or not that was error.

In a volume entitled "Abbott's Trial Brief," the general doctrine in such cases is thus stated: "The rule that the witness must give such former testimony, substantially and in all its material parts, does not require him to reproduce the very language."

In a case there cited, the 80 Ky., sanctioned and followed in 63 Iowa, this we find: "If the statement appears on its face to cover the substance of what the deceased witness, testified to in reference to the material matters in issue, the evidence should be allowed to go to the jury for their consideration. When the witness stated that he had heard the whole of the testimony of deceased witness, and that he remembers the substance thereof, the court will not be justified in taking it from the jury, unless from the statement of the witness himself it obviously appears that he does not remember the substance of what the deceased witness testified to in reference to the material issue being considered."

It is evident that any other ruling might deprive the party of his right to reproduce the evidence or declarations of parties who testified in a former trial or suit, whether now living or deceased. It would be impossible for a listener to remember the testimony of a witness, if of any great length, except in the very rarest instances of memory; and therefore, it is a reasonable application of the general doctrine that it is sufficient if, in respect to the matter that is material in the trial, the witness can state the substance of all that the former testimony contained. We think, then, that the stenographer in this case was qualified.

The next point to be considered is the defendant's claim of right to submit evidence to the jury of the conduct and declarations of Halthill, Snyder, and one or two others toward him, based on an alleged conspiracy between Snyder and these others to do him violence. I shall not go into the particulars of that; it presents, in the first place, a question peculiarly within the province of the court below in such cases, for determination. Counsel and the bar are familiar with the proposition that, before evidence can properly go to a jury of the declarations of alleged co-conspirators, where one alone is on trial, and against him, there must be what the law terms a *prima facie* case shown to the court. Here, all the facts were adduced which the defendant had to offer on the question of the conspiracy that he sought to establish in order to obtain the admission of declarations, especially of his wife, (and I suppose he, too, would have testified had it been admitted) in regard to a transaction in an alley along in 1892, claiming at that time Halthill had joined with Snyder, the man who was killed in this affair, in a fierce assault upon Donald.

The special bill of exceptions in its material parts reads: "Be it remembred that on the 17th day of March, A. D. 1900, and in the trial of this case evidence had been already offered by the defendant tending to prove that the deceased, William S. Snyder, had, on a certain Sunday afternoon in the town of Higginsport, Brown county, Ohio, in the year 1892, violently assaulted the defendant, John H. Donald, and that at the time he did assault him one Charles Halthill, who was at that time the acting marshal of the town of Higginsport, was present and assisted in the assault, participating therein; that no evidence had been offered on the part of the defendant tending to show that there had existed a criminal conspiracy between the said Charles Halthill and William S. Snyder, the deceased in the present case, and one William Duffey to get rid of or put out of the way the said defendant, John H. Donald, by violent means. And thereupon the defendant, to further maintain the issue on his part, called one Eliza Donald, the wife of the defendant, who was inquired of as to where she lived during the year 1897, and who in response to the inquiries of counsel for defendant testified as follows:"

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The bill then recites the preliminary testimony of Mrs. Donald, which was permitted to be given to the jury until the witness sought to testify to the individual acts of another than the deceased, Snyder, when the court sustained the state's objection to such testimony. Thereupon the bill further sets out that the defendant expected to prove by said witness, in answer to the question objected to, that "on the night of the 27th day of November, 1897, while the witness, her husband and their young child were in bed in their sleeping room, and about the hour of 10 o'clock at night, five shots were fired at and toward their said house and sleeping room, and that one pistol ball from among said five shots struck the outer wall of their said sleeping room, producing an indentation therein, and afterwards falling upon the floor of said sleeping room; that said bullet passing through said sleeping room, passed above, but near the bed wherein the said wife, her husband and said child were asleep, her husband being the defendant herein." Then, by further testimony, it is stated that they expected to show that Halfhill fired those shots, said Halfhill being the same Halfhill whom it was alleged was present and participated in the assault upon Donald in the alley.

There is some evidence of circumstances where Halfhill and Duffey, perhaps Halfhill only, appeared in other ways to have shown ill-will toward Donald; of a disposition perhaps to harm him; but the court finds as a fact, that there is no proof tending to show that Halfhill and Snyder, by any pre-arrangement or conspiracy, joined in the assault that was made upon Donald in the alley in 1892. Upon the proposition of conspiracy between the deceased Snyder and the deceased Halfhill, the court also finds against the defendant. Counsel for defendant contend with great force that, notwithstanding the finding of the trial court, the record discloses sufficient evidence of such conspiracy to send it to the jury, and that in refusing so to do error was committed. We cannot say that the court erred, in rejecting this evidence. It may be a case where different judges might have differed upon the proposition, and we do not say that if it had been admitted, it would have been error. It was a question on a matter primarily with the trial judge. We are of the opinion that he did not err in that regard.

It is contended, on behalf of the plaintiff in error, that the evidence proposed to be given by the wife and other witnesses would be competent independent of any question of conspiracy, as bearing upon the state of mind in which the defendant below stood with reference to the man he killed, and so we are called upon to consider that proposition. We cannot see that the rejected testimony reaches to that extent, or relates in any way to the transaction out of which arose the death of the man Snyder. Of course, it was evidence against Halfhill, would be if he were on trial, of the most cogent sort, as to his disposition, and would have been equally so without regard to whether he had been firing into the house of the plaintiff in error, John H. Donald, or not. But how can it be relevant to the controversy arising as to the state of mind, the conspiracy unproved, of the plaintiff in error in reference to the transaction out of which grew the death of Snyder? We are unable to see the connection by which the enmity of Halfhill as an individual, independent of the other, could have such legal relation as to make it competent evidence to be introduced in behalf of the defendant below, Donald, when charged with the killing of Snyder; and must, therefore, say it was rightly ruled out. On the whole controversy here raised with

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reference to the Halfhill testimony, as it is made to appear by the record before us, we think the court below fell into no error.

We now come to the state's claim of conspiracy. It is a familiar and elementary doctrine that proof of conspiracy must precede the declarations of conspirators, and declarations of conspirators are admissible only in so far as they become verbal acts or operate in furtherance of a common purpose. So, too, a co-conspirator may make many statements that would be competent and cogent evidence against him, were he on trial, which would be wholly incompetent against the conspirator when he is being tried. But on the question of conspiracy, Justice Bradbury has stated, in *Goins v. State*, 46 Ohio St., 457, 463, that "Much latitude is necessarily left to the trial court in determining whether or not there has been introduced sufficient *prima facie* proof of a conspiracy to admit evidence of the acts and declarations of one claimed to be a co-conspirator with the defendant on trial."

That is the general principle, and there is no better statement of the rule as to the necessity for a wide degree of discretion. On the exception now under consideration, the court here must be able to say that there was in some point no proof of conspiracy, or the ruling of the trial judge will stand. It finally results in leaving that matter very largely within his discretion, governed by all the circumstances that are disclosed in the evidence bearing upon the question of conspiracy. We can not say that the trial judge erred here in admitting any competent declaration of William L. Donald, as co-conspirator; that is, in holding that there was sufficient evidence *prima facie* to put him in this category in view of the principles by which we conceive ourselves to be governed.

We next come to the exception to the admission of evidence of the individual acts and declarations of William L. Donald, on the claim of the defendant below that said acts and declarations were not in furtherance of the alleged conspiracy. The doctrine is laid down clearly in *Fouts v. State*, 7 Ohio St., 471, and *Clawson v. State*, 14 Ohio St., 234, the rule being stated there as a general legal proposition, but aided by illustrations, that any act or statement relied upon as competent upon the theory of conspiracy between the party who made or did it, as against another on trial, must be in furtherance of a common purpose or design. Common purpose is a familiar expression or phrase frequently used in the books as equivalent to community of purpose, or of a design that was not only the one of each but of both. Assuming that the conspiracy was sufficiently proved, we are called upon to review the evidence of independent acts and declarations of William L. Donald, objected to upon the ground that even in that view they are still incompetent.

The first is William L. Donald's declarations to another man in his father's absence: "Are you coming to town to-day? There is going to be some shooting here; if father don't kill a man, I will." Now the question is whether that is in furtherance of a common design. On the authority of *Fouts v. State*, *supra*, we think not. It is a declaration of William's purpose; if his father did not do the act, he would do it. It does not point to something that they were to do jointly; he simply declares that if his father fails to kill a man that day, he will kill him. The name of Snyder was not mentioned, in fact no name was given. Now take the illustration given by *Fouts v. State*, *supra*. There, the man who was killed is named as one who ought to be killed, and the co-conspirator declared that he was going to do something which would

put him in the penitentiary ; with the further declaration that Scott, the person afterwards killed, was not fit to live ; which showed that his declaration related to the killing of that man. But it did not couple with him any one else in the act. In that case, notwithstanding the fact that the conspiracy was shown, the declaration was rejected, and we think it must be in this.

Then further : " I would as soon shoot Snyder as I would a rabbit." This declaration has not the slightest apparent relation to any common purpose of William L. and his father, but is an independent declaration of his own feelings. It would be cogent evidence against himself if he were on trial, but as far as it relates to his father it has not the least tendency to further or show a common design to kill Snyder. That is the lacking element in both of the declarations to which I have referred. We held, therefore, that it was prejudicial error to admit them.

The other exceptions are in regard to the testimony of witnesses who testified as to having seen William L. Donald around at various points in the vicinity where the killing occurred. We regard that evidence as properly admissible for the purpose of showing what he was doing in furtherance of a common design. So that in respect to all the testimony admitted on the theory of conspiracy, we hold there was error in respect to those two declarations only. Two witnesses testified to the rabbit statement and one to the other matter. This disposes of all questions made as to conspiracy, or the admission and rejection of testimony, and, as I have stated, we find no error except in the particulars specified.

II. I come now to instructions to the jury, and shall first take up exceptions to the special charges. The case, from its very nature requires considerable time to dispose of it, and I will be excused for not trying to rush it through.

The first exception made, that counsel rely on in argument, is to special instruction No 9. However, before disposing of the objection to this charge, I want to take the liberty of commenting on the practice of loading the court with special charges by the cart load.

When an instruction is once clearly stated, to repeat it in a different form is calculated to confuse a jury ; for if they have two charges on the same subject, one in one form and another in varied form, it is very natural for them to think that these charges must have some different import. Hence, after a proposition of law relative to the case had been once covered, let counsel keep their repetitions, instead of throwing them at the jury. This is the unquestionable right of the trial court which it would be well for it to exercise. Of course, there arise different phases of a case from which charges with a view to varying aspects may be material and important ; and where such is the situation the court should meet it. The object of a charge is to bring into view (1) the great issue in the case, and (2) other aspects, developed on the trial, to show the jury by a proper statement of the law, how the evidence should be applied.

When that is done, the charge is complete in legal view. All that goes beyond tends to confusion ; and into error courts may fall if they give a long string of charges, varying slightly in form—are made to lose sight of the real case.

Special instruction No. 9 is this : " While the burden is on the state, in the first instance, to prove beyond a reasonable doubt an intentional killing, yet if it has done so, or if that fact is admitted by defend-

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ant in this case, the burden is on defendant to make out his defense ; and for him to do so, he must satisfy you by a preponderance of all the evidence in the case :

"First. That at the time he fired the fatal shot, he did, in the careful and proper use of all his faculties, honestly believe and have reasonable grounds for believing, that he was then and there in imminent danger of losing his life, or suffering enormous bodily harm from an assault at the hands of the deceased, William S. Snyder. And

"Second. When he so fired the fatal shot, he had no other means of averting the loss of life or preventing great bodily harm from assault at the hands of the deceased, William S. Snyder, than shooting and killing him, the said William S. Snyder ; or at the time he fired he honestly believed and had reasonable grounds to believe that he had no other means of averting said danger than shooting, as it is alleged he did shoot."

Counsel for defendant contend that this charge shifts the burden of proof absolutely on proof of an intentional killing, without making it an unlawful killing, and it may be a very nice question indeed, whether or not the point is well taken. As our law now defines manslaughter, it is simply an unlawful killing. Every lawyer understands that there are many intentional homicides which are perfectly lawful. If the court had said unlawful killing, that objection would have been removed ; or if the court had said intentional and malicious killing, the objection would not lie. Either unlawfulness or malice implies that it was a killing which rendered the party guilty, amenable to the law ; but in view of what is said in the opinion in *Silvus v. State*, 22 Ohio St., 90, and the authorities there cited, we are not willing to go so far as to say that on this ground the charge is erroneous.

Special instruction No. 10 is the next one excepted to. "If the evidence in the case shows, beyond a reasonable doubt, that the defendant unlawfully and purposely shot and killed William S. Snyder, and defendant claims he did the act in self-defense, in determining this issue you are not to apply the rule of reasonable doubt, but the burden rests upon the defendant to satisfy you by a preponderance of all the testimony in the case that the shooting and killing was done, not of malice, but in the necessary defense of his person from death or enormous bodily harm at the hands of the deceased."

This is an illustration of giving a charge and overlooking a feature that belongs to it. Here it is made the obligation of the defendant, in order to exonerate himself, to show that the shooting was done by him in the necessary defense of his person. It leaves out the element of reasonably apprehended or apparent danger which may justify one in exercising the right of self-defense, and puts it upon the necessity from imminent danger in fact. The charge is palpably erroneous on that ground.

Charges 11 and 14 are grouped together and exceptions are taken to the giving of them. Charge 11 reads as follows : "The defendant is not justifiable or excusable in taking the life of William S. Snyder, although he believed, in good faith, that he was in imminent danger of death, or great bodily harm, and that his only means of escape from such danger consisted in taking the life of said William S. Snyder, unless there were reasonable grounds for such belief.

Charge 14 is this : "If the state has proven, beyond a reasonable doubt, that the defendant, John H. Donald, did shoot and kill the deceased, William S. Snyder, or if the defendant has admitted that he

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fired the shot that killed the said Snyder"—as I understand it, there is no admission of that kind whatever in the record, and while this statement in the charge is not seriously prejudicial, yet it should not be given in any charge where it can be properly excluded if by possibility it might be misleading—"then it is not sufficient that the defendant show you that he honestly believed, at the time he fired the fatal shot, that he was in danger of loss of life, or of suffering great bodily harm from an assault made by the deceased, William S. Snyder; but he must go further and satisfy you by a preponderance of all the evidence that, at the time he fired the fatal shot, he had reasonable grounds to believe he was in such danger."

These two instructions, we think, simply state the law of self-defense, the rules that apply on the authority of *Marts v. State*, 26 Ohio St., 162, in substance as to the rule of proof in respect to the claim of self-defense, and we do not see that they are objectionable; if objectionable at all, it is only because they may be said to twice state the rule. The last one is sufficient alone. The first is superfluous if 14 is given.

Charge 16. The criticism of this charge rests upon the phrase "had formed a common purpose," and the point made is that there might be a common purpose without community of purpose; that the jury might find that each separately had formed a common purpose; and so under this instruction hold the defendant on trial responsible for the act of William, if he fired the fatal shot, notwithstanding there was no unity of purpose or conspiracy between them. But on looking into the meaning of the term "common," and examining the books as to uses of it by courts and lawyers, we are inclined to think the criticism, though very keenly put, is not valid as against the right of the court to phrase the matter in that form. For example, Justice Bradbury, in *Goins v. State*, *supra*, in discussing conspiracy, says, referring to the testimony that had been offered: "Its admissibility depends upon its having been made by a co-conspirator in furtherance of a common purpose."

It is evidently treated as a phrase, as already stated, which is equivalent to unity of purpose, united in a common design and in fact in common parlance we so regard it. After careful consideration of it, we are convinced that there was nothing in the statement which was calculated to mislead the jury, and we hold, therefore, that there is no error in the charge upon that ground, which is the only criticism made, proof of conspiracy being taken for granted.

Charges 17, 19, 20, and 21 are all excepted to and all objectionable, as we think, on a common ground. I will read charge 17: "If the jury find from the evidence, beyond a reasonable doubt, that the defendant and William L. Donald were each present at the time that William S. Snyder was killed, each aiding and abetting the other in the killing, and that William S. Snyder was then and there unlawfully shot and killed, the defendant is responsible for such killing, no matter whether he fired the fatal shot or that it was fired by William L. Donald; unless you further believe from the evidence that such shooting was done under circumstances which made the same either justifiable or excusable."

Now, as we understand this record, there is no evidence for the application of the doctrine of aiding and abetting; nothing to show that John Donald said or did a thing to induce L. William Donald to fire the fatal shot, if he fired it, and John Donald, therefore, in this view of the case, was not aiding and abetting William L. Donald. He was an independent actor within the principle of *Woolweaver v. State*, 50 Ohio

St., 277. This clause, or its equivalent, runs through all this line of charges, and is not warranted, we think, by the testimony of witnesses who gave in its substance what occurred at the time of the killing; there is no evidence that puts John Donald in the relation of an aider and abetter of William L. Donald; in fact, we think there is a total failure of proof on that point.

By the disclosures of testimony here, the case must stand on the fact that John H. Donald fired the fatal shot, or that William fired it as a co-conspirator with him to kill Snyder and not upon the theory that John H. Donald was there aiding and abetting his son, William, in his shooting and killing Snyder, if he fired the fatal shot. To throw that element in thrusts a prejudicial confusion into the case which has nothing in the evidence to warrant it. In that view, charges 17, 19, 20 and 21 are held to be prejudicial and erroneous.

III. This brings me to the general charge. The first exception, the less important one I shall consider first, although it comes later in the charge. "If the jury find that the shot that killed Snyder was fired when the two men were lying in the gutter on the west side of Jackson street, and that during the conflict preceding their falling into the gutter, Snyder had become disabled or disarmed, or both, and the danger to which the defendant, Donald, had been subjected before they fell into the gutter had passed, regardless of how it may have been brought on, and the defendant in the proper use of his faculties, if at the time he had the proper use of his faculties, knew or had reasonable grounds to know and should have known that Snyder had, after the beginning and during the continuance of the conflict, become disabled or disarmed, or both, and was not in a condition to kill the defendant or do him great bodily harm by reason of being so disabled or disarmed, or both, then the defendant, Donald, would not be in a situation to invoke the law of self-defense and take the life of Snyder under such circumstances, if he did so take it."

This is objected to. The clause "and should have known that Snyder had" has been the one criticism on the ground that it is contrary to the law of self-defense as laid down in *Marts v. State*, *supra*, case. We have given this objection careful consideration, because we were somewhat impressed by the argument for it; but on looking closely we think no substantial fault is shown. There was a state of facts proven that justified a charge of the general character to which this belonged; that is to say, the evidence showed that each of the men, in the beginning of the fight, had a pistol; that after they were together, Donald fired one shot that took effect upon the body of Snyder; and there is enough to fairly show that, coupled with this, Snyder threw up his hand and dropped his pistol; enough to show, therefore, that as far as that pistol was concerned he was disarmed. They struggled on, however, and both fell into the ditch. As to which was on top or which under in the fall is a matter of controversy; but there is evidence to go to the jury upon in argument, and justify an instruction from the court on the theory that, by the shot and the loss of the weapon, Snyder had become disarmed and disabled; and therefore, that if the defendant below, Donald, knew this, and that he was no longer in danger of great bodily harm, then he had no right to shoot him. It amounts in substance to this; that if the jury should find that the defendant knew Snyder was disabled and disarmed, they would be warranted in saying he had no ground of self-defense, that he could not under such circumstances have had an

apprehension of death, or of great bodily harm. This is the general principle in *Marts v. State*, *supra*, that the grounds of self-defense are either an actual or a reasonably apprehended danger of death or great bodily harm. By throwing in the clause most criticized by counsel, the state has been harmed rather than the defendant. The court, doubtless in view of the testimony of the defendant that he was dazed and bruised and scarcely knew what he was doing, says: "If the defendant, in the proper use of his faculties, that is, if at the time he had the proper use of them," thus making it obligatory upon the jury to find that he must have had the proper use of his faculties in order to put him under the requirement which this charge suggests. We find, then, that there was no error on the part of the court on that feature of its general charge.

Next comes what has been the great core of controversy and around which the battle has waged. And here I state what I intended to say in the beginning, that, on behalf of both the state and the plaintiff in error, the case has been very fully and ably argued, and we do not think that anything further to aid the court in its investigation could have been given by other counsel. Finally we are left to do the work of decision with the best judgment we possess and the light afforded us, and we think it all has been turned on.

On page 2202 of the record the other objectionable clause is found. Perhaps I had better read the whole paragraph, in order to put in view fairly the court below on this feature of the charge.

"To make the defendant in such a case the sole arbiter of the facts would insure acquittal in most instances when the plea of self-defense was set up, and thereby tend to disturb the peace and security of society without much probability of redress. But such is not the law. While the defendant at the time was sole judge, and while you shall not judge his judgment when formed, if formed at all, with nicety or severity, yet it is your duty to judge whether his judgment was an honest judgment, and whether the circumstances were such as afforded a reasonable ground for the belief that he, at the time the fatal shot was fired, was in imminent danger of loss of life or of receiving great bodily harm." If I were making a verbal criticism I would say a "sincere judgment," "sincere belief," for the doctrine of self-defense is in this aspect the doctrine of good faith.

"The appearance at the time the fatal shot was fired must have been such as to have alarmed a man of ordinary firmness and impressed him that his danger was imminent." The Supreme Court has said, "*bona fide* believes that there was such danger." This is the first clause in which the words "ordinary firmness" appear, and it is applied directly to the time when the fatal shot was fired. The next clause is like unto it, only a little worse. "And if he acted under such circumstances, that is under what reasonably appeared to be real danger at the time the fatal shot was fired, it is immaterial whether it was real or not. But you will remember, gentlemen, that the foundation of the legal right to take human life is self-defense, and that necessity must be real or the appearances such as to impress an honest man of ordinary firmness with the honest belief that such appearances are real, and that he is in danger of loss of life or of receiving great bodily harm. By the use of the term 'great bodily harm,' or 'enormous bodily harm' is meant something more than a mere beating or thrashing. Something of a more lasting or permanent nature is meant. For no man would be justified in shooting or wounding or killing an assailant who merely meant or was

in the known condition as to weapons only to give him a thrashing or beating. In this case, gentlemen, it is for you, from all the circumstances in the case, to say whether or not at the time the defendant fired the shot that took the life of William S. Snyder, (if such you find the case to be) there was any necessity for so doing, and whether the circumstances were such as would have impressed an honest man of ordinary courage with an honest apprehension of danger of the loss of life or of receiving great bodily harm, either to himself or to one whom he had a right to protect."

Aside from the other authorities cited, after a full consideration of the subject, in the light of the decision in *Marts v. State*, *supra*, which is the unmodified authority in this state for the law of self-defense, we are compelled to say what I have read in regard to an honest man of ordinary firmness, or of ordinary courage, are wholly misleading and thrust upon the jury a consideration with which they have nothing to do. The test the Supreme Court makes, the law, is not what a man of ordinary courage or firmness might do under similar circumstances, but whether or not in the light of all the facts apparent to the defendant, as disclosed by the testimony, he was acting on the *bona fide* apprehension of imminent danger and had reasonable ground therefor. *Marts v. State*, *supra*, must be reversed in some material features, before we could hold this charge correct. The decision in *Martin v. State*, 9 Circ. Dec., 621, cited by counsel for defendant is not only relevant, but required by the logic of the *Marts* case; that is, it puts the question not only upon what the real fact was, if the fact is sufficient to show that the defendant was in real danger, but it goes a step beyond that and permits the defendant to act upon the actual appearances before him, without regard to real danger, provided those appearances be reasonably well grounded.

To say one must stand as a man of ordinary firmness, or of ordinary courage, and, beyond all the most extraordinary requirement, that he must be an honest man in order to avail himself of the right of self-defense is clearly error. As this charge reads, before applying the rule of self-defense the jury was required to determine the character of the defendant in respect to honesty, and then to determine whether an honest man would have believed as the defendant did; and if they took the view that Donald was not exactly of that type, that he was, in business dealings, perhaps, a scoundrel, they might debar him of the right of protection under the real law of self-defense. It seems to me this needs no further comment.

The law of the state, as given in *Marts v. State*, *supra*, is: "Homicide is justifiable on the ground of self-defense where the slayer in the careful and proper use of his faculties, *bona fide* believes and has reasonable ground to believe that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although in fact he is mistaken as to the existence or imminence of the danger." And the question as to what an honest man of ordinary firmness or courage would have done under like circumstances is misleading and ought not to go into a charge on self-defense."

The result of it all is, that while we are reluctant to reverse judgments, where the impression is made upon our minds as it is in this case, that we could not disturb it upon the weight of testimony alone, yet we find ourselves very clear in the conclusion that this one must be reversed and a new trial granted.

BRIDGES—MUNICIPAL CORPORATIONS.

[Lucas Circuit Court, 1900.]

Haynes, Parker and Hull, JJ.

STATE EX REL. WALBRIDGE V. SAMUEL M. JONES, MAYOR.

HARVEY P. PLATT V. JOHN CRAIG ET AL.

1. EVIDENCE INCOMPETENT TO IMPEACH VALIDITY OF LAW.

The clerk of either house of the state legislature may certify, relative to the proceedings of the house in which he served, to the facts appearing upon the journals, but evidence in the form of a copy of an original bill, certified as a correct copy by the clerk, for the purpose of impeaching a law as it appears in the session laws on account of the omission of words, is incompetent.

2. EFFECT OF SUCH EVIDENCE IF COMPETENT.

And if such evidence was competent, it would amount to nothing more than negative evidence that the bill was not amended by striking out the omitted words; and it is doubtful if it would go that far, where it appears to have been engrossed in the form in which it appears in the session laws and so read and put upon its passage.

3. OMISSION OF WORD CONSTITUTING MATERIAL DIFFERENCE.

The omission of the word "hundred" from a bill, relating to bridges within municipalities, providing that "persons desiring a bridge at any other location may also file their petition and that the petition shall be considered and the location voted upon if they file a petition containing not less than twenty-five hundred signatures", constitutes a material difference.

4. PRESUMPTION OF REGULARITY IN PASSING LAW.

Where the journals show that a bill was passed, and there is nothing in them to show that it was not read as the constitution requires, the presumption is that it was so read, and this presumption is not liable to be rebutted by proof. *Miller v. State*, 3 Ohio St., 475.

5. BRIDGES WITHIN MUNICIPALITIES—CLASSIFICATION—LAWS.

The matter of building bridges within and to be paid for by municipalities, is a proper subject of municipal control and may be provided for by a law applicable to cities of a certain grade and class.

6. LAW OF GENERAL NATURE AND UNIFORM OPERATION.

A law relating to the matter of building bridges, within municipalities, which is made applicable to all cities of a certain grade and class, is a law of a general nature and having a uniform operation throughout the state within the meaning of Sec. 26, Art. 2, of the constitution.

7. ACT. 94 O. L., 175, LIMITED TO ONE CITY, VALID.

The act of April 14, 1900, 94 O. L., 175, to supplement Sec. 2835, Rev. Stat., and providing for proceedings to be had in "cities of the third grade of the first class to accomplish the location and construction of bridges across navigable rivers," is not invalid for the reason that there is but one city in the state of the class to which the law applies.

8. THAT IT MIGHT HAVE BEEN MADE BROADER NOT VALID OBJECTION.

Nor is it a valid objection to the law in question that it might have been framed so as to have been equally suitable for and applicable to cities of other grades and classes.

9. RESTRICTED BY NATURAL CONDITIONS—NOT VALID OBJECTION.

The fact that all municipalities of or that may come into the class may not be in a similar natural situation, that is, may not have navigable streams to bridge and therefore not in a situation to avail themselves of the law, is not a valid objection to the law.

Walbridge v. Jones.

10. JUDICIAL NOTICE—LAW MAY EVENTUALLY APPLY TO OTHER CITIES.

In determining whether the act in question, which relates to "cities of the third grade of the first class having a navigable river passing into or through the same" is invalid, as limited in operation to one city in the state, the court may take judicial notice that other smaller, growing cities have navigable streams within their limits and may in time come within the statute.

11. WORDS AS TO NAVIGABLE RIVER—NOT AN ADDED CLASSIFICATION.

The words "having a navigable river passing into or through the same," in the act referred to, do not constitute a new or additional classification, but are simply a provision for a condition that may or may not exist in cities of the grade and class referred to.

12. NATURAL CONDITIONS WOULD JUSTIFY CLASSIFICATION.

There are sufficient apparent natural reasons suggested by necessity for a difference based upon the navigability of streams, and the necessity of different laws with respect to the bridging of navigable streams, to justify the placing of cities of that character in a class by themselves for the purpose of bridge legislation.

13. RULE AS TO VOTING UNDER LAW IN QUESTION.

Under the provision of the act in question that "each registered elector of such municipality shall be entitled to vote upon the question of construction, reconstruction, enlargement or repair of bridges and to vote for only one location therefor," each voter may cast a negative vote that shall cover each proposition, but an affirmative vote is limited to the general proposition and to one location.

14. NEGATIVE VOTE AS TO GENERAL PROPOSITION.

If a voter, under the law in question, marks his ballot "no," as to any proposition, and does not mark "Yes" to any proposition, this is a negative vote as to the general proposition and as to every bridge, the same as if he marked it "No" to each and every proposition.

15. AFFIRMATIVE VOTE AS TO LOCATION AND PROPOSITION.

Where a voter, under said law, with respect to any proposition or location votes "Yes," this amounts to an affirmative vote as to the particular location and an affirmative vote as to the general proposition.

16. CANNOT VOTE AGAINST PROPOSITION AND FOR LOCATION.

An elector, under the statute in question, cannot vote against all bridges, or against the general proposition, and at the same time vote his choice of locations to be counted if the general proposition carries.

17. FORM OF TALLY SHEET.

For an election under said act the form of the tally sheet should show, first, the number of persons voting; second, the tally of ballots counted; third, the vote on the various propositions or locations, "Yes," or "No."

18. RULE AS TO DETERMINING RESULT.

From the number of ballots counted deduct the number of votes in favor of all locations. The remainder will be the number of negative votes. If this number is less than one-half of the whole number of ballots cast, the general proposition to build a bridge has carried; if more, the proposition is lost. If proposition carries, the location receiving the largest number of affirmative votes is the location selected.

MANDAMUS AND INJUNCTION.

PARKER, J.

The case of the state of Ohio on relation of Thomas H. Walbridge against Samuel M. Jones, mayor of the city of Toledo, is a proceeding in mandamus. The case of Harvey P. Platt against John Craig and others is a suit for an injunction. Both are with respect to the same subject mat-

ter and involve proceedings under an act entitled "An act to supplement section 2835 of the Revised Statutes of Ohio," which purports to have been passed and to have taken effect on April 14, 1900. The act is found in 94 O. L., 175.

Speaking in general terms, the act provides for certain proceedings to be had in cities of the third grade of the first class to accomplish the location and construction of a bridge across a navigable river. It provides for the appointment of a commission who shall prepare general plans and specifications for such a bridge, upon a certain petition being filed, and it provides that after certain proceedings—the filing of petitions and the report of the bridge commission—the mayor of the city shall issue a proclamation for an election to be held under the act, in order that it may be determined whether or not any bridge shall be built, and if so, at what location; the act also providing for the building of the bridge at the location thus selected.

Now the petition in the mandamus case sets forth that all the steps have been taken, in accordance with the statute, which require of the mayor the performance of his duty, to-wit, the issuing of a proclamation for an election. And it sets forth that the mayor has, for various reasons, declared that he will not perform this duty. The answer in that case on behalf of the mayor, sets forth several objections to the statute and to the steps taken under the statute, amounting, as it is claimed, to invalidity in the statute and such irregularities in the steps taken under the statute as that the mayor is not called upon to issue the proclamation.

The petition in the injunction case, which is brought against certain of the bridge commission and the mayor, to restrain them from proceeding further under the act, sets forth substantially the same objections to the law and the proceedings under the law as are set forth in the answer in the mandamus case; and the answer in the injunction case sets forth substantially the same objection to the act, and the action taken under the act, as are set forth in the petition in the mandamus case.

So the cases have been heard and considered together, and will be decided at the same time. In deciding them we will take up the points of objection to the law, and to the steps taken under the law, in substantially the order in which they are set out in the pleadings on behalf of those who assert these objections, and in the order in which they have been presented in argument.

The first objection urged to the law is, that it was not regularly passed. It is said that the bill which was introduced in the house, and designated as "House Bill No. 749," and which was passed and messaged over to the senate, was substantially different from the bill as passed by the senate, and, therefore, it not being the identical bill passed by the house, it has not received in both houses the vote required by the constitution in order to effect its adoption.

Section 17, Art. 2, of the constitution provides as follows:

"The presiding officer of each house shall sign, publicly in the presence of the house over which he presides, while the same is in session, and capable of transacting business, all bills and joint resolutions passed by the general assembly."

This act, according to the certificate attached to the session laws, and according to the engrossed copy with which we are furnished, appears to be properly authenticated in accordance with these provisions of the constitution.

Another provision of the constitution that we will have occasion to refer to is to Sec. 9, Art. 2, which reads as follows:

"Each house shall keep a correct journal of its proceedings, which shall be published. At the desire of any two members, the yeas and nays shall be entered upon the journal; and, on the passage of every bill, in either house, the vote shall be taken by yeas and nays, and entered upon the journal; and no law shall be passed in either house, without the concurrence of a majority of all the members elected thereto."

It is said that this bridge law did not receive that vote, *i. e.* "the concurrence of a majority of all the members elected thereto," in both houses; that one bill, was voted upon in the lower house and another bill was voted upon in the senate.

The evidence upon this subject, which we are asked to consider, consists of what purports to be a copy of "House Bill No. 749," as it was introduced into the lower house, and a transcript from the journal of the house, which purports to set forth all the action taken upon this bill in the house, and a certificate thereto of the acting assistant clerk of the house; also the bill as engrossed and sent over to the senate, together with a transcript from the journal of the senate setting forth all the action taken in the senate upon this bill, and attached to this is a certificate of the assistant clerk of the senate stating that the transcript and this copy of the bill are correct.

This evidence was received under objection to its competency. It is said that the clerks of either house may certify, to the proceedings of the house wherein they serve respectively, to the facts appearing upon the journal; in other words, they may certify to transcripts from the journal, and that this will be evidence in so far as the matter therein appearing is properly upon the journal; but beyond that, the certificate is of no effect and cannot be given consideration. It is also contended that there is no provision of law for the deposit with, or keeping by, the clerk of the house, where it was introduced, of the original bill, and that therefore the certificate as to that being a copy of the original bill must be disregarded.

It is agreed that these certificates, in so far as they state that the contents of the papers attached to them are transcripts of the proceedings of the respective houses, may be considered as the testimony of the persons who signed the certificates, subject, however, to the same objections to their competency that might be interposed if they were here testifying.

The difference between the bill as it passed the house and the bill as it passed the senate is said to consist in the omission from the latter of the word "hundred" in the third line of the law as printed upon page 177 of volume 94 of the session laws.

The law provides that before any proceedings are had under the act, or before any work is done, or before any contract shall be let for the construction, reconstruction, enlargement or repair of any such bridge, there shall be filed in the office of the city clerk of such city, petitions signed by not less than twenty-five per cent. of the duly qualified electors of such city, and that immediately upon the filing of such petition or petitions, containing not less than twenty-five hundred signatures as therein required, the city clerk shall publish for five consecutive days in not less than three (if so many there are) newspapers published and in general circulation in such municipality, a notice setting forth the filing

of said petitions, and the location of the bridge that is petitioned to be constructed, reconstructed, enlarged, etc.

The provision from which the word "hundred" is omitted is to the effect that those desiring a bridge at any other location may also file their petition, and that their petition shall be considered and the location voted upon, if they file a petition signed by not less than "twenty-five hundred" qualified petitioners, (as it is said the law provided for as introduced in the house,) or by not less than "twenty-five" qualified petitioners, as it appears upon the statute books. It is contended and we are of the opinion that the difference in the bill as introduced in the house and as we find it upon the statute books is a material difference.

As to whether this evidence is competent, when introduced for the purpose of impeaching the law, we have no direct decisions by the Supreme Court of the state. We have, however, the case of the State v. Kiesewetter, 45 Ohio St., 254, in which it was attempted to establish a law which had not been signed by the speakers of the respective houses, and which had not been authenticated as required by the constitution. It was there held that parol evidence was inadmissible to show that a certain law had been passed. In that connection it was undertaken to introduce in evidence a like copy of the original bill, which it appears had been deposited in pursuance of law with the librarian of the state. The Supreme Court held that such evidence, in such a case, was not competent; and the discussion we think is pertinent to the question we have under consideration here, although the case is not precisely the same. There is much of it and I shall not take time to read it. It is of such character that its full force and effect cannot be gathered without considerable attention being given it, and therefore I shall not enter upon its discussion.

We have also State ex rel. Herron v. Smith, 44 Ohio St., 348, in which it was undertaken to defeat a law upon the ground that it had not received a constitutional majority, it being averred that one of the members was not duly elected to the house, and that there was a conspiracy between the officers of the house and the senate, to foist upon the people as a law a bill that had not been regularly and constitutionally passed. The question of evidence of this character was there considered, and it was held to be inadmissible. There is some discussion also of the effect of introducing a certified transcript of the journal in that case, to which I shall make further reference.

On the authority of these cases we hold that these certificates, in so far as they go beyond certifying to the contents of the journal, will be ruled out.

If, however, we were to consider this, and not rule it out, I desire to call attention to the effect that we should feel obliged to give to it. If received and considered the record affords no more than negative evidence that the bill was not amended in the house by the striking out of the word "hundred." It is doubtful if it goes that far, as it appears to us from the transcript of the journal of the house that it was engrossed in its present form, according to the evidence submitted, and read the third time and put upon its passage in its present form.

The transcript from the journal of the house, after setting forth the introduction of house bill No. 749, and after stating that it was referred to a certain committee consisting of Mr. Griffin and Mr. Demuth, says that the committee reported it back with certain proposed amendments, that those amendments were agreed to, and then it proceeds as follows :

"The bill was ordered to be engrossed at the clerk's desk, and read the third time now. The bill was then read the third time."

And according to the journal, if the clerk performed the duty imposed upon him by the order of the house, which he is presumed to have done, the bill was read the third time *after* it had been engrossed at the clerk's desk. The engrossed copy with which we are furnished omits the word "hundred."

Then follows this upon the house journal:

"The question being 'Shall the bill pass?' the yeas and nays were taken, and resulted—Yeas, 76; nays, 0."

This is followed by the record of the votes of the members. And that is the only action taken in the house on the bill. So that while it does not appear in affirmative form that any amendment was proposed, striking out the word "hundred," it does appear that after the bill was engrossed and submitted to the house upon the third reading, and when it was voted upon and passed, the word "hundred" was no longer in it. The house listened to the reading of the bill with the word "hundred" omitted, made no objection to any change or amendment, and by unanimous consent of the body it was carried, and the bill was adopted by the house in that form. It is conceded that in the same, *i. e.*, its present form, it was duly passed by the senate.

In *Miller v. State*, 3 Ohio St., 475, one of the questions was whether the bill had been read on three different days in each house, as required by sec. 16, art. 2, of the constitution. The court, Thurman, J., delivering the opinion, was inclined to treat the provision as directory, but said:

"Whether the constitution, in the particular under consideration, is merely directory or not, it can not be gainsaid, it seems to us, that where the journals show that a bill was passed, and there is nothing in them to show that it was not read as the constitution requires, the presumption is that it was so read, and this presumption is not liable to be rebutted by proof."

There is much more to the same effect in decisions cited and commented upon in *State ex rel. v. Smith*, *supra*.

Our attention has been called to a decision of the circuit court in *State ex rel. v. Price*, 4 Circ. Dec., 296, which, it is contended by counsel for the objectors (as I may call them for short), is not in harmony with the views we are here expressing. That case was peculiar in its facts. It is there held, as stated in the syllabus, as follows:

"In determining the existence of a statute, the house and senate journals may be examined notwithstanding the act appears in the annual laws with the required certificate of the speakers of each house, and the usual certificate of the secretary of state appended to the volume."

But, as I say, they had under consideration a very peculiar state of facts, and the question which seemed to be under consideration was as to the *identity* of the bill. Here there is no question raised as to the *identity* of house bill No. 749. That is to say, while it is contended here that the contents of the bill as it passed the senate, are not exactly identical with the contents of the bill as it passed the house, yet that they are substantially identical, and that it is house bill No. 749 is unquestioned. As to the identity of the bill or the identity of the document here, there is no dispute, but there does seem to have been such a dispute or such a question in the case decided by the circuit court in the eighth circuit.

In looking at the session laws we find that they had to meet this state of facts: In volume 88 of the session laws, at page 256, appears an act "to abolish the office of street commissioner in certain cities of the third and fourth grade, second class, and to create the office of street superintendent," passed March 31, 1891, apparently duly certified, and designated house bill No. 1460.

On page 279, same volume, we have an act with precisely the same title, and also designated house bill No. 1460, and yet the bills are materially different. Upon the question being made as to the passage of this bill the court looked at the journal and came to the conclusion that neither one nor the other was the identical bill, that they were both wrong, and that there was no law in force upon the subject. We so understand this decision, and we are not prepared to say that we should not have pursued the same course and arrived at the same conclusion in a case like it upon the facts.

The second serious objection raised is as to the constitutionality of this act. It is urged that it is obnoxious to the provisions of sec. 22, art. 2, requiring that all laws of a general nature shall have a uniform operation throughout the state; also to the provisions of sec. 1, art. 13, prohibiting the general assembly from passing any special act conferring corporate power; and also to sec. 6, art. 13, requiring that certain legislation affecting municipalities shall be of general form and effect.

The argument, however, has been addressed chiefly to the proposition that the law is one of a general nature and that it does not have a uniform operation through the state, because it is confined or restricted by its terms to cities of the third grade of the first class. That, it is said, is sufficient to render it invalid. It is further urged that it is restricted not only to cities of the third grade of the first class, but to such cities of that grade and class as may have navigable streams in or passing through them, and therefore it establishes, for the purposes of this law, another classification of municipalities.

This has been argued with great earnestness, and since the oral arguments the court has been bombarded with briefs, counter-briefs, rebutters, sur-rebutters, etc., and we have given the question the careful examination which its importance seem to require and which the earnestness of counsel seem to make it proper for us to give to it.

To the objection that the law is of so general a nature that it must have a uniform operation throughout the state, the answer is, that if it is made to apply to all cities of a recognized and approved class it has a uniform operation through the state. That it is a law of a general nature we are disposed to grant. The nature of the law is to be determined, as we understand, by the character of the subject-matter and not by the form of the law. If it is a subject-matter of a general nature, notwithstanding the form of the law may be local or special, within the meaning of this provision of the constitution it is an act of a general nature, which must, in order to its validity, have a uniform operation throughout the state.

It has been held distinctly in *State ex rel. v. Davis*, 55 Ohio St., 15, that the subject-matter of bridges over streams is a subject-matter of a general nature requiring general legislation under the constitution. But, as I have indicated, it does not follow that because the subject-matter is of a general nature and therefore required to be embodied in a law of a general form that shall have a uniform operation throughout the state,

it is obnoxious to this provision of the constitution merely because it is limited to certain municipalities of the state.

The question remains whether the subject matter is appropriate to municipal control, and therefore proper to be brought under such classification of municipalities as has been approved by our supreme court.

It has been suggested in argument that the supreme court has intimated a disposition, and perhaps a purpose to disapprove of its earlier decisions sustaining the classification of municipalities established by laws which have stood upon the statute books for many years; that it has shown lately a disposition to overrule those decisions and hold such classification to be invalid. We have examined this question with some care, and we cannot agree with counsel that such action at the hands of our Supreme Court is imminent.

I will call attention to a few of the decisions throwing light upon this question, and also upon the question of what are laws of a general nature, and what is meant by the phrase, "uniform operation through the state."

In *State v. Brewster*, 39 Ohio St., 653, it is said in the syllabus:

"The classification of municipal corporations provided for in the revised statutes, sections 1546-1550 referred to in the act of 1883 (80 O. L., 124), is authorized by the constitution, and is not in conflict with article 2, section 26, nor article 13, section 6; and the fact that territory is attached to any such corporation for school purposes does not affect the validity of such classification."

And reading from page 658:

"When the bill providing for the classification referred to in the clause quoted from the act of April 16, 1883 (2690a), was reported to the general assembly, the reasons in support of such classification were stated by the codifying commissioners at length. Rev. Stats. Preface VIII-X. The objection that the classification was illusory was conceded to be forcible, but it did not prevail. On the contrary, the reasons given by the commissioners in support of such classification were thought to be sufficient, and hence the classification was adopted. Rev. Stats., secs. 1546-1550. The validity of that classification has been repeatedly recognized in this court, and the reason for adhering to that construction of the constitution are cogent and satisfactory. Hence, we hold that statutory provisions with respect to any such class are for governmental purposes, general legislation, and not in conflict with art. 2, sec. 26, nor art. 13, sec. 6 of the constitution."

In *State v. Hawkins*, 44 Ohio St., 98, it is held that:

"The act of the general assembly passed April 3, 1885 (82 Ohio L., 101-111), conferring certain corporate powers on cities of the first grade of the first class, is one of a general, and not of a special nature; and, therefore, not in conflict with art. 13, sec. 1, of the constitution, prohibiting the passage of special acts conferring such powers."

The court in this case reviews certain of the decisions that had gone before, and speaking of this subject of classification, uses this language, page 108:

"The act under consideration in that case," (the Pugh case), was held invalid, because it was not merely made applicable to the grade and class to which Columbus then belonged, but because it was the only city in the grade and class to which it then belonged, or could belong in the next five days from the passage of the act, the time in which the powers

conferred were required to be exercised; after the lapse of that time neither Columbus, nor any other city of its grade, could have exercised the powers conferred by the act.

"To hold this statute invalid, for the reason stated, would be to deprive not only Cincinnati, but every city of the state of any system of municipal government whatever; as all statutes conferring corporate power upon the municipalities of the state apply, in terms, to cities of certain grades and classes. There should be something more than a mere question as to the validity of a statute, to warrant a court in a holding that must lead to such serious consequences."

In *State v. Hudson*, 44 Ohio St., 137, it is held that:

"The act of April 3, 1885 (82 Ohio L., 101), providing for a police force in 'cities of the first grade of the first class,' applies to all cities of that grade and class in the state, and is a law of a general nature, having a uniform operation throughout the state, and is constitutional."

That is quite pertinent to this case and the argument advanced here. Although the law applied to but one city, yet it applied to a city classified as a city of the first grade of the first class. Notwithstanding the subject-matter was of a general nature, and therefore one that must be operated upon by a law of a general nature having a uniform operation throughout the state, the law was sustained upon the ground that it had uniform operation through the state, although at the time it applied to but the one city of Cincinnati. In discussing the matter Judge Follett says, on page 139:

"This question vitally affects Cincinnati, as well as Cleveland, Toledo, Columbus and Dayton; for, at present, under our system of classification of cities, there is but *one* of these cities in a *general* class." "This act (section 1870) applies to 'cities of the first grade of the first class'—to all such cities in Ohio—though Cincinnati is now the only city in that class. Each city just named is now similarly situated. Each of the large cities seems to need peculiar legislation, which can be provided only by such general classification. The peace and prosperity of these cities, and the best interests of the state, require that this system of classification be regarded as *stare decisis* and settled. See Rev. Stat., sec. 1546. Under the power to organize cities and village. (Const., art 18, sec. 6), the general assembly is authorized to classify municipal corporations, and an act relating to any such class may be one of a general nature."

While I have referred to several and shall refer to other decisions, letting the Supreme Court speak for itself on this subject, I shall not exhaust the list by any means.

In *Marmet v. State*, 45 Ohio St., 63, it is held that:

"The provisions of secs. 1, 2, 22, 26 and 35 of the act of April 16, 1883 (80 Ohio L., 129), and sec. 29 as amended March 25, 1884 (81 Ohio L., 78), which require that in cities of the first grade of the first class each proprietor or lessee of a theatre, etc., and all keepers or owners of livery, sale or boarding stables, every dealer in second-hand articles and keepers of junk shops, and the owners of all vehicles used upon the streets of the city, shall pay license as therein provided; that no person shall engage in any such business until a license therefor shall have been obtained, and that any person who shall violate any of the provisions of the act shall be punished by fine, are not in conflict with the constitution."

Respecting that law it is said by Judge Spear, on page 66 :

"The law is not a special act. It is local and special as to the ends to be accomplished, but general in its terms and operation, applying to all cities of the first grade of the class. It is not limited to such city as may have been in that class and grade at the date of its enactment. At that time Cincinnati was the only city in the state answering to the description; but there is a possibility, not to say certainty, that other cities in the state will increase in population, so that they will pass into this grade, and when that happens they will come within the provisions of this law."

Another case in point is that of the State v. Wall, 47 Ohio St., 499. I refer to the last paragraph on page 500, and refer to this clause because it is the utterance of the whole court--a *per curiam* :

"Grave doubts may well be entertained as to the constitutionality of this method of classifying cities for the purpose of general legislation. But it has received the sanction of this court in repeated decisions heretofore made; and in view of this fact, and the rule that forbids a court to declare a law enacted by the legislature as unconstitutional, unless clearly convinced that it is so, we do not feel warranted in doing so in this instance."

Recent doubts upon this question seem to have arisen chiefly from the *dicta* of one of the judges of the Supreme Court in the course of his opinion in Hixson v. Burson, 54 Ohio St., 470, 483, to the effect that the doctrine of classification of municipalities has been applied and upheld only where the laws in question related to the organization of such municipalities, and that it cannot be upheld when applied to a subject, in such municipalities, of a general nature, requiring laws of uniform operation throughout the state.

The act providing for the Toledo gas plant, upheld in State v. Toledo, 48 Ohio St., 112, confers corporate power. This is a case in which something else than organization simply is provided for. Indeed, no organization is provided for, except the organization of a board to take care of that particular enterprise.

The case of Seifert v. Weidner, 5 Circ. Dec., 506, sustains a law by which the power to build a crematory was conferred upon the city of Dayton, that city standing, with respect to the constitution, precisely as does Toledo, being but one of a class. That law also conferred corporate power, and did not relate to municipal organization.

The law authorizing Cincinnati to pave streets and issue bonds to the amount of \$2,000,000, 80 O. L., 156, was held to be constitutional by the Cincinnati superior court; Sheer v. Cincinnati, 6 Dec. Re., 1233; and this was affirmed by the Supreme Court without report January 19, 1886. This law conferred corporate power, and did not relate to municipal organization.

Another law to which we call attention is that authorizing Cincinnati to build waterworks and issue bonds to the extent of \$6,500,000 (98 O. L., 606,) passed upon and sustained in Ampt v. Cincinnati, 5 Circ. Dec., 356; affirmed in 56 Ohio St., 47. That law confers corporate power, and is of a general nature.

Of a like character is the law considered in State v. Brewster, 89 Ohio St., 653.

In State v. Nelson, 52 Ohio St., 88, in an opinion by the same judge, who uttered the *dicta* in Hixson v. Burson, *supra*, this occurs :

"This section of the constitution requires that laws of a general nature shall have not only an operation, but a uniform operation throughout the state, that is the whole state, and not only in one or more counties. The operation must be uniform upon the subject matter of the statute. It cannot operate upon the named subject matter in one part of the state differently from what it operates upon it in other parts of the state. That is, the law must operate uniformly on the named subject matter in every part of the state, and when it does that it complies with this section of the constitution. That this is the scope and purpose of this section appears from its language, the debates of the constitutional convention, and the uniform construction placed thereon by this court in the cases above cited, and others hereinafter referred to.

As the statutes affecting different cities and villages of different classes practically do not operate in every part of the state, but only where a city or village of the particular class is found, it might seem that such laws do not operate uniformly throughout the state. A moment's reflection will show that this is not so. If a new city or village of a particular class should be built in the wildest spot in the state, the statutes applicable to such class of city or villages would be found to be in force there, and in that sense all statutes applicable to different classes of cities and villages, are in uniform operation in every part of the state. The classification of cities and villages is in its nature territorial, and this court has uniformly held that such classification must be reasonable and not arbitrary."

In *State ex rel. v. Baker*, 55 Ohio St., 1, at page 10, Judge Minshall, speaking for a majority of the judges, in the course of a very vigorous opinion in support of the doctrine of classification of cities and villages, with respect to this utterance of Judge Burket in *Hixson v. Burson*, *supra*, uses this language:

"What was said on the subject of the classification of cities in *Hixson v. Burson*, 54 Ohio St., 470, was not germane to the case considered. It was not concurred in by all the judges; and, by a rule of this court, adopted in 1857 (6 O. S., note), the concurrence of the judges in an opinion is limited to the part necessary to the decision, and expressed in the syllabus."

This case is one of the latest and strongest in support of the classification of municipalities—holding that the doctrine is to be regarded as *stare decisis*.

Counsel cite *Ampt v. Cincinnati*, 5 Circ. Dec., 356, a case decided by the circuit court in the first circuit and affirmed by the Supreme Court. 56 Ohio St., 47. Especial attention has been called to certain language used by Judge Swing, who announced the opinion of the court. His language appears to be relied upon by counsel on both sides of this controversy as sustaining their respective positions; and it is said it should be regarded as in effect the language of the Supreme Court because in affirming the decision the Supreme Court say it is affirmed for the reasons stated by the judge of the circuit court in passing upon the case. The law there under consideration was one providing for the construction of waterworks in the city of Cincinnati. It was held that the law was constitutional, and this is said in the syllabus:

"Wherever a law relates to the government of cities, and to the doing of corporate acts by said cities, and only indirectly affects the citizens, it is not a general law within the meaning of sec. 26, art. 2, of the state constitution, although the subject matter, if applied to any portion

of the state other than classified cities and incorporated villages, would be a law of a general nature."

Judge Swing says that he deduces this rule from the decisions of the Supreme Court, on the subject, and he uses this language:

"It seem to me that there is a rule deducible from these decisions, and that is, that whenever any law, directly operates upon and affects the rights, privileges and interests of the citizen, and there is no reason why it should not operate on all the citizens of the state alike, it is a law of a general nature within the meaning of this section of the constitution, and it should have a uniform operation throughout the state. But wherever a law relates to the government of cities and to the doing of corporate acts by said cities, and only indirectly affects the citizen, it is not a general law within the meaning of this section, although the subject matter, if applied to any portion of the state other than classified cities and incorporated villages, would be a law of a general nature."

If I were to venture to amend this I would say, that while such law would be a law of a general nature, according to several of the decisions of the Supreme Court from which I have read, it would not be such general law as is prohibited by the constitution, because it is given uniform operation throughout the state.

I think the point that Judge Swing undertook to state, and has stated with more or less clearness, is, that there are certain subjects of a general nature, which, if legislated upon in a form affecting citizens directly, must have a general and uniform operation throughout the state. For instance, if the legislature were to enact a law making it unlawful for the citizens of cities of the third grade of the first class to do certain things in such cities, lawful elsewhere, such a law affecting and operating upon the citizens and the rights of the citizens immediately, must apply to and reach the whole state and the whole population of the state. And yet, the legislature might properly pass a law authorizing cities of that class to pass ordinances with respect to the same subject matter, making it unlawful to do that very thing: and such a law, having uniform operation upon the cities of the specified class, might be, under the decisions, a law of uniform operation throughout the state, and valid.

This point is indicated more clearly by Judge Summers in *Seifert v. Weidner*, 5 Circ. Dec., 506, affirmed in 65 Ohio St., 646. It was the application of this principle, as I understand it, which resulted in the law in question being held unconstitutional in the case of *Cincinnati v. Steinkamp*, 54 Ohio St., 284; it being a law providing for fire escapes on buildings of a certain height in cities of the first grade of the first class. It did not provide that a city of the first grade of the first class might pass an ordinance to regulate the subject, but it provided directly that the citizens residing within the territorial limits of such a city should do certain things, and it was therefore held to be unconstitutional. In the one case the citizen is the unit operated upon by the law, and in the other case the municipality is the unit operated upon.

In speaking of the *Steinkamp* case Judge Summers, in *Seifert v. Weidner*, *supra*, says:

"We think that case is distinguishable from this. It will be observed that the act under consideration in that case did not confer power upon cities of the first grade of the first class to regulate the construction of buildings within their limits, but provided for the appointment, by the mayor of such cities, of inspectors, and prescribed their

duties and the regulations to be observed, and provided that any person violating any provision of the act should be guilty of a misdemeanor and subject to fine and imprisonment. If the act had conferred the power upon cities of the first grade of the first class, any such city could, by ordinance, have prescribed the same regulations and enforced them by fine and imprisonment, and the act would not have been in conflict with section 26 of article 2."

What was said by the court in *Cincinnati v. Steinkamp*, *supra*, is in line, we think, with the suggestions of Judges Swing and Summers. I read a portion of a paragraph on page 295:

"And it would seem to follow from this that the constitutional requirement of uniform operation throughout the state is not answered by showing that the law is of uniform operation within one city of the state only, however populous, and even though described as a city of the first grade of the first class, if it appears that the act does not confer power, corporate or administrative, and that the conditions undertaken to be legislated upon are common to other sections of the state generally."

In other words, if it appears that the legislature is operating directly upon the citizen, and not indirectly by conferring corporate power upon the municipality, then the law will not be valid unless it operates upon the whole population of the state.

A further illustration of what is meant by the phrase "having a uniform operation throughout the state" will be found in *Gordon v. State*, 46 Ohio St., 607, wherein the township local option law was held to be constitutional. I shall not stop to read it.

So we hold that, the fact that there is but one city of the class to which the law may apply is not a valid objection to the law; and we also hold, that the fact that the law might have been so framed as to be equally suitable for and applicable to certain other cities of certain other grades and classes is not a valid objection to the law; and the fact (if a fact) that all municipalities of or that may come into the class may not be in a similar natural situation, so as to make use of the law—that is, may not have navigable streams to bridge, and therefore are not in situations to avail themselves of the law—is not a valid objection to the law.

To hold otherwise would be to ignore many decisions of the Supreme Court, overturn classifications heretofore approved, and invalidate many laws applicable to certain classes that may be found by the courts to be suitable to other classes, or not available to certain municipalities of a class because of the natural situation giving rise to no need of the same. See *State ex rel. v. Toledo*, 48 Ohio St., 112.

We think the matter of building bridges within municipal borders, to be paid for by such municipalities, is a proper subject of municipal control, and may be provided for by a law applicable to a class, and that such a law will be one of a general nature having a uniform operation throughout the state, if the classification is legitimate within the rules laid down by the Supreme Court.

I call attention to the fact that sec. 1692, Rev. Stat., conferring powers generally upon municipalities, provides that the council shall legislate upon and provide for bridges, viaducts, wharves, and a variety of things of that character, as well as for the care and improvement of streets and alleys; so that though the building of bridges is a subject matter of a general nature, it is also a subject matter appropriate to

municipal control under certain circumstances, and therefore subject to proper laws of classification of municipalities.

But it is contended that this law defines a new class, *i e.*, "cities of the third grade of the first class having a navigable river passing into or through the same;" and that this classification and limitation is fanciful and illusory, and in effect limits the act to Toledo. As Toledo is the only city of the third grade of the first class in the state it is apparent that if this is a new classification it does not affect existing conditions.

As to the future, we can not say judicially that other cities of the third grade of the first class, hereafter coming into existence, may not have navigable streams. Indeed we cannot say that they may not all have navigable rivers. And among the growing and prosperous cities of the state that may come into this class we take notice of Fremont, Portsmouth, Marietta, Zanesville, Ashtabula, Conneaut, and others, all upon navigable rivers.

But we do not regard this as classification. We regard it as simply a provision for a condition that may or may not exist in such cities.

In *Cincinnati v. Steinkamp*, 54 Ohio St., 284, 295, in speaking of the phrase "existing in every county throughout the state" the court say:

"This means, we suppose, only in every county where the conditions of the statute exist, for in order to be general and uniform in operation it is not necessary that the law should operate upon every person in the state, nor in every locality; it is sufficient, the authorities coincide in holding, if it operates upon every person brought within the relation and circumstances provided for, and in every locality where the conditions exist."

To hold that this is classification that renders the law invalid, would be to adopt a rule that, carried to its logical result would require us to hold such legislation invalid even if it were made applicable to all municipalities in the state, from cities of the first class down to hamlets. The same objection could be brought forward with equal force if a law were made applicable to counties instead of municipalities; for instance, it might be said that the ditch laws undertake to classify or actually effect the classification of counties, because some counties have no use for such great drainage canals as we have been obliged to build in Wood county, and other counties of Northwestern Ohio, and that the ditch laws classify counties by putting in one class those that may avail themselves of the law, and in the other class those that cannot make use of the law.

The same objection might be raised to laws providing for various objects recognized as being within the legitimate scope of municipal government; that is, laws applying to wharves, viaducts, canals, hospitals, parks, ferries, etc., all of which are subjects to be provided for, legislated upon and controlled by municipalities; some purely artificial, some appurtenant to certain natural objects, not to be found in every municipality.

Can there be any doubt of the legality of laws conferring powers upon municipalities touching wharves, landing places, ferries, etc., notwithstanding the fact that they cannot be of universal application? It is not required that the law shall have "universal application" but only "uniform operation" throughout the state.

To consider or pass upon the wisdom and appropriateness of the law, is beyond our authority or province. But it might be pointed out that there may be weighty and valid reasons for providing a different method of deciding upon and providing bridges for navigable streams, from that

appropriate to small streams; that the rights of navigation must be considered, a subject within the jurisdiction of the United States; that the necessity, therefore, of draws must be considered; that the effect upon wharves and upon the harbor must and should be considered, as well as the large expense involved. And therefore it may very well be deemed proper and wise to submit questions of this sort to the voters of a municipality like this, though the general laws in force may authorize councils to proceed without taking such a vote.

There may be good reasons advanced why small municipalities should not enter upon such an enterprise with authority to make the same debt, and why there a less number of signatures should be required to a petition initiating such measures. On the other hand, reasons of an opposite character would apply to cities of a larger population.

Certain cases on this subject are relied upon especially by counsel for those who oppose an election on this question, which will be referred to briefly. In *State v. Pugh*, 43 Ohio St., 98, the law in question did not admit of another city of the same grade and class coming under its provisions. It applied to cities of the first grade, second class, "having trustees of the sinking fund," and required such trustees to "proceed within five days after the passage of this act to redistrict such cities," etc.

The Supreme Court find that it was impossible, within the time limited by the statute, for any other city to come into that class, even though its population entitled to come in; and therefore the law was held to be unconstitutional.

The law under consideration in *Costello v. Wyoming*, 49 Ohio St., 202 was with respect to sidewalks, and it was made to apply to villages in a county having a city of the first grade of the first class "in which sidewalks have not already been constructed under the provisions of existing laws," etc.

With respect to that kind of classification the Supreme Court say, at page 210:

"Villages situated in counties containing large and populous cities, and which are or may become contiguous to such cities, would naturally need legislation very different from that required by villages otherwise situated. Their particular location—thereby calling for the maintenance of an adequate police force, for protection against fire, for water supply, for paving, grading, curbing and lighting of streets, and for other municipal improvements—would furnish reasonable grounds for placing villages so situated, in the same class, for purposes of legislation. But the case at bar presents to us a new and unique classification of villages founded on an incident or characteristic, arbitrary and restrictive, unreasonable and illusory."

And the court thereupon proceeds to hold that such attempted classification is invalid.

Now we do not think, as do counsel presenting this case, that the facts of the case are at all like those of the case at bar, or that the reasoning there is applicable to the situation here. We think, rather, that certain of the general rules adverted to and cited in the opinion are applicable to the case at bar. This rule is cited on page 212, as laid down in *Nichols v. Walter*, 37 Minn., 264, 272:

"The true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason—some reason suggested by necessity, by such a difference in the situation

and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."

We think that this rule would justify the classification here, if it shall be regarded as a classification; that is, that there are such apparent natural reasons suggested by necessity for a difference based upon the navigability of streams, and the necessity of different laws with respect to the bridging of navigable streams, as would justify the placing of cities through which such streams pass in a class by themselves for the purposes of bridge legislation.

Upon the question of whether this is a classification, I remark that the law under consideration in the case at bar does not provide that in all cities of a certain grade and class having a navigable stream, all bridges may be built in a certain way; but it provides that in cities of a certain grade and class bridges over navigable rivers only may be built in a certain way. If in the Wyoming case the law had provided that in all villages of a certain class then or thereafter existing, unfinished sidewalks might be constructed in a certain way, we believe that it is not apparent that the law would have been obnoxious to the constitution.

Cases like *State v. Anderson*, 44 Ohio St., 247, and *Kenton v. State*, 52 Ohio St., 59, where the classification is based upon population, but the number is narrow, as in *Kenton v. State*, where it is based upon a difference of only ten, we regard as so unlike the case at bar as to afford no guide for its decision.

In *Gaylord v. Hubbard*, 56 Ohio St., 25, the law provided for the appointment of a board of equalization and assessment in cities of the second grade of the first class; and it was held that it could not be enforced; that it conferred powers that substantially differed from those conferred by the general statute upon that subject, and that the general law on the subject of taxation, and all relating thereto must govern.

The armory case, in *Hubbard v. Fitzsimmons*, 57 Ohio St., 486, is also a case of a special law affecting the subject of taxation, and the law was declared void.

The law in *Mott v. Hubbard*, 59 Ohio St., 199, was an attempt at county classification. The case of *State v. Brown*, 60 Ohio St., 462, is also a county case. *Hixson v. Burson*, 54 Ohio St., 470, is of the same character.

The third objection is, that the law does not permit an elector to express his desire by vote, and have his vote counted in such a way that this desire may be ascertained and given effect. We do not think this objection is tenable.

We see no difficulty about registering the vote of each person voting, in such a way that the number voting for or against the general proposition may be ascertained and determined with certainty. And if it occurs that a number of electors vote in favor of each location, it seems to us it will be a simple matter to ascertain which location has the greatest number of votes; so that full effect may be given to the law.

Judge Haynes suggests that I should go into this a little more fully, and I will do so. The so-called bridge statute provides that—" * * * each registered elector of such municipality shall be entitled to vote upon the question of construction, reconstruction, enlargement or repair of bridges, *and to vote for only one location therefor.* * * * The provisions of sections 2836, 2837 and 2837a of the Revised Statutes, except as modified herein, so far as applicable to cities of the third grade of the first class, shall apply to and govern the proceedings for the holding of

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elections, the issue of bonds, the payment thereof, and the construction of the work contemplated in this section. Provided, however, that the ballots for such election shall be so prepared as to read, 'for bridge from _____ to _____, and the issue of bonds not to exceed estimated cost, \$_____ Yes.' 'For bridge from _____ to _____, and the issue of bonds not to exceed estimated cost, \$_____ No.' For each of the proposed bridge reported by said bridge commission. * * * And there shall be printed in the proper space the termini of each proposed bridge, and the estimated cost and expense thereof reported by said bridge commission. If a majority of the electors voting upon all such propositions taken together, vote in the affirmative, the common council of such city shall at once proceed to enact the proper legislation to acquire the necessary real estate and right of way for the approaches of such bridge and for the support thereof, and to cause such bridge to be constructed, reconstructed, enlarged or repaired, at the location receiving the highest affirmative vote."

Now there are various objections suggested, some of which we do not perhaps fully comprehend, but we see no difficulty about these provisions. We say that their effect is, that each voter has an opportunity to cast one vote for or one vote against either of these propositions. He may cast a negative vote that will apply to the general proposition and every location, but an affirmative vote is limited to one location.

As to how his ballot shall be marked, it may be mere dicta here to say it, but we believe and hold that if a voter marks his ballot "No" as to any proposition, and does not mark "Yes" to any proposition, this is a negative vote as to the general proposition and as to every bridge, the same as if he marked it "No" to each and every proposition. We think that that ballot must be counted as a negative ballot. If upon that ballot with respect to any proposition or location he votes "Yes," why that is necessarily an affirmative vote as to that particular location. It is affirmative as to the general proposition, and at the same time affirmative as to the particular location he desires.

Let us suppose there are 300 negative votes, and on all locations 400 affirmative votes. Of such affirmative votes we have 200 for the Cherry street location, 100 for the Jefferson street location, and 100 for the Grand street location. We then have 400 affirmative votes, and only 300 negative votes; so that the proposition to build a bridge is carried. Of these affirmative votes we have 200 in favor of the Cherry street bridge, and it having the greater number of affirmative votes, under the provisions of the statute that is the location selected.

As to the ballot itself: Something was said in criticism of the provision that if it were impossible to determine the purpose of the voter from his ballot, it should not be counted. There is nothing singular about that provision, for precisely the same provision is found in sec. 2966-35 of the general law with respect to elections. The ballots are to be separate from the general ballots for candidates for offices, as provided by sec. 2966-32. The election laws provide for keeping tally of the number of persons voting at the election, as well as a tally of the ballots for a candidate or upon a particular proposition.

HAYNES, J. :

Let me state that as I understand it. The statute here provides that every elector may vote once in the affirmative for some one bridge. The general statute provides for keeping track of the vote, and this

ballot is a separate, independent ballot. Now, upon the conclusion of the voting, the statute provides in regard to the issuing of the certificate of the number of votes cast, etc. That should be followed in this case. The whole number of votes cast upon the bridge question should be certified. The statute also provides that a person who votes in the affirmative may not vote but the once. Then the statute provides that all the affirmative votes shall be counted. If a majority of the electors voting upon all such propositions, taken together, vote in the affirmative, the question of course will be carried. You count the affirmative votes only on the question of location, no matter what the negative votes are—it is indifferent—or rather if a man votes "No" on the subject you do not count the ballot on the question of location. You take the total number of votes, and determine whether the proposition has carried or not. That is to say, if there are 1,000 votes cast, and 550 persons vote in the affirmative, the officers certify to that fact, and it shows that the proposition to build a bridge is carried. Afterwards, when the common council come to build a bridge they will be guided simply by the certificate as to the votes. They will adopt the location receiving the greatest number of affirmative votes. That will determine the location of the bridge. It seems to me it is as clear as can be with regard to the vote. I do not see how there can be any question about it.

The bridge statute provides that each registered elector shall be entitled to vote, etc., and to vote for only one location. The general election law, sec. 2966-32, provides that—

"Whenever the approval of a constitutional amendment or other question is to be submitted to a vote of the people, such question shall be printed on a separate ballot and deposited in a separate ballot-box to be presided over by the same judges and clerks."

Section 2966-38 requires the number of electors voting to be stated to the public immediately after the counting of the vote. Therefore the number of ballots cast for or against bridges shall, at the close of election, be tallied and certified. The bridge law then provides that if a majority of all electors voting upon all of such propositions, taken together, vote in the affirmative, the council may proceed to the building of a bridge.

Mr. Tracy:

I would like to suggest the propriety of the court putting in the opinion what the court would consider an appropriate form of tally sheet, as it will be an efficient aid to the board of elections.

PARKER, J.:

I have it here in my hand, and will give the form to the stenographer. It is as follows:

Tally of persons voting...	.....
Tally of ballots counted..	.....
Cherry street, Yes..... ..	.....
" No..... ..	.....
Lagrange street, Yes.....	.....
" No.....	.....
Jefferson street, Yes.....	.....
" No.....	.....
Grand street, Yes. ....	.....
" No.....	.....

From the number of *ballots counted* deduct the sum of votes in favor of *all* locations. The remainder will be the number of negative votes. If this number is less than one-half of the whole number of ballots cast, the general proposition to build a bridge is carried; if more, the proposition is lost. If it carries, the location receiving the largest number of the affirmative votes is the location selected.

We understand the petition in the injunction case was submitted here on appeal for final judgment?

Mr. Tracy:

Yes.

PARKER, J.:

The rights of the different parties, then, will be saved, as they are not here.

Mr. Seiders:

I appear here in the absence of Mr. Lewis. I would like to ask the court this, on the question of voting: Is a negative vote on any one of the bridges to be considered as negative against the whole bridge-building proposition?

PARKER, J.:

That is the way we understand it, provided there is no affirmative vote on the ballot.

HAYNES, J.:

It will be necessary to take the whole number of votes to find out whether the bridge proposition has been carried or not. To determine the location chosen (if the general proposition carries), you take the affirmative votes only. Of course if a man votes twice affirmatively it is cast out.

PARKER, J.:

In argument Mr. Lewis stated that one standing in his situation could not express his wish, by this ballot. I understand his position to be, that he is opposed to the whole scheme or plan of any bridge, and he would like to vote "No" on the general proposition; and if the vote carries in favor of building a bridge he would like to vote his choice of locations.

Now under this statute an elector is not given the right to vote against all bridges, and, at the same time, vote his choice of locations in the event that the general proposition carries. In other words, he is not entitled to say by his vote, "I am opposed to any and all bridges being built, but if my wish to not build a bridge is defeated at the election, then I would like to have my vote counted among the affirmative votes for some particular location." That might have been provided for by law, and this original bill before its amendment contained such a provision. But the legislature saw fit to amend it, leaving out that provision, and it now stands as does the law generally upon the subject of voting for candidates for office. For instance, if there are three candidates in the field for one office, a Republican, a Prohibitionist, and a Democrat, one who votes the Prohibition ticket votes in effect against the Republican and the Democratic candidates, and he is not permitted by his ballot to say, "I desire to have this ballot counted for the Prohibition candidate, but if he is defeated, then I would like to have it counted for the Republi-

can candidate," or "for the Democratic candidate." His right is confined to voting for one candidate. And under this bridge law, if a person votes "No" on the general proposition, that is as much as he has a right to do. He thereby says that he is not in favor of any bridge, and, therefore, not in favor of any location. If he votes "Yes," that he is in favor of some bridge, he may at the same time designate the location which he favors.

To make clear what I have said as to the change in the bill: The original bill contained in lines 98, 99, 100, 101 and part of 102, the following, which, for convenience, may be bracketed:

["Provided, however, that the ballots for such election shall be so prepared as to read:

"For the construction, reconstruction, enlargement or repair of bridges, 'Yes.'"

"For the construction, reconstruction, enlargement or repair of bridges, 'No.' And —"]

Then follows what now appears in the law as to the form of ballots, already quoted.

One of the amendments struck out "all in lines 100 and 101," and in 102 the words "No. And." This resulted in striking out all of the above in brackets after the words "to read."

In the case first mentioned a peremptory writ of mandamus is awarded; in the other the petition will be dismissed.

CORPORATIONS—UNIVERSITIES.

[Cuyahoga Circuit Court, January 21, 1901.]

Caldwell, Hale and Adams, JJ.

HARRY KOBLITZ V. WESTERN RESERVE UNIVERSITY.

1. UNIVERSITY A PRIVATE CORPORATION.

A university of learning that has received its charter from the state and is exempt from paying taxes by legislation of the state, but has received no other benefit from the state, and has an endowment from private donors, and charges tuition fees to students, is a private corporation. The charity it administers may be public, but the corporation is private.

2. STATE WILL NOT EXERCISE VISITATORIAL POWER OR INTERFERE IN MANAGEMENT.

Where the corporation is private and is not administering funds contributed to its aid by the state, the state will not exercise visitatorial power over its domestic affairs, and will not interfere with its government unless there has been unjust, unfair and oppressive treatment of its students, nor will the state interfere with the management of the trust funds of the university unless there has been a breach of trust on the part of the officers of the university.

3. FAILURE OF STUDENT TO PERFORM OBLIGATIONS—DISMISSAL.

Whether the student, when he pays tuition for instruction in the university, thereby enters into a contract or obtains a mere license, is not material; in either case, there are numerous obligations which he agrees to perform and his failure to perform such obligations may be of such a nature that the university may be justified in dismissing him from the institution.

4. STUDENT DISCIPLINED NOT ENTITLED TO FORMAL TRIAL.

The student agrees to be disciplined by the faculty according to the custom of such institutions and, in administering such discipline, the authorities should afford him a fair opportunity of presenting evidence of his innocence, but are not under obligation to afford him all the formalities of a trial in a court of justice.

5. STUDENTS AGREE TO CONFORM TO AND BE TRIED BY RULES.

The faculty of a university, under the custom of the land which has been uniform for so long a time that it has become law, are justified in disciplining students in the institution, and the student who enters such institution agrees to conform to that rule of law and to be tried for his demeanors by such rule.

6. WHEN FACULTY MAY REMOVE STUDENT.

Where a student has been guilty of various breaches of duty, of such a nature that it is injurious to the institution to allow him longer to remain as a student, and where opportunity has been afforded him to make full explanation before the faculty, and present evidence of his innocence, and where the faculty have made a careful examination of his conduct and have found him acts to be such that he is a very undesirable student and his presence is injurious to the benefits of the university, they are justified in removing him from the institution.

APPEAL.

Ford, Quiber, Henry & McGraw and McKisson & Dawley, for plaintiff.

Williamson, Cushing & Clark, for defendant.

CALDWELL, J.

The Western Reserve University, made one of the defendants in this case, is a corporation incorporated under the laws of the state of Ohio, and not for profit, and is for the purpose of imparting instruction. Its work is divided into several departments; one is the Franklin T. Backus Law School of The Western Reserve University in which instruction in the study and the practice of the law is imparted to those who enter as students. Charles Franklin Thwing is president of the university, and the defendant, Evan H. Hopkins, is dean of the law school. They are the executive officers in the management of that department.

The plaintiff is a resident of the city of Cleveland and in September, 1899, he was admitted as a student of the law school and was received by the university as such; he paid \$100; that was the tuition for one year. He was admitted as a special student, and he attended the exercises and lectures in the school during the school year of 1899 and 1900, ending in June, 1900.

The university, by its catalogues and in other ways, represented to the public itself as ready and willing to impart instruction to all its students in good standing, and it conferred at the end of the law course, upon those having good character and having passed the examination satisfactory to the board of professors, the degree of LL. B. The advantage gained by the degree conferred upon students, is that of prestige in their profession and an aid in passing the examinations to the practice of law under the authority of the Supreme Court of the state of Ohio.

About March 15, 1900, the dean of the law school notified the plaintiff that his continuance as a student in the school was not desirable. Thereupon the plaintiff took counsel from an attorney as to his rights, and persisted in attending and did attend the exercises of the school up to the close of that year, June, 1900, and the defendant permitted him to attend the lectures up to that time, hoping that at the end of that school year he would withdraw from the school without any notoriety being given to the matter.

During the summer vacation he was several times told by the dean that he would not be allowed to return to the school in the fall; and

about September 10, 1900, he was notified by the university that he would not be allowed to return.

This action on the part of the law school and of the university was for two reasons: One, that the plaintiff's conduct had been such that it was detrimental to the best interests of the school and tended to beget insubordination on the part of the other students, and because he had not been successful in passing his examinations and keeping up his studies to the satisfaction of the teachers of the school.

After this action was commenced, he was, by stipulation between the parties, allowed to take and did take his examinations for studies that he had failed in, and such permission was given to him without prejudice to the rights and interests of either parties to this action.

After the action taken by the authorities of the school had been imparted to the plaintiff, he notified the authorities that he *would* attend the classes, regardless of the notices which had been given him to the effect that he would not be allowed to enter upon his second year in the college.

The plaintiff is about twenty-two years old. The school is a public institution. The building and equipment of the school have been furnished to the university by gift from private persons for the purpose of the school. No public funds have ever been received for the purpose of a law school or the university. The fees paid by students are applied to the payment of the running expenses of the school. The university makes no discriminations against any class or sect, but receives and retains any who fulfil the requirements in point of study and character.

The accusations against the plaintiff, so far as pertain to his character, were, that during the year he attended the school he was twice arrested on criminal charges; he was called before the faculty to explain his conduct, which led to his arrest, and his explanation was unsatisfactory. One of the charges grew out of a difficulty which he had with a fellow-student, and the evidence shows that it caused much annoyance to the faculty and authorities of the school. He indulged in threats and abusive language and disorderly conduct towards fellow-students in and out of the school building. The faculty found that he was untruthful, and that he was in general a disturbing and undesirable element in the school; and these were the accusations and findings that led up to his removal.

There is evidence offered in this court by the defendants, tending to prove all of the accusations above recited against the plaintiff. The plaintiff himself contradicts many of these witnesses.

There is evidence before the court showing conclusively that the state has never contributed anything to this institution, by way of funds or endowment of any kind, nor towards its property or the erection of its buildings. The evidence shows that the state bestowed upon the defendants its charter and has exempted it from taxation, and in no other way has the school ever been directly benefited by the state.

Much of the argument of the plaintiff's counsel in this case is built upon the superstructure and the single proposition that this university is a *public* corporation.

Incorporations in this state are divided into public and private. We see no advantage to be gained from going into a discussion of the distinctions between these two classes of corporations. Private corporations are sometimes divided into eleemosynary and lay or civil.

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It is claimed that this corporation, while it may be classified as eleemosynary, was created for a public purpose, the public being deeply interested in the education of its youth; and that the endowments given to the college were intended for all classes of youth, without any distinction whatever, providing their education and morals were such as could meet the conditions required by defendant.

The authorities all agree that while the charity may be public, the corporation is private. The charity distributed by hospitals or to the poor by trustees, or by way of schools, all have in them an element, so far as it pertains to charity, of *public* corporation, but at the same time the corporation itself is *private*.

The argument of counsel for plaintiff is, that the uses of this eleemosynary corporation is in the distribution of a general charity, and that that charity is public and therefore the corporation that distributes the charity must be a public corporation.

But this is not the law as established by the authorities. Trustees of Dartmouth College v. Woodward, 17 U. S. (4 Wheat.), 518, 519; 1 Thomp. Com. on Corp., Sec. 26.

Angell & Ames on Corp., Sec. 34, says: "A college founded and endowed by private benefaction, though for the general promotion of learning, is a private corporation. A college merely because it receives a charter from the government, if founded by private benefactors, is not thereby constituted a public corporation controllable by the government."

The fact, then, that the charity is public, is no proof that the corporation also is public, and this being the foundation on which the counsel for plaintiff have built much of their argument, the foundation being removed and it being determined that the corporation is a private one, much of the argument becomes worthless to determine the questions in this case.

It becomes important to consider in this case, to what extent the state will interfere with the affairs of this university as a corporation.

It is contended that if it is a public corporation, the management and control of the college is entirely within the authority of the state. On the other hand, it is contended that inasmuch as the corporation is a private one, and the affairs of the corporation being committed to a board of trustees, the state will not interfere with the government and the internal affairs of the corporation, and that when the state sees to it that the purposes for which funds have been given to the university are being complied with, and that the trusts involved in the gift of such funds is being fully executed, according to the intention of the donors and the purposes of the organization, that there shall be no farther interference with the affairs of the corporation by the state.

In this regard corporations formed for the purpose of carrying out the purposes and objects of charitable gifts, and which corporations are known as eleemosynary corporations from the earliest history of such corporations, there has been no disposition on the part of the government creating them to interfere with their domestic concerns any farther than indicated in the rule above stated.

An eleemosynary corporation upon a private foundation, being, as we have said, a private corporation, it becomes important to inquire what is that foundation; and I have said *private foundation* to distinguish it from one of a public foundation.

Who is the founder? If there are no gifts or endowments given to the body, then there is but one founder and that is the one that bestows the charter.

Where there is an endowment then there becomes a private foundation if that endowment is given by individuals or persons separate from the state. In such case the government is the general founder, and, in the sense of private foundation, the founder is the one who has bestowed the endowment,

Now, to all eleemosynary corporations a visitatorial power attaches as a necessary incident. These corporations are composed of individuals and they are subject to infirmities and are liable to not carry out the purposes of the original giver of the funds. The law, therefore, from very early times has provided that there shall somewhere exist a power to visit and inquire into and correct all the irregularities and abuses, and to see that the charity is being applied according to the intention of the donor. If the state is the only donor, then the power to appoint visitors and the visitatorial power vests in the state. But, if the charity is one resting solely upon a private foundation, then the visitatorial power rests originally in the donor, and, at his death, in his heirs, and he may impart that power to any person or persons that he may see fit, and no formality nor precise language is required in imparting such power.

This doctrine is found in the courts from the earliest history of institutions of learning down to the present time. In *Phillips v. Bury*, 1 Raym., 58, Lord Holt says, that corporations are divided into two kinds, one for public government and the other for private charity. That those for public government are not subject to any founder or visitor, or particular statutes, or to the general and common laws of the realm and, by them, they have their maintenance and support; but the last sort of corporations for private charity, is entirely private and wholly subject to the rules, laws, statutes and ordinances which the founder ordains and to the visitor whom he appoints, and to no others; and if the founder has not appointed any visitor, then the law appoints the founder and his heirs to be visitors, for visitation was not introduced by the common law, but of necessity was created by the common law, and it is the office of the visitor, by the common law, to change according to the statutes of the college; and, by the statutes of the college is meant the conditions and terms upon which the endowment is given, to expel and deprive upon just occasion and to hear appeals; and from him and him only the party aggrieved ought to have redress, and in him the founder hath reposed so entire confidence that he will administer justice impartially, that his determinations are final and examinable in no other court whatever.

This was the rule of the common law, engrafted upon it from necessity, and the common law is applicable to the affairs of this state so far as it is adapted to our institutions; and it has been said that while the doctrine, that the founder is the visitor and after him his heirs, cannot well be applied to institutions of learning in this country, for the reason that the heirs soon become so numerous that it would lead to confusion, whereas in England the oldest brother or the oldest son is always the heir and confusion is not so certain to follow as it would be in this country. Yet, because of this confusion, which is likely to follow both in England and especially in this country, it has become the custom of those who endow charitable institutions to bestow the visitatorial power

upon a board of trustees and that method of carrying out this purpose of the law had become a part of the common law of England before occasion arose to apply it to institutions in this state, and we have adopted in the form of the visitatorial power vesting and remaining in the trustees appointed to carry out the purposes of those who have bestowed the endowment. And, so far as this mode of applying the rule is concerned, it is entirely adapted to the institutions of this state and has been found to be the safest and most practical method of executing such charities.

In determining when a court of chancery will interfere with and regulate the affairs of a college, it becomes necessary to determine what is within the jurisdiction of the visitors or trustees, and what is not within their jurisdiction.

It has been repeatedly held that the duties of the visitor are strictly domestic, and that he has no power to act in a proceeding by a third person against the corporation for the specific performance of an agreement, and that if he did act, his action would be nugatory; and, as the authority of the visitor is domestic, his power is confined to offenses against the private laws of a corporation and he has no cognizance of acts of disobedience to the general laws of the land; and it has been repeatedly held that he is not bound to proceed according to the rules of the common law, nor according to any exact forms of proceeding, but the hearing must be fair and conducted in an impartial manner, and allow convenient time for the offender against such rules to make his defense.

Where there is a charter, giving powers, the charity must be regulated in the manner which the charter has pointed out; and where there is a local visitor, the court of chancery has no jurisdiction over any subject within the cognizance of the visitor. *Attorney-General v. Price*, 3 Atk., 108; 2 Ves., 328; *Attorney-General v. Harrow School*, 2 Ves., 551; 2 Kyd's Corp., 182, 187.

And it has been held in New York that a court of chancery can exercise no authority over an eleemosynary corporation in visitatorial character. *Auburn Academy v. Strong*, 1 Hopk. Ch., 278; 2 John's Chan., 379.

But the persons entitled to execute the visitatorial functions have frequently the management of the revenues with which the charity is endowed and, in such cases, courts of chancery, by virtue of their general jurisdiction, will compel them to account and for their administration in the same manner as other trustees. And in New York it was held that it might take cognizance of a cause in which the academy on one side and the teacher on the other were parties, upon some ground of its proper jurisdiction, as its power to cause contracts to be delivered up and cancelled. *Auburn Academy v. Strong*, *supra*.

There may be authorities cited to the point that even though the courts have no visitatorial power and cannot undertake to regulate the domestic affairs of the college, such as passing upon the reasonableness of the course of study, the reasonableness of the mode of discipline or what the discipline shall be, yet if the authorities governing the school have been indiscreet in their punishment and have inflicted unnecessary and uncalled-for punishment, and such indiscretion is carried to that extent that it does not show a spirit of fairness, nor an intention to do justice by the pupils, they will interfere so far as to require the authorities governing the college to do justice and give the party offending such con-

sideration as is necessary to arrive at the proper conclusion as to his guilt or innocence and as to the nature of his offense. And where the trustees control the funds donated for the support of the charity and they have abused their rights and privileges in the management of such funds, the courts will interfere to see that the purposes of the donors are carried out.

Beyond these two points the governmental authorities of this country have never, through the legislature nor through the courts, undertaken to interfere with the affairs of a private college, supported entirely by private funds and tuition, and not, in any way, deriving benefits from the state by way of support. But this class of corporations must all the while be kept separate and distinct from similar corporations which are formed for civil purposes, and from that class of like corporations which derive their support partly or wholly from the state or public revenues.

It is claimed in this case, that in refusing the plaintiff admission to the college for the second year, the authorities governing the college acted in such a way as to unnecessarily punish the plaintiff, and in a way that they were not warranted in doing under the facts in the case; and that they have made their punishment unnecessarily oppressive; and that the court should relieve from such unnecessary oppression and require the university to allow the plaintiff to continue his study of the law in the law school which he was attending. And there is some intimation that these charities, being intended for the use of any one who might avail himself of their benefit by way of becoming a student in the university, that to expel the student without just cause is to thwart the purposes of the endowment, and hence is a breach of the trust imposed in the university authorities.

It is also claimed that the rights of the plaintiff rest in contract and that he cannot be deprived of his right under his contract without due process of law, and that due process of law in this case means such a trial as is usually conducted by courts of justice, and that the plaintiff had no such trial, no such opportunity for trial, before the officers of the university, and that, therefore, he should be restored to his rights under the contract until such opportunity is given him by those in authority over the college.

His attorneys claim that he is entitled to have a complaint filed against him and submitted to him; that he has a right to be present to hear all the testimony offered against him, and to offer such testimony as he may wish to offer in his own favor; that he has a right to cross-examine witnesses called by the university; that he has a right to be present by attorney during the trial, and to have his case conducted and argued by his attorney, and, in fact, insist upon all the formalities attending trials in courts of justice. These several claims we now proceed to consider.

We have no doubt of the proposition that oppression of a student may be carried to that extent that the courts would interfere in his behalf. Whether such oppression was exercised in this case, remains to be considered later. And we have no doubt that if a student is expelled without any cause whatever, or even is refused admission without any cause, and the charity is a public one, open to all persons who may see fit to avail themselves of its benefit, the courts would interfere in behalf of such persons denied the rights that are guaranteed to all persons.

But what facts would warrant the authorities of the university in refusing a student admission or excluding him from the privileges of the

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school after admitted, remain to be considered. As to whether his rights rest in contract or not, is not very material in this case; for, if they rest in contract, then the consideration that he has paid for the privileges that he is to obtain under that contract, is paid under certain restrictions and conditions to be complied with upon his part, and upon such conditions and restrictions as may be imposed upon that contract by the authorities of the university, so long as they do not conflict with the laws of the state nor the laws of the country.

What then are the terms of such a contract? He, upon making that contract, agrees to submit himself to the reasonable discipline of the school. He agrees that his conduct and character shall be such as to in no manner be a detriment to the school; and this conduct and character he must bear in all his relations with the school and with the other students. He agrees that he will conform to the customs of the school; if it is the custom of the school that the professors shall discipline the scholars, reprimand, and inflict such punishment as is proper under the circumstances, then he has agreed that he will conform to that custom. And he agrees that when he fails in any of the duties devolving upon him, the authorities over the school may discipline him in such manner as shall be proper under the circumstances.

The university agrees with him that it will impart to him instruction; that it will aid him in the ordinary ways of his studies; that it will treat him fairly; that it will give to him every opportunity to improve himself, and that it will not impose upon him penalties which he in no wise merits, and that it will deal with him impartially.

These terms all enter into the contract.

It is said that, under the policy of this state, the professors have no authority to discipline by way of suspension or expulsion except as it may be done under rules laid down by the trustees of the university.

It has been the custom of all school authorities, for so long a time that it has become a rule of law, to commit the discipline of the school very largely, if not wholly, to the teachers; and this custom having become law, being recognized as the usual mode of proceeding, both by the school authorities and by the state, we have no hesitation in saying that if the plaintiff had a contract such as he says he has, that then he submitted himself in that contract to be disciplined by the professors of the school. In fact, it has been found impracticable in colleges, and not for the best good of the pupils themselves, to lay down a large number of rules and attach to the violation of each one a penalty. It makes of the youth attending such schools, law-abiding persons largely from necessity and fear of punishment, rather than throwing them upon their own manhood and relying upon them to observe the golden rule without a code of laws to enforce it. And this, no doubt, is wisdom on the part of these institutions, and hence it has become the custom and the rule that young men in such institutions must do right according to their knowledge of right and wrong, and as they may be instructed in such matters by the teachers from time to time.

And the necessity of such cases would seem to forbid that every time that a pupil is to be disciplined the trustees should be called together and go through all the formalities of a trial in court to determine whether the party is guilty and what penalty shall be inflicted upon him for his wrong-doing. The trustees of such institutions live in remote parts of the country; they are generally men of business affairs, who cannot be summoned at any moment to the seat of learning, and who

have not the experience in teaching that the professors have, who do not know what is required to keep proper discipline in such institutions as well as the professors do, and are not as well adapted to carry out the purposes and designs of the institution in regard to governmental affairs as are the professors themselves. Such regulations would lead to long delays, would leave a rebellious student in the institution to corrupt others, without any speedy remedy, and are altogether impracticable in a large number of cases. The trustees of such institutions are not accustomed to meet more than once or twice a year at the seat of learning; then, being men of pressing business of their own, they are not capable of remaining there to go through a long and tedious trial, an examination of witnesses and a full hearing.

So, by common consent and common usage, such matters have been left largely, if not entirely, to the faculty, and their action in such matters is binding upon the institution they represent; and this is not unusual at all.

The same rule applies largely to all other kinds of corporations. The duties and powers of the minor officers and agents of corporations are not generally prescribed by the by-laws, but are determined by custom, so says Beach on Private Corporations, and whether or not the particular act be within the scope of an official's authority is to be determined largely by the circumstances of each case. And in commercial corporations where it is the custom for agents and minor officers to perform certain duties, although no such authority has been delegated to them, yet the custom has been such, if long enough continued, that the courts will hold all persons bound by the authority of the agents.

Here is a custom that has existed, as we have said, from the earliest times, and one that has become thoroughly fixed as a rule of law in all such institutions in our country.

This will not deprive the trustees from acting in such matters, nor will it permit the officers or the dean of the school to do anything contrary to law, nor will it allow him to do anything not within the power of the trustees of the corporation.

The same may be said as to trial. Custom, again, has established a rule. That rule is so uniform that it has become a rule of law; and, if the plaintiff had a contract with the university, he agreed to abide by that rule of law, and that rule of law is this: That in determining whether a student has been guilty of improper conduct that will tend to demoralize the school, it is not necessary that the professors should go through the formality of a trial. They should give the student whose conduct is being investigated, every fair opportunity of showing his innocence. They should be careful in receiving evidence against him; they should weigh it; determine whether it comes from a source freighted with prejudice; determine the likelihood, by all surrounding circumstances, as to who is right, and then act upon it as jurors, with calmness, consideration and fair minds. When they have done this and reached a conclusion, they have done all that the law requires of them to do. They are not trying the accused for crime as a civil court. They are helpless to pronounce the judgment of the civil authorities upon him. They are trying only the question whether it is detrimental to the good discipline and the good morals of the school to allow the person whose conduct is being examined, to remain in the school; and, if they find he is guilty, they determine the degree and pronounce a judgment that is fair under the circumstances. That may be a private reprimand. It may be a reprimand before the school. It

may be suspension; it may be expulsion; it may be any penalty that the authorities over the school may see fit to impose.

The only requirement necessary, so far as concerns a review of the matter in a court of justice, is that it shall not be so unreasonable and oppressive as to leave the conclusion of unfairness on the part of the teachers. It matters not whether we call this arrangement between the pupils and the authorities over the school a contract or a license. The same results and the same relations and the same duties and the same obligations arise if we call it a license, as arise if we call it a contract.

But it is insisted by the plaintiff that, by reason of his contract, he got a right or a property, that cannot be taken away from him without a full and complete trial before the proper authorities. That right or property is worked out by him in this way: That this institution was endowed; that so far as the endowment went, he was charged nothing for its benefits, but wherein the endowment failed to pay the expenses, he was to pay a consideration, and that he paid \$100, and was willing and ready to pay the \$100 for the second year, but the university refused to receive it, and what he got in return was not only benefits to the extent of his \$100, but benefits growing out of the endowment or all moneys that had been contributed to the building up or sustaining of the law school. I confess this is not very clear, and, in reading over the brief carefully of the attorney for plaintiff, it is a little difficult to make out just wherein he gets this consideration over and beyond what he has himself paid. But this proposition is made the basis on which this superstructure is built, of right to trial in a formal manner as though the proceeding was had in court.

We see nothing whatever in this proposition. If there was any agreement here at all, it was simply that if he would pay \$100 the university would impart to him instructions for one year; at the end of that year they were ready to contract further, for further tuition and further instruction. The university refused to enter into any further contract. He had received the full consideration that he was to receive for the contract for the first year, and the university refused to enter into a further contract because he was not a fit subject to become a student in its law school.

But this interest is worked out through an old custom or rule that existed in very early times in England wherein the masters, the fellows and the students became in some way interested in the endowment. But this doctrine has long since been obsolete in England and never existed at all in this country, nor is there any ground for giving it the place that is now claimed for it in this case, and the mere statement of the proposition contended for is a refutation of it.

We come, then, to the conclusion that a court of chancery may be justified in this country in hearing a complaint of this character where there has been unnecessary oppression and unfair dealing, and also in a case where there has been an expulsion that violates the purposes of the trust.

It is the purpose of every trust of this character, that only such students shall attend the school as can bring with them a good moral character and that degree of intelligence and preparation required of the students; and, in order to remain members of the school according to the intention of the trust, it is necessary that they should retain that character, refrain from conduct that would be demoralizing upon the school, and make such progress in the studies as will enable them to

pass the required examinations; and, if in inflicting punishment upon the plaintiff, the school has not gone beyond what was reasonable by reason of the plaintiff's conduct and scholarship, then this court is at the end of its inquiry and the plaintiff would have no standing in court.

This leads us to inquire into the evidence in this case as it is presented to the court, and, in doing this, it is not our province to enter upon it with a view to ascertaining whether the college authorities were fair and right to the very letter of the law, but whether they acted with that prudence and discretion and fairness that men circumstanced as they were generally exercise in such affairs.

The testimony before us tends to show, and, we think, does fairly show, that the plaintiff's scholarship in the school has been poor and that, while a student during the year that he attended the law school, he was twice arrested on criminal charges; that he carried a revolver and threatened to inflict violence upon a fellow student; he indulged in abusive language and disorderly conduct towards fellow-students in and out of the school building; he was untruthful. When he was notified by the faculty to appear before them by reason of some of these offenses, for an examination, he said that he did not know whether he would go or not, that if they undertook to discipline him, they would find they had a lawsuit on their hands, and the evidence shows that he was a disturbing element in the school and a very undesirable student.

He denies many of these accusations, but not all of them. He bought a book from a fellow-student and ascertained afterwards from one of the professors that it was not the latest edition and was not the edition they were using in the school, but that it would serve his purpose very well. Thereupon he clandestinely entered the building and the room of the student who sold him the book, and took from the room a book, not of the student who sold him the book, but from that student's room-mate, which book he proposed to hold until the money was refunded to him for the book that he bought. He convicted his fellow-student without trial, and he inflicted a most unreasonable punishment and when the faculty persuaded him to relent and desired him to mend his ways and reform his conduct, he informed them that if they undertook to discipline him, they would find themselves with a lawsuit on their hands.

It seems to us that such conduct from a young man who has a fair mind and an honest purpose, is impossible. And we believe that the authorities were entirely right in refusing him admittance upon the second year.

Injunction is denied, and plaintiff's petition is dismissed at his costs.

FRAUD—DAMAGES.

[Lucas Circuit Court, November 5, 1900.]

Haynes, Parker and Hull, JJ.

LAURENS CABLE V. NOAH BOWLUS.**1. DAMAGES CANNOT BE RECOVERED FOR DISGRACE OF BUYING WORTHLESS STOCK.**

A person is not entitled to recover damages for injuries to his feelings and for his disappointment or his disgrace in the community as a result of having been induced to buy worthless mining stock by false representations, made knowingly or recklessly, that the property was unencumbered.

2. EVIDENCE OF GENERAL TALK OF FINANCIAL CONDITION.

In an action for damages for the sale of the stock of a mining company upon the false representation that the property was unencumbered, it is doubtful whether evidence, in support of the claim that the defendant or his agent had knowledge that the property was heavily encumbered, that the matter was talked about in the city, on the produce exchange and on the oil market and in offices generally, but where no witness is able to testify that it was ever mentioned in the presence of defendant or his agent, and the same may be said in regard to a custom of putting such stock on the market.

3. EVIDENCE IN REBUTTAL IMPROPERLY REFUSED.

Where, in such an action, evidence is given that the plaintiff was present at a meeting of the directors of the corporation on a certain occasion and was then told that the company owed a large sum for the mines; that the debt was serious and outstanding; and that at that time that he expressed no surprise, that he kept quiet, plaintiff in rebuttal should be permitted to give the reasons why he did not make a statement.

4. CHARGE NOT APPLICABLE UNDER PLEADINGS.

While the president of a corporation who, being inquired of by a person desiring to make an investment in the company, carelessly and recklessly made misstatements which misled such person, may be liable in damages, a charge to that effect would be improper in an action based upon charges that the statements were fraudulently made and was properly refused.

5. BARE FRAUD—PUNITIVE DAMAGES NOT RECOVERABLE.

In an action against the president of a corporation involving false statements or bare fraud concerning the financial condition of the corporation, without a showing of gross or malicious fraud, or a very corrupt condition, punitive damages in any form cannot be recovered.

6. DEPOSITION WITHOUT PROPER CERTIFICATES.

A deposition taken before a notary public in Arizona, containing copies of instruments recorded in the office of a county recorder, containing certificates of the notary and county recorder, but without the certificate of a presiding judge or the governor, are inadmissible in evidence. Sec. 906, U. S. Rev. Stat.

HEARD ON ERROR.

Hurd, Brumback & Thatcher, for the plaintiff.

D. R. Austin and Gilbert Harmon, for the defendant.

HAYNES, J.

This is an action which, I think, counts entirely on fraud. It is set up that the plaintiff was about to purchase some stock in the Guyjas Gold Mining Company, and he applied to the defendant, who was then the president of that company, to make some inquiries in regard to the mine. He inquired in regard to the title of the mine and in regard to the indebtedness, and was informed by the president that there was no

indebtedness on the mine, that he was the president, and that none would be allowed to accumulate, and remarked that they would only operate so far as they had means to operate; indeed he stated that they had no credit wherewith to get into debt, and he said they had abstracts which had been furnished by the attorneys in Tucson, Arizona, and that the title was good. It developed subsequently that the company had taken a title bond to certain claims in Arizona, for which they were to pay, I think, \$60,000. It had in fact paid about \$15,000, and the balance remained unpaid and a payment was falling due in July—this conversation having taken place in January—which payment in fact was never met and the title of the company to the claims failed and was forfeited. Thereupon this suit was brought.

Now the plaintiff claims that there was fraud here. I think he claims also, at least did in argument, that if the statements were not knowingly made falsely, they were made recklessly, and plaintiff asks for damages, punitive damages, attorneys' fees and damages to the plaintiff's feelings and for his disgrace in the community for having been concerned in the buying of stock of this kind, which proved to be worthless; and he proceeded to offer testimony upon those points.

We are very frank to say that this is the first case that we have ever known in which a party in a case of this kind attempted to recover for his feelings, disappointment or disgrace in being induced to purchase stock of this kind.

One of the first exceptions taken is to the certificate to a deposition; that the certificate is not made in accordance with the statutes of the United States governing certificates of that kind and that appears to be true. There was no certificate of a presiding judge or governor attached to the depositions certifying to the official character of the county recorder, as required by Sec. 906, U. S. Rev. Stat. The deposition, taken in Tucson, Arizona, contained copies of instruments recorded in the records of Pima county, Arizona. The certificates of the notary and recorder were duly attached. Objection was made during the trial below that there was no certificate under the United States statutes attached to the deposition. We find no statute or decision in this state which would permit that deposition to be read and we think the court was right in ruling it out.

There is another class of statements in the case to which the plaintiff objects, which consists of these: For the purpose of showing that the plaintiff, Cable, had knowledge, or that one Bowman, who was claimed to be the agent of the plaintiff, had knowledge of the condition of the title and indebtedness of the company, they offered testimony showing that it was talked about in the city, on the produce exchange and in the oil market and in the offices generally, very fully; indeed that it was the general topic of conversation, that this company had an outstanding indebtedness of this kind for the purchase price of the mine, but no witness was able to testify that it was ever mentioned in the presence of Bowman or Cable. Cable testified that the first time that he knew of it was at a certain meeting of the directors, where he was informed that there was an outstanding indebtedness. The above class of evidence was permitted to be given. In regard to that we say that a majority of this court are not fully satisfied that some evidence of that kind might not be given, but at the same time they have very serious doubts in regard to its admissibility, and if parties on the trial of the case hereafter put the evidence in again they will do it with knowledge that it is an

open question. Speaking for myself, I think the testimony is entirely inadmissible and never ought to have been received.

There was another item of testimony in regard to the custom of putting these stocks upon the market, that it was known throughout the country that these claims were obtained by options upon them, and then that they were stocked up and that the stock was put upon the market to obtain money to operate the mine. To this the same remarks apply which I made to the preceding evidence, a moment ago. I do not myself see how such evidence could properly be received. The plaintiff inquired of this party (who was the president of the company), as to the true condition of the company in regard to title and debts, and the president undertook to answer in regard to this mine. Now what the custom may have been in regard to other companies, is a matter that I deem entirely irrelevant to the issue in this case.

There is another matter in which the error is serious, and that is this: Mr. Cable was present at a meeting of the directors on a certain occasion and he was then told that the company owed for the mines perhaps \$45,000, and that a payment would be due in July; that the debt was outstanding and was serious and had to be provided for. Now at that time, it is said that he did not express his surprise; that he kept quiet. The plaintiff, when he came to the rebuttal, proposed to offer some reasons why he did not make a statement at that time, and this was excluded under the objection of defendant's counsel and he was prevented from doing so, and the court is very clearly of the opinion that the testimony was competent, and that the plaintiff should have been permitted to give his reasons why he did not make a statement. I, myself, doubt very much whether there was anything in the case which required him to make any statement whatever, or say anything about it, but if he was required to do it, he should have been permitted to state the reasons why he did not do it.

There is another objection, and that is that Judge Austin testified that he gave an opinion upon the title to the officers of the company. I do not deem that very material in this case, and whether rightfully given or not, I do not think it should have had any influence against the plaintiff, for the reason that he stated to the officers that upon the abstracts, *the parties who were proposing to deed the property to them had a good title.* The difficulty in the whole case was that the defendants themselves had not yet obtained the title; the most that the company had put into these mines was the amount of \$15,000, and that is all there was of it. He never in fact gave an opinion that the company itself had a good title, but that they had an option and upon making the payments stated, they would be entitled to have deeds to the lands.

There were some matters in the charge of the court also which I call attention to.

The plaintiff requested that the jury should be given two propositions, numbered respectively three and six, and that they should be given before argument. No. 3 was as follows:

"3. If the jury find that Noah Bowlus was the president of the Guijas Gold Mining Company, and as such knew the real status of the title to the mines which were being operated by the company, and further knew of the indebtedness outstanding against the mines, then it was his duty when asked by any person regarding the title of the mines, or debts against them, to tell the truth about the matter if he undertook to give information concerning the same; and if the jury find

that the defendant Noah Bowlus knew that the plaintiff was contemplating a purchase of stock in the company, and came to him and inquired about the company and the title to its mines, and if the said defendant knew, or under the circumstances had good reason to believe that the plaintiff was relying upon the representations of the defendant as to the title to the said mines and the debts of the company; and the jury further find that the defendant when asked by the plaintiff regarding the same did not truthfully state the knowledge he had concerning the mines and indebtedness, then the defendant was guilty of making false representations, and if the plaintiff was thereby misled, and without knowing the facts about the title of said mines or the indebtedness against the same, relied upon the statements and was thereby influenced to invest in the stock of the company, and suffered loss whereby your verdict will be for the plaintiff."

The objection made was, that this matter did not follow the petition; that the petition was one charging fraud and that this did not bring the charge within the allegations of the petition, but that if he knew certain facts and failed to state them, he then was liable. We are not prepared to say, under that view of the case, that the court was wrong in its refusal to give that particular charge. It was not drawn with the care required of counsel in drawing a charge of that kind. If the case was a proper one and the pleadings properly stated, it would, perhaps, be proper to charge under the decisions in Ohio and at common law, that this person, being the president of the company and being inquired of by a person who wanted to make an investment in the company, and being inquired of in regard to the standing of the company, if he recklessly and carelessly made misstatements which misled the other, that he would be liable; but that was not the case charged against the party; he was charged with having fraudulently and wilfully made the statements.

The sixth proposition is as follows:

"If the jury find for the plaintiff under the rules of law given by the court, then plaintiff is entitled to recover damages, both compensatory and punitive. Compensatory damages are allowed to compensate the plaintiff for the actual loss he has sustained. In this case compensatory damages would include the full money loss sustained by plaintiff by reason of his purchase of stock in the company together with reasonable attorney's fees to the plaintiff for the services of attorneys in the prosecution of this case. Punitive damages are given as smart money in the way of pecuniary punishment. If you find for the plaintiff you will add to the compensatory damages such sum by the way of punitive damages as in your judgment you may think just and proper in view of all the evidence and circumstances."

He has asked that even on the state of facts set forth in the former request if the jury find them to be established, or if they find at all for the plaintiff, that they may add to these compensatory damages punitive damages. It is pretty difficult for the court to believe that the plaintiff has made out here a case for punitive damages in any form. The matter seems to have been dwelt upon and placed before the jury until it looks very much as if the jury had returned a verdict in favor of the defendant because the plaintiff had asked too much; but, be that as it may, we think the charge, in that form, is not right.

It is true that in *Roberts v. Mason*, 10 Ohio St., 278, they use the word "fraud," but so far as we can discover, the case must be such as

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that it was either gross or malicious fraud, or something showing a very corrupt condition of affairs. I have never even heard of a bare case of fraud where it was claimed that for fraud alone the party was entitled to punitive damages. The cases cited to us are where there was a malicious attack upon a party and the defendant had been indicted for maliciously attacking persons with intent to kill and had been convicted by the jury and in that case they would allow compensatory damages. So in *Hayner v. Cowden*, 27 Ohio St., 292, to which we are cited, where a clergyman was maliciously and wilfully charged by a woman, very falsely and under very aggravating circumstances, with a matter that was actionable of itself, and they there allowed compensatory damages and with them included attorney's fees, punitive damages. We are not disposed to hold that the court erred in refusal to give this charge, in the form in which it was asked. Perhaps a charge might be framed which would state various phases of this case which would be entitled to be given the jury.

It is contended very stoutly on behalf of the defendant that he understood, when the party inquired in regard to indebtedness, that it was with regard to the general floating indebtedness of the running of the institution, and he claims very strongly that he stated correctly, as he understood it to be, the condition of the title to the land.

A charge was given the jury, I think numbered three in the defendant's request, in reference to the duty of Bowman if certain rumors or suspicious circumstances came to him, to make further investigation, which states the law too strongly against the plaintiff upon the evidence in the case; also in the fourth request as to the same point.

The judgment will be reversed and the cause remanded for a new trial.

RAILROADS—MASTER AND SERVANT.

[Lucas Circuit Court, January 12, 1901.]

Haynes, Parker and Hull, JJ.

JAMES WAINRIGHT, ADMR., v. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.

1. QUESTIONS INVOLVED IN DETERMINING WHETHER VERDICT IS AGAINST EVIDENCE.

In determining whether a verdict for defendant in an action against a railroad company for wrongful death, is against the weight of the evidence, when questions of negligence of the company and contributory negligence of deceased are both involved, a reviewing court must, if it is determined that the verdict is against the weight of the evidence on the question of negligence of the company, also determine whether the verdict is against the weight of the evidence on the question of contributory negligence of deceased.

2. JUDICIAL NOTICE OF CITY MAPS.

A court may take judicial notice of the map of a city in order to determine the distance between certain points on a railroad track within its limits.

3. CAUTION NOT TO STAND UPON CARS—IMPLICATION.

A caution given to an inexperienced man upon his employment as a brakeman by a railroad company, to the effect that it would be unsafe for him to *stand* upon box-cars while passing through tunnels or under bridges, carries with it the implication that it would be safe to sit upon such cars while passing through or under such obstructions.

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4. WARNING REQUIRED AS TO OVERHEAD OBSTRUCTIONS.

Where, in order to pass safely through a certain tunnel upon the top of a box-car, it would be necessary to take a recumbent position, it is negligence for the railroad company to put an inexperienced man at work as a brakeman, where he will be required to pass through such tunnel upon the top of such cars, without giving him specific warning, by word of mouth or otherwise, that it will not be safe for him to sit upon the cars.

5. NEGLIGENCE TO PUT IN CAR UNUSUALLY HIGH WITHOUT NOTICE.

It is negligence for a railroad company to put in its train a box-car considerably higher than ordinary cars of that class, and upon which, in order to safely pass through a certain tunnel, a person on the top of such car would be required to take a recumbent position, without giving specific warning to a brakeman who has been in their employ only a few days and who has been over the line only three times, and never upon a train with such a car, and who may go upon such car in the performance of his duties, that he must not go upon that car, or, if he does, that it will be necessary, in passing through such tunnel, for him to lie down or get into a position lower than that which he would be in by sitting upon the car.

6. INADEQUATE WHIPPING-STRAPS OR TELL-TALES—NO DEFENSE.

It is no defense to an action for the wrongful death of a brakeman who was put at work where he would be required to pass through such tunnel on the top of box-cars, and without warning that he could not safely sit upon such cars, that the railroad company maintained whipping-straps or tell-tales on either end of the tunnel, where it appears that such straps or tell-tales did not hang low enough to reach a person sitting upon a box-car.

7. BRAKEMAN NOT NEGLIGENT IN SITTING UPON CARS, WHEN.

A brakeman who has not been cautioned that, for his safety, he must stand, or that in order to be warned by whipping-straps or tell-tales he must stand, but only that he must stand in order that he may perform his duties, is not guilty of negligence in sitting down, when it does not appear that there was any duty incumbent upon him requiring him to stand.

8. NOT NEGLIGENT TO SIT UPON EDGE OF CAR, WHEN.

Where a brakeman is not negligent in duty, and where he is not forewarned that it will be essential to his safety to maintain a position upon the center of the car, such brakeman may, without being negligent, occupy a sitting position upon the edge of the car.

9. NOT REQUIRED TO LOOK AHEAD FOR OBSTRUCTIONS.

A brakeman may keep his face turned from the locomotive to avoid the smoke, cinders and gases, or he may look in another direction through indifference or inattention, when not required to do otherwise by his duties, and if not warned by word or circumstance, or former knowledge or observation, that to do so while sitting upon the car will be unsafe, cannot be said to have been negligent in thus acting.

10. FACTS TENDING TO JUSTIFY BRAKEMAN IN NOT LOOKING AHEAD.

The fact that a brakeman received warning only that it would be unsafe to *stand* upon a car, that he had passed under other structures in safety while sitting upon the same car, and that no whipping-straps or tell-tales warned him of a lower structure, and the reliance which he might base upon the assumption that the company would do its duty by warning him of anything dangerous, may tend to justify such brakeman in not looking ahead.

11. MERE COMPLIANCE WITH RULES WOULD NOT AVERT DISASTER.

The fact that the rules of the company required the brakeman to be standing, and that if he had been standing the whipping-straps or tell-tales would have warned him that the train was approaching the tunnel, are not sufficient to defeat a recovery, where it appears that if such brakeman had been so warned by the whipping-straps or tell-tales, he might still have assumed that it would have been entirely safe, in view of the character of the warnings received, to sit upon the car and that that would be all he would be required to do to be safe.

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12. CONTRIBUTORY NEGLIGENCE OF BRAKEMAN CANNOT BE ASSUMED.

And if such brakeman was actually looking ahead, and did see, or might by ordinary care have seen the danger in time to avert it by changing his position, so that his failure to do so would constitute negligence, these facts must be established by proof; since a brakeman is not required to be faced and looking toward the front end of the train, the jury would have no right to assume or guess that he was in that position, and that he saw or might have seen and avoided the danger.

13. ESTIMATE OF HEIGHT OF STRUCTURE FROM MOVING TRAIN.

A brakeman in passing through a tunnel or under an overhead structure upon a moving train cannot be required to make such an estimate as will register in his mind that if he should pass through or under such structure on a car somewhat higher than the one upon which he is riding, he could not sit up with safety.

14. OBJECTIONABLE CHARGE AS TO OBVIOUS DANGERS.

A charge which directs the jury that if the dangers could be readily observed, or were open, apparent or obvious to a man of ordinary observation, or if they could be readily seen and appreciated, then the company was not under obligation to give warning to its employees, without qualifications as to time or circumstances, or opportunity for observation, in view of duties to be performed, is objectionable.

15. RULE AS TO OBVIOUS DANGERS.

A peril that might be visible and apparent to a person in a favorable position and under favorable circumstances might not be obvious to another person, in the same sense or degree, whose position is less favorable to observation and appreciation of the danger. Therefore, whether a servant was guilty of negligence in failing to note and avoid a peril of which he had no previous knowledge, or whether he would be entitled to notice thereof, must depend upon whether in the exercise of ordinary care under all the circumstances he should have discovered it in time to avoid it.

HEARD ON ERROR.

E. D. Potter, for plaintiff in error.

Hurd, Brumback & Thatcher, for defendant in error.

PARKER, J.

An action was instituted in the court of common pleas, by Wainright as administrator of the estate of Louis E. Canfield, deceased, against the Lake Shore & Michigan Southern Railway Company to recover on account of the death of deceased, which it is alleged was produced by the wrongful act of company. It appears that deceased was an employe and brakeman of the defendant, and that while in the line of his duty, riding upon a freight car along the road of defendant, in this city he came in contact with the stonework of an aqueduct conveying a canal over the road of defendant company, and received a blow and wound, from which he died.

The charges in the petition are, that the defendant company was negligent in these respects:

First, because of its failure to lower its tracks sufficiently, so that a person passing through what has been called a tunnel under this aqueduct and while upon the top of a train of cars, in the line of his duty, which required him to be there, would not come in contact with the stone-work.

Second, on account of its failure to maintain proper whipping-straps, warning-straps or "tell-tales," to warn one approaching this overhead construction, so that he might duck or dodge or take a safe position. It is alleged that these whipping-straps were not as long as they should have been or did not hang down as far as they should; that this was in

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consequence of their being improperly constructed in the first instance or because they had become out of repair, been whipped out at the ends and shortened up.

Third, on account of its failure to notify deceased of the danger of attempting to ride under this overhead structure upon freight cars, especially upon large box-cars, used for furniture, such as the one upon which he was riding at the time of the accident which resulted in his death.

The answer denies that there was any negligence in any of these respects, and avers that if this was not in law a pure accident, it was the result of contributory negligence of the deceased.

The jury returned a verdict for the railway company. A motion was made by the administrator for a new trial, on the following grounds: First, that the court erred in rejecting evidence offered by the plaintiff.

Second, that the court erred in admitting evidence on behalf of the defendant over the exceptions of the plaintiff.

Third, that the court erred in refusing to charge the jury as requested by the plaintiff.

Fourth, that the court erred in its charge to the jury.

Fifth, that the verdict is contrary to the weight of evidence.

Sixth, that the verdict is contrary to law.

This motion was overruled and judgment was entered upon the verdict, and the administrator of deceased prosecutes error here, averring in his petition in error precisely the same grounds of error as those stated in the motion as grounds for a new trial.

Without stopping to discuss the various alleged errors in the admission or rejection of evidence, we will simply say that we have examined all of them and we find no error in either of those respects.

• It is contended with great earnestness that the verdict is against the weight of evidence and that the court erred in its charge to the jury, and that this verdict is probably the result of the jury having been to some extent misled by a certain paragraph in the charge of the court, as to the law on the subject of obvious danger applicable to the case.

The rules which should govern this court in determining the question whether a judgment should be set aside on error on the ground that the verdict is against the weight of evidence, have been stated in various forms by our Supreme Court and are familiar to the profession, so that a statement of them, with fullness, need not be undertaken here, but we refer as applicable and pertinent to the inquiry here, to what was said by Judge McIlvaine in *Dean v. King & Co.*, 22 Ohio St., 118, reading from page 184:

"Motions for new trials, upon the ground that the verdict is against the weight of evidence, are addressed to the discretion of the court, and if granted, the judgment will not be disturbed on error unless the case is so strong as to show an abuse of the discretion." (Citing cases.) "And if the motion be overruled, a reviewing court should not reverse, unless the verdict (or finding of fact, if the jury be waived) is so clearly unsupported by the weight of evidence as to indicate some misapprehension, or mistake, or bias on the part of the jury, or a wilful disregard of duty."

It is not claimed here, and there does not appear to be any ground for claiming, that there was any bias on the part of the jury in favor of the railroad company and against the plaintiff, or that there

was any wilful disregard of duty on the part of the jury. The returning of a verdict in favor of a railroad company by a jury, in a case at all close, where there is a fair excuse for returning a verdict in favor of the plaintiff, is a thing so uncommon and extraordinary, that, where a question of this kind is presented, we feel like giving it very careful examination.

The question, then, is, whether the record indicates that there was misapprehension or mistake on the part of the jury? It devolved upon the plaintiff below to establish negligence upon the part of the company in some one or more of the particulars alleged. So we have to inquire whether, if the verdict is wrong if it was returned upon the theory that there was no negligence established; whether it is against the manifest weight of the evidence on that head.

On the other hand, the verdict may have been founded upon the theory or conclusion that the plaintiff below was guilty of contributory negligence, so that if we conclude that the verdict is against the weight of the evidence, on the question of the negligence of the company, we are then required to go farther and inquire whether the verdict was against the weight of the evidence upon the question of contributory negligence. We have examined the case upon both of these grounds.

It appears that the deceased was what is called a "green hand." He had been employed by the railroad company as a brakeman but a few days before this accident. This was his first employment and his first service in that capacity. At the time he met his death, he had made three trips over the section of the road that his duties called him to, that is to say, between Air Line Junction, in the city of Toledo, the western terminus of his route, and the city of Cleveland, the eastern terminus thereof, and this was his fourth trip, second *round* trip, or second "lap" over that section of the road; so that he had passed under this aqueduct three times, and while the train was passing under it the fourth time, this accident occurred.

It does not appear whether when he passed under this aqueduct on the other occasions, he was upon a box-car or a flat car, or where he was actually riding, but it does appear that he had not passed through on any occasion upon one of these large box-cars called "furniture cars," since it appears that there had not been, on either of the other occasions, a car of that description in the train on which he was riding and serving as brakeman.

The height of this structure, at the middle, was sixteen feet four and three-quarter inches; that it was in the form of an arch, so that at the sides the top or roof was somewhat lower than at the center; that he could not pass through it upon an ordinary box-car standing erect, but that he could pass through it upon an ordinary box-car in a sitting position. Also that he could not pass through it sitting upright upon a furniture car. Furniture cars are from two to three feet higher than ordinary box cars, the car upon which he was riding on this occasion being fourteen feet high, so that the distance between the top of the car, at the middle, where the running board is, and the highest part of the arch, the part under which the running board passed directly, was two feet, three and three-quarter inches, and that space gradually lessened toward the sides of the car so that at the eaves of the car the distance was only twelve inches.

No one saw the accident. No one saw the deceased immediately before he reached the tunnel. The train upon which he was riding was

passing to the westward through this tunnel, approaching Air Line Junction, some distance west of the tunnel. The accident happened shortly after noon, in broad daylight.

A Mr. Gillespie testifies that about the time this train passed he was walking along the side-track of the Clover Leaf road to the eastward of this tunnel, when a train which, in its general description answers to this one passed towards the west, and that a man was sitting upon a box-car near the locomotive; that he was sitting near the middle of the car, upon its south side, facing to the south; that he was sitting upon the edge of the car with his legs hanging over the eaves. That, *probably*, was the deceased; but, how far the car upon which he was riding was, at that time, eastward from this aqueduct, does not appear. Taking judicial notice of the map of the city, we judge that distance may have been anywhere from five hundred feet to one thousand feet (it may have been more and it may have been less), so that it does not appear but what the deceased had ample time, after Mr. Gillespie saw him, to change his position upon the car, either by drawing himself up towards the middle and sitting on or near the running-board, or even taking a standing position upon the car.

The train appears to have been going westward at the rate of about ten miles an hour. There were but five cars besides the caboose in the train. The deceased was head brakeman. It was his duty, under the rules of the company, to be upon a car near the head of the train while passing along that part of the road. He appears to have been in the line of his duty, upon this car. After the train had passed through the tunnel, and perhaps after it had reached the junction, search was made for the deceased and he was found upon the top of the car, near its east end, with a wound on the right side of his head, which was sufficient to produce death, the skull being fractured, and in an insensible condition.

It does not appear that the deceased had been cautioned, especially, that it would be unsafe for him to sit in an upright position upon a furniture car while riding through that tunnel. He had been told of the tunnel; he seems to have known of the tunnel; he knew it was there; he had been cautioned that it would not be safe for him to attempt to pass through it while standing upright upon a freight car; that he would not "clear," I think is the way the witness puts it. On that subject we have the testimony of Mr. Kean, formerly the agent of the company, at Elmore. I read from page 55 of the record, where he testifies as follows:

"Q. Did you have any conversation with him at that time," (Meaning deceased) "or he with you, with reference to any obstructions or overhead obstructions, along the line of the road?" (This referred to the night before the deceased began work and when he contemplated going to work and had, perhaps, been employed to go to work.)

"A. Between the time that he made the application and the time that he went to work for the company he was in the habit of dropping into the office. That was about all the conversation, dwelling upon the fact that he must look out for these bridges, or one thing and another; that he was liable to get struck with; among others, this tunnel. I told him I had always understood that it wouldn't clear a man standing on a car. I had always understood, anyhow, that it wouldn't clear a man standing on a car."

And on page 57, he repeats that: "There was a bridge in Toledo that wouldn't clear, and it had struck a man that I knew and killed him;

this tunnel wouldn't clear a man on a car—something like that—that is, I understood it wouldn't clear a man on a car."

This, he says, he had stated to the deceased.

Mr. Eoff, a brakeman in the employ of the company, testified, page 52, that after the deceased had told him he had got a job and was going to work for the company, he said he was very glad of it; quoting:

"I says 'it is very cold weather and you want to look out for yourself; frosty nights, you just going on the road. These pins and links are liable to break. Look out for yourself in walking over the tops of cars to see that they are not broke in two. Also, look out for the bridges from Air Line Junction and the river—Oak Street bridge will hit you, Broadway will hit you, and the tunnel.' He says 'Jake, I have got a good pair of gloves and a cap.' I says 'That is right; keep yourself warm.'"

The witness was asked whether the deceased said anything to him about having knowledge of the tunnel and he answered that he could not say that he did.

Another brakeman by the name of Haack, testifies, at page 59:

"I told Canfield that he should watch out for the Toledo yards. I says (Look out for the bridges, especially the tunnel.) I says be careful, Lou, so you don't get caught there? That is just what I told him."

And he says the deceased said to him that he knew about the tunnel and the bridge. That is the substance of all the evidence upon the subject of direct caution or notification to the deceased.

Evidence was introduced of a card stuck up in the caboose containing a caution to the employees of the company that they must take care and avoid danger to themselves while on the tops or sides of trains when approaching and passing bridges, wires, switches and other obstacles.

This is all the evidence as to any caution to him. There is no evidence of any cautionary remark or statement of any person whose duty it was to caution him, and no statement to him of caution by anybody that it would be unsafe for him to *sit* upon the cars, but the statement was that it would be unsafe for him to *stand* upon the cars, and that, we think, carried with it the implication, since it was his duty to be upon that car, that he might safely *sit* upon it.

And in these cautionary remarks nothing was said about any particular kind of cars, that is, he was not told that it would be safe for him to sit upon the lower or smaller box-cars, but that it would not be safe for him to stand upon the taller freight cars, or large box-cars. The statement was general, that it would be unsafe for him to stand upon the box-cars in passing under certain overhead obstructions; that, as we think, carrying the implication that if he did not stand, he would be safe.

Now it appears that in order to pass under this aqueduct upon a furniture car, without collision, it would be necessary for a person to take a recumbent position, not lying down flat, but a position somewhat between lying flat and sitting.

We are of the opinion that it is negligence upon the part of a railroad company to put a man at work as brakeman upon its trains where he is required to pass under an overhead obstruction of this character on the top of its box-cars, without distinct warning of the danger. To be more specific it was negligence on the part of the railroad company in this instance, to put the deceased at work upon this train, where he was required to pass under this overhead structure, and make it his duty to be upon the top of the car, without giving him specific warning, by word of

mouth or otherwise, that it would not be safe for him to sit upon the car; or, stated in another form, which I regard as setting forth the same principle, it was negligence on the part of this railroad company to put that large car in its train upon which deceased was riding and serving as a brakeman without cautioning him that he must not go upon that car in the performance of his duty, or, if he did, that it would be necessary for him to lie down or to get into a position lower than that he would maintain in sitting upon the car to pass through the tunnel.

As to these whips serving as a warning. It appears that they were placed to the eastward of this aqueduct about one hundred and six feet and that they were fastened to an overhead apparatus that allowed them to hang down so that a person standing upon a box-car would come in contact with them with his head and shoulders, and they would serve to warn a person in that position that he was approaching an overhead obstruction and must duck, but they did not come as low as the obstruction, not nearly as low as the roof of the arch at the sides, and not as low as the arch at the center. They ran substantially straight across, and above the middle of the track they were from six to eight inches higher than the lowest portion of this arch at that point. The result of the situation was this: That a person sitting upon this car, near the center of it, a person of ordinary height, sitting upright upon a furniture car would pass under these whips and therefore not be warned by them; he would pass on to the arch and his shoulders would just about go under the center of the arch and then the stone-work of the arch would strike him on the head. And that is the way, we conclude, from the evidence in this case, this accident occurred. Notwithstanding the testimony of Mr. Gillespie, that some time before reaching the arch, this man was sitting upon the edge of the car, we think it a thing incredible that he could have been sitting upon the edge of the car when he reached the tunnel and yet receive the wound upon the head, and that that should be the only injury he sustained.

And further we think it incredible that he should have been sitting on the edge of the car and yet should have been found in the position in which he was found upon this car after the accident; for, if he had been sitting upon the edge of the car with only twelve inches space between the top of the car and the stone-work at that part of the arch, when he came in contact with the stone-work it must have inevitably swept him from the top of the car; at all events, he could not have passed through the whole distance of a hundred feet of that arch without being rolled or swept from the car, and, furthermore, he would have received a wound upon his shoulder, as that would have been the part of his person to come in contact first with the arch if he were riding in the position described by Gillespie. It appears, however, that the right side of his head was the part that received a wound. The witnesses testified to that wound only, and the record contains the admission that he received that wound, that from that wound he died, and there is no statement or suggestion anywhere in the record that he received any other wound, or that there was any bruise on his shoulder or side, such as he would have received had he come in contact with the stone-work with his person, below his head.

As to his position upon the car, Baker, the conductor, at page 15, says that he found him upon the head car, on the east end of it, with *one leg* hanging over the south side of the car, and his head was towards the running board. Nothing upon the car indicated that he had been

dragged along the top of the car—nothing that he saw—and there is no evidence of any kind that he was dragged along the top of the car, and Richards, the engineer, testifies, at page 31, giving him a position still further up upon the car and nearer to the running-board. He says he was right close to the end of the car, that he lay straight from the running-board down to the edge.

"Q. With his feet hanging over the edge of the car?" "A. I don't think they were; I wouldn't say positively. They might possibly have been sticking over a few inches. He lay with his head just about level with the edge of the running board."

We do not see how it is possible that he reached that position, by the operation of the train passing through the tunnel, if he had been sitting in the position in which Mr. Gillespie says he saw him. We think he must have been sitting near the center of the car, upon or near the running-board, so that he passed under these whips and went on to the tunnel, evidently, with his face averted and not looking towards the tunnel, and his shoulder passed into the tunnel, receiving no wound, and then he was struck upon the side of the head. The height of the tunnel and the distances given would admit of the accident happening precisely in that way, and we think this theory is sustained by all the evidence.

We cannot conceive of a trap being purposely contrived that would be more successful in luring him on to his death than this arrangement, and therefore we think it was negligence. While these remarks may seem to be strong, and possibly harsh, we do not mean to intimate, of course, that there was any wrong purpose; it was simply the result of an oversight; nor do we mean that our remarks shall be made use of in another trial of this case to a jury. The jury will have no business with our views of the facts.

Was the deceased guilty of contributory negligence? We think not. It being his duty to be upon the top of the car and he not having been warned that it would be unsafe for him to be there in what would be the usual position of one not standing, we think that he might sit there in the performance of his duty and not look out for this obstruction and yet not be guilty of negligence; that he would have no reason to anticipate that there would be an overhead structure that would make it unsafe for him to sit upon the car.

It is said that he was negligent in that the rules of the company made it his duty at that time and place to be standing upon the car, and that if he had been standing upon the car, as he was required to do by the rules, he would have come in contact with these whipping-straps and would have been forewarned of the tunnel and then might have placed himself in a safe position. But it is not certain that if he had been standing up and had been forewarned, he would have escaped this calamity. He might have been standing up and been forewarned and even then have assumed that it would be entirely safe for him to sit and that that would be all he was required to do. To take a recumbent position after these straps had hit him and before reaching the tunnel, with the train going ten miles an hour, he must have done so within a very few seconds; he might possibly have done it, but it would have required great activity. But we do not think he was negligent in that he was not standing, as he had not been cautioned, that, for his safety, he must stand, or that in order that he might be warned of an overhead structure, he must stand, but that he must stand in order that he might perform his duties; and it does not appear that he was negligent in his duty

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or that there was any duty then immediately incumbent upon him which required him to stand. There were in the train only five cars. The purpose of the rule requiring him to stand on the top of the cars was to put him in a position where he might see any signals given from either end of the train; and it seems that he might have performed this duty while sitting upon the tall car in this short train. At all events, if he was not in the line of his duty in not standing upon that train, we do not think, under the circumstances stated, that should be regarded as negligence contributing to his injury, because he had not been cautioned that standing was something essential to his safety, or that it had anything to do with the question of his safety.

And the same remarks would apply to his alleged negligence in sitting upon the edge of the car; we think that so far as he was not negligent in duty, and inasmuch as he was not forewarned that it was essential to his safety to maintain a position upon the center of the car, that he might, without any negligence, occupy a sitting position upon the edge of the car. He may have kept his face turned from a position fronting the locomotive to avoid the cinders, and in a measure, the smoke and gases, that we know, without evidence, as a matter of common knowledge and observation, are emitted from the smoke-stack of a moving locomotive and generally float back over a train and must be more or less annoying to one riding on the top of a box-car next to the locomotive. Or he may have looked in another direction from that in which the train was moving, through sheer indifference or inattention, and if not warned by any word or circumstance, or former knowledge or observation, that to do so while sitting upon the car would be unsafe, it cannot be said that his conduct was negligent. *L. & N. Railway Co. v. Cooley*, 49 S. W., 389, 5 Am. Negligence Rep., 800. Not only the warning that he had received that it would be unsafe to *stand* upon a freight car while passing certain overhead structures in the Toledo yards, but the fact that he had passed under other of these structures in safety while sitting upon this car, and the fact that no whipping-cords warned him of a lower structure, but the reliance he might easily base upon the assumption that the company would do the duty devolving upon the master of warning him of anything making it dangerous to remain at his station of duty on the top of the cars in an ordinary attitude for riding, all may have tended to make him feel secure, and to justify him on not looking ahead. *Chicago, etc. Ry. v. Carpenter*. 56 Fed. Rep., 451.

It is complained by the plaintiff in error that the court erred in its charge to the jury upon the subject of obvious dangers with reference to which the company would not be required to give the deceased or its employees any warning. And it is said that this was an obvious danger of that character, and that in passing through on these other trips deceased must have observed, or was bound to observe the height of that tunnel, and that upon approaching the tunnel on this occasion he was bound to see and observe the height of the tunnel.

As to his passing through on these occasions, as I have said, we cannot tell what kind of a car he was upon or what duty he may have been performing, what there might have been to interfere with his making an accurate estimate of the height. It seems to us that under ordinary circumstances, in passing through upon a moving train, one could hardly do that, and could hardly be expected or required to make such an estimate as that it would register in his mind that, if he passed through on a car which was somewhat higher than the one upon which he was riding, he

could not sit up with safety. Upon this particular occasion, even if he were approaching this tunnel with his face towards it, having no warning other than that which he might receive by his observation made there upon the instant of the height of the tunnel and as to whether he could pass through, we think that it would be unsafe to conclude that even if his mind were intent upon the tunnel, he would surely observe that the tunnel was too low for him to pass under sitting; that he could make such an accurate measurement as would inform him that he could not pass under that tunnel in safety sitting upright upon the car. There would be nothing by which he could make any comparison or measurement until the end of the car upon which he was riding had reached the end of the tunnel. Then, if he were a man of quick intelligence, and could make a quick and accurate estimate, he might see that the space between the head end of the car and the stone-work of the tunnel was not as great as that he was occupying in sitting in an upright position; and yet that observation and estimate he must make and act upon in the course of about three seconds, to escape the collision. If, however, deceased was actually looking ahead, and did see, or might by ordinary care while in that position have seen the danger in time to avoid it by changing his position, so that his failure to see or avoid would amount to negligence, still, as was said in *Columbus & Terminal Valley R. R. Co. v. Marsh*, 63 Ohio St., 236, recently decided by our Supreme Court, negligence must be proved and not guessed at (a proposition as fully applicable to the case of one party as to that of the other), and since he was not bound to be faced and looking toward the front end of the train, the jury would have no right to assume or guess that he was in that position, and that therefore he saw or might have seen and avoided the impending danger. Upon the subject of the duty of the master with respect to obvious dangers, the court charged the jury as follows:

"One charge of negligence against the defendant which is made in the petition is, that the defendant failed to inform the decedent of the height of this tunnel and of the danger of being struck by the tunnel while riding upon the top of the car. What is the fact—what do you find the fact to be from the evidence? Did the defendant fail to give such information, and if so, was it negligence? The defendant was under obligation to inform the decedent of the danger, and if it was not obvious to the common understanding, or if it was not reasonably to be supposed that the decedent understood and appreciated it. But if the danger was visible and apparent to one of ordinary understanding, or if the decedent knew and appreciated and understood the danger from his own observation or otherwise, then any failure of the defendant to inform or instruct him as to the danger cannot be complained of as negligence. If the company knew or ought to have known that the decedent was inexperienced, and did not know or appreciate or comprehend the peculiar or special danger existing at the tunnel, if there was such peculiar or special danger, and if such danger, could not readily be seen and understood by ordinary observation, then it was the duty of the company to warn him of such special danger and instruct him as to how it was to be avoided. But the company was under no obligation to inform or instruct him as to dangers which were the subject of common knowledge and which could readily be seen and appreciated by ordinary observation."

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It is contended here on behalf of the plaintiff-in-error that the court erred in charging that the company was not bound to warn deceased of the danger if it was obvious to the common understanding, or if it could be readily seen and understood by ordinary observation, and in failing to qualify this by saying that the master must give warning unless the danger is observable or discoverable by the exercise of ordinary care and prudence; and we think this particular paragraph of this charge is open to this criticism; it does not contain any qualifications as to the time or circumstances or the opportunity for observation, but says that if the dangers could be readily observed, or were open, or apparent, or obvious to a man of ordinary observation, if they could be readily seen and appreciated then the company was not under obligation to give any warning. If that were understood in a broad sense by the jury, it would be fatal to the plaintiff's case, because any one of ordinary understanding and vision coming to that spot, with time and opportunity to observe (as for instance, persons present on the occasion when this photograph was taken of a man lying down upon the car in a recumbent position), could see and observe, it would be obvious to him, could readily be seen and appreciated by him, that a person could not safely sit in an upright position upon the furniture car passing through that tunnel. We think the court should have modified that part of the charge by saying that if the deceased, in the exercise of ordinary care, under the circumstances taking into consideration the opportunities which he had, and the duties that he was performing at the time, and the chance which he had to make the discovery, and all those things, if under those circumstances he could have observed the obstruction and the danger in time to avert it; if it were an obstruction of that kind, so that that must have been true, then the company was not bound to give any warning of it.

In other parts of the charge this qualification, or something that amounts to it, is stated. For instance, take the following paragraph:

"To entitle the plaintiff to recover it must be shown that the decedent did not know and would not have known by the exercise of ordinary and reasonable care that in riding upon the top of the car as he did he was exposing himself to the danger of injury in coming in contact with the tunnel. If he knew or understood that danger, or if by the exercise of ordinary and reasonable care he might have known and understood it, then under the law, he assumed and took upon himself the risk of injury from the danger."

This is a cognate proposition, not exactly the same, but we think the qualification is there which should have gone into the other part of the charge quoted. The charge as a whole is correct and fair and the exception is general, and therefore we do not hold that the charge is erroneous, but we think this paragraph may account for what we regard as a wrong verdict; it may have caused a misapprehension on the part of the jury and may have served in a measure to mislead the jury as to the law applicable to this feature of the case. Counsel for defendant in error cite in support of this charge the case of *VanDuzen Gas and Gasoline Engine Co. v. Schelies*, 61 Ohio St., 298, but we do not think it supports their contention that this paragraph is complete and beyond criticism.

The proposition that the employer is bound to call the attention of the employe to unusual dangers of his employment unless they are so obvious that they will become known to the employe by the exercise of ordinary care on his part, is supported by the following authorities:

Bailey on Master and Servant, 111, 112; Pullman Palace Car Co. v. Laack, 143 Ills., 242; Galveston, etc. Railroad Co. v. Surratt, 73 Texas 262; Holland v. Tennessee, etc., R.R. Co., 91 Ala., 444; 1 Shearman & Redfield on Negligence, sec. 203; Feeren v. Old Colony R. R., 148 Mass., 197; Motey v. Pickle Marble & G. Co., 74 Fed. Rep., 155; Louisville & N. R. R. Co. v. Miller, 104 Fed. Rep., 124; Wheeler v. Wason Mfg. Co., 185 Mass., 294.

A peril that may be visible and apparent to one in a favorable position and under favorable circumstances to observe it, might be, as to such person, an obvious peril that he would be bound to note and guard against, and of which he would not be entitled to any warning, and yet the same peril might not be obvious to another person in the same sense or degree because his position and circumstances might be less favorable to an observation and appreciation of the danger, and, therefore, the latter might be entitled to warning of its existence. Whether a servant would be guilty of negligence in failing to note, and avoid a peril of which he had no previous knowledge, or whether he would be entitled to notice thereof, must depend, we think, upon whether in the exercise of ordinary care under all the circumstances he must or should have discovered it in time to have avoided it. It is not apparent that the deceased, under the circumstances surrounding him as he approached this tunnel, in the exercise of ordinary care for his own safety, must or should have discovered this peril in time to secure his safety. The evidence on this point being fully as consistent with absence of negligence as with negligence on his part, or failing to show affirmatively that he was guilty of negligence, a conclusion that he was guilty of negligence was not warranted. Lake Shore & M. S. Ry. v. Andrews, 58 Ohio St., 426; Columbus Terminal & Valley R R. Co. v. Marsh, *supra*.

We hold, therefore, that the jury was not warranted by the evidence in finding either that the defendant was free from negligence or that the deceased was guilty of contributory negligence; but that it should have found that the defendant was guilty of negligence in the particular stated, and that the deceased was free from contributory negligence, and that therefore the verdict is contrary to the weight of the evidence, and for that reason the motion for a new trial should have been sustained.

On these grounds the judgment is reversed, the verdict is set aside and the cause is remanded to the court of common pleas.

DAYS OF GRACE.

[Franklin Circuit Court, January Term, 1901.]

Summers, Wilson and Sullivan, JJ.

EVANS V. LUMBER CO.

1. ACT ABOLISHING DAYS OF GRACE NOT APPLICABLE, WHEN.

An act has no force until it goes into effect, and a note entitled to days of grace, made after the passage of an act abolishing days of grace but before it goes into effect, is not affected by the act.

2. DAYS OF GRACE PART OF CONTRACT AND NOT AFFECTED BY ACT.

Days of grace enter into the contract, and a note entitled to days of grace, made after the passage of an act abolishing days of grace, but before it went into effect though payable after the act takes effect, is not affected by the act.

3. RULE AS TO DEMAND OF PAYMENT OF NOTE.

For the purpose of fixing the liability of endorers of commercial paper payable at a bank, demand of payment may be made at the bank on the last day of grace at any time within banking hours, and it is not necessary that such demand be made at the close of banking hours.

HEARD ON ERROR.

C. S. Cherrington, for plaintiff in error.

Huggins, Sowers & Watson, for defendants in error.

In the court of common pleas the Geo. D. Cross Lumber Company brought suit against the Columbus Central Railway Company as maker and John D. Evans as indorser upon two promissory notes, each payable at the Deshler National Bank, one dated Columbus, Ohio, June 24, 1896, and due three months after date, and the other dated Columbus, Ohio, August 3, 1896, and due September 5, next after date. It was averred in the petition that each note was duly indorsed to the plaintiff for a valuable consideration before maturity, and that it was the owner and holder of each, and that payment of each was duly demanded at the Deshler National Bank in Columbus, Ohio, at the close of banking hours and during the usual hours of business, on the first note on September 26, 1896, and on the second on September 8, 1896, and that the same were not paid, of all which each of the defendants had due notice.

There is a fourth cause of action, in which it is averred that the defendant Evans, at the maturity of the notes, had security therefor of the amount and value of the notes and interest, to-wit, a mechanic's lien upon real estate and buildings of the railway company.

The defendant Evans denies that demand of payment was made at the maturity of the notes, and denies that he had security for the notes; but says that after he had indorsed them to the plaintiff, he filed an affidavit for a mechanic's lien, and that whatever lien was thereby created belonged not to him, but to the plaintiff as owner of the notes, and he further avers, that said lien is disputed by the railway company, and that its value is by reason of various facts stated uncertain.

A jury was waived and the case submitted upon an agreed statement of facts, from which it appears that the first note was presented at the bank on Saturday, September 26, 1896, during banking hours, but before twelve o'clock noon and before the close of banking hours; that the second note was presented at the bank on Tuesday, September 8, 1896, at the close of banking hours; that for many years the usual banking

hours in the city of Columbus were from nine o'clock A. M. to two o'clock P. M., and that subsequent to April, 1896, the clearing house in said city met on Saturdays at eleven o'clock A. M., and at twelve o'clock noon on other days. The agreed statement of facts contained also a recital of facts relative to the mechanic's lien, but the defendant Evans objected to the competency of these facts, and they were agreed upon subject to his objection.

The court found in favor of the plaintiff, and rendered judgment for the amount asked. A motion for a new trial was overruled, a bill of exceptions was taken, and error is prosecuted to this court.

SUMMERS, J.

On March 12, 1896, 92 O. L., 61, an act was passed to take effect and be in force from and after September 1, 1896, amending Secs. 3175 and 3176, Rev. Stat., so as to abolish days of grace on bills and notes, etc., and to require demand of payment thereof to be made on the day mentioned for the payment of the same.

Prior to this amendment these sections provided that negotiable promissory notes, payable at a day certain after date, should be entitled to three days of grace, and that demand of payment made on the third day of grace, and notice of non-payment thereof to the indorser within a reasonable time thereafter, should be adjudged due diligence.

The first question presented is whether days of grace on a note entitled thereto under the statute before amendment are abolished by the amendatory act, the note having been made after the passage of the act, but before it took effect, and being made payable at a date subsequent to that the act went into effect?

Days of grace, when not abolished by statute, enter into the contract (*Bank of Washington v. Triplett and Neal*, 1 Pet., 25; *Kilgore v. Bulkley*, 14 Conn., 362, 389; *Daniel on Neg. Insts.*, section 614; *Swan's Treatise*, 712; *Wood v. Rosendale*, 10 Circ. Dec., 66), and cannot be cut off by a statute subsequently passed. But it is contended that inasmuch as these notes were not made until after the passage of this act, and are payable after the act took effect, there is a legal presumption that days of grace did not enter into the contract.

No such presumption arises; "until the day when the act is to take effect arrives the law has no force, even as notice to the persons to be affected by it." *Endlich on Inter. of Stat.*, Sec. 499; *Sutherland on Stat. Const.*, Sec. 107; 23 Am. & Eng. Ency. Law, 217, 218.

The next question presented is the constitutionality of the act known as the Saturday half holiday act, 92 O. L., 208. This act was passed and took effect on April 21, 1896, prior to the execution of these notes. After declaring that every Saturday after twelve o'clock noon shall be a "one-half legal holiday" the statute reads: "Provided that all bills, bonds or promissory notes presentable for payment or acceptance on Saturday, or on the preceding day if said preceding day should be a holiday, shall be presentable for acceptance or payment at or before twelve o'clock noon of such Saturday. But if not then paid or accepted, a demand of acceptance or payment thereof may be made and notice of protest or dishonor thereof may be given on the next succeeding secular business day."

The first note was presented for payment on Saturday, September 26, before noon, and was not again presented on the following Monday. The contention on one side is that demand on Saturday was necessary, and

payment not then being made, it was necessary to again present the note on Monday, and on the other that it could be made on either Saturday or Monday, and that a demand on both days was not necessary. The wording of the statute is a botch, and inasmuch as it has been held unconstitutional, an attempt to interpret it would be a waste of time. The act was limited in its application to cities of fifty thousand or more inhabitants, and was declared unconstitutional in *Diemer v. Hudson*, 9 Circ. Dec., 858, on the ground that it was a law of a general nature and did not have a uniform operation throughout the state. The decision finds support in *City of Cincinnati v. Steinkamp*, 54 Ohio St., 284.

The next question is at what hour must a note payable at a bank be presented.

The first note was presented at the bank before noon on the day of its maturity and at no other time. The contention on the part of the plaintiff in error is that demand must be made at the close of banking hours, and, on the part of defendant that demand during banking hours is all that is required.

Second National Bank v. McGuire, 33 Ohio St., 295, is cited in support of plaintiff's contention. In the opinion, page 303, Wright, J., says: "If the demand had been made at the close of bank hours, *non constat* but that the note might have been paid. Perhaps the supposition is far fetched. We concede it to be so. But the indorser had the right to have that done which would exclude the possibility of any supposition, reasonable or unreasonable. He had to the last minute of the last hour of the last day, and if no one by that time stepped in to meet the demand of payment, he was liable." This is not a correct statement of the law, and is contrary to all the decisions, English and American.

But the question here presented was neither considered nor decided in that case. In that case no demand at all was made. The maker had made an assignment of all his property to an indorser for the benefit of all the maker's creditors equally and it was held that this did not dispense with demand and notice in order to hold the indorser, the property assigned being insufficient to meet all the maker's liabilities. The learned judge did not have in mind the exception to the rule.

In *Gordon v. Parmelee*, 15 Gray, 413, 418 (1860), Shaw, C. J., says: "By the general rule of the common law, on an obligation to pay money on a day certain, as debt for rent, debt due on bond or speciality, or otherwise, the party bound has the whole of the last day in which to pay it, and his obligation is not broken so as to subject him to an action for a breach till the whole day has expired. To this rule negotiable instruments, as bills of exchange and promissory notes, payable with grace, are an exception. Whether they are entitled to grace by usage, by the terms of the instrument, or by statute, in this respect makes no difference. *Leftley v. Mills*, 4 T. R., 174; *Whitwell v. Brigham*, 19 Pick., 122.

"The question then is as to the nature, extent and limits of such exception. We think that exception is, that notes and bills entitled to grace are payable on demand at any reasonable time and place on the last day of grace, and, if not paid on such demand, the note is dishonored, the contract is broken, and an action may be forthwith brought against the promisor or acceptor, and on due notice given, or due diligence used to give notice, action may be brought against the indorser."

The decision in that case is in accord with the earlier cases. *Staples v. Franklin Bank*, 1 Met., 43 (1840), in which Shaw, C. J., reviews the

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cases. *Hine v. Alley*, 4 B. and A., 624, decided in 1833, is not noticed, but is in accord.

In *King v. Crowell*, 61 Me., 244, 250, Virgin, J., says: "Ever since the review of the cases by C. J. Shaw in *Staples v. Franklin Bank*, 1 Met., 43, the rule applicable to notes like the one in question has been that the note is due on actual demand at any such hour on the last day of grace that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in condition to attend to ordinary business; and if upon demand payment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser. But if no such demand be made, and the maker does nothing amounting to a waiver, he has the whole of the day in which to make payment, and is not in default until the expiration of the business day within which such demand might have been made." And he cites many cases in support of his statement.

The reason for the exception is well stated in *Leftley v. Mills*, 4 Durnford and East, 170, 174. Buller, J., says: "The acceptor's undertaking is to pay the bill on demand on any part of the third day of grace, and that rule is now so well established that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange all the books agree that the protest must be made on the last day of grace. Now that supposes a default in payment, for a protest cannot exist unless default be made. But if the party has till the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore the usage on bills of exchange is established; they are payable any time on the last day of grace on demand, provided that demand be made within reasonable hours."

In *McFarland v. Pico*, 8 Cal., 626, Field, J., summarizes the law as follows: "First. The presentment and demand of commercial paper having days of grace, must be made within reasonable hours on the last day of grace. For the purpose of fixing the liability of indorsers, the note or bill is payable on demand at any time within these hours. Second. What are reasonable hours will depend upon the question, whether or not the note or bill is payable at a place or bank where, by the established usage of trade, business transactions are limited to certain stated hours. Third. If there are such stated hours where the note or bill is payable, the presentment and demand must be made within those hours; but if there are no stated hours, and no place of payment is designated in the note or bill, the presentment and demand may be made either at the place of business, or residence of the maker or acceptor. Fourth. If at his place of business, it must be within the usual business hours of the city or town; if at his residence, then, within those hours when the maker or acceptor may be presumed to be in a condition to attend to business. Fifth. Notice may be given to the endorser, or other parties entitled to notice, immediately after presentment to the maker or acceptor, and refusal by him to pay, although it is not necessary that notice should be given until the following day. Sixth. After due presentment and demand the liability of the parties becomes fixed. If, however, the maker of the note chooses after this to seek out the holder and pay his note, he can do so, and thus save himself from the liability to suit on the following day. Seventh. For the purpose of fixing the liability of an endorser, the note is payable on demand at any time, during reasonable hours, on the last day of grace; but, for the purpose of sustaining an action, the

holder must wait until the following day, as the maker has the whole of the day to make payment."

In *Exchange Bank v. Bank of North America*, 182 Mass., 147, 148, Endicott, J., summarizes the law as follows: "A note entitled to grace is payable on demand at any reasonable time and place on the last day of grace, and if not paid, an action may be brought forthwith against the maker. But if no such demand is made, the maker has the whole day in which to make payment. *Gordon v. Parmelee*, 15 Gray, 413; *Estes v. Tower*, 102 Mass., 65; *Pierce v. Cate*, 12 Cush., 190. When a note is made payable at a bank, the contract is that it shall be paid at some time during the banking hours of the bank, and a demand for payment may be made at any time during those hours. If no demand is made, the maker of the note is not in default until the close of business at the bank on that day. *Church v. Clark*, 21 Pick., 310; *Clark v. Eldridge*, 13 Met., 96; *United States Bank v. Carneal*, 1 O. F. D. 259, 549; *Staples v. Franklin Bank*, 1 Met., 43, 50, 54, 56. If a formal demand is made, during banking hours, by the holder of the note, at the bank where it is payable, and there are then no funds, it is the duty of the bank to say there are no funds; and there is then a breach of the contract on the part of the maker, and notice thereof would bind the indorsers. There is no necessity for a personal demand on the maker elsewhere, for he has made it payable at the bank, and the demand may be made there. But if no such demand is made, and the note is only sent or placed in the bank for collection, then the maker has till the close of business hours to make payment."

None of the many text books examined states the rule otherwise than that demand may be made at any reasonable time on the last day of grace, and if the note be payable at a bank or place of business, that any time during banking hours or business hours is a reasonable time.

No interruption in this current of authorities has been observed excepting in Mississippi. The only conflict in the authorities elsewhere is as to when suit may be commenced, Massachusetts and those in line with that state holding that the note is due on demand at any reasonable time and place on the last day of grace, and if not paid on such demand, that an action may be commenced on that day, and California and those in line with that state holding that for the purpose of fixing the liability of indorsers, demand may be made at any such reasonable time on the last day of grace, but that an action may not be commenced until the following day for the reason that the maker has the whole of the last day of grace in which to make payment. In Pennsylvania, however, in *Coleman v. Carpenter*, 9 Barr., 179, Chief Justice Gibson states the rule and the reason why suit may not be commenced until the next day as follows: "The contract of the acceptor is to pay on demand, and that is broken if the bill be not paid the instant it is presented, from which it results that notice may be given the same day. True, an action cannot be brought till the next day from the anomalous reason that the acceptor may pay after refusal, if he takes the trouble to seek the holder. A better one would be, that as there are no fractions of a day but such as are made by statute, or the custom of merchants, the impetration of a writ is an act which covers the whole day."

In *Harrison v. Crowder*, 6 Smed. and M., 464, 45 Am. Dec., 290, it is held that "A personal demand may be made at any time during the third day of grace, but a constructive demand at a bank, having regular banking hours, must be made at the close of business hours, for the

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maker has until that time to deposit the money for the payment of the note."

In the opinion it is said: "This rule has in it more strictness than reason; but as it is so established, it is best not to depart from it." No authority is cited, and as hereinbefore stated, none has been found.

There is a rule that when a bank has in its possession, at the close of banking hours on the last day of grace, a note payable there, either as owner or for collection, ready to be delivered up to any party who may be entitled to it on payment of the amount due, and it is unpaid, that these facts alone constitute a dishonor, and that a formal demand is unnecessary. Parsons on Notes and Bills, 435; Daniels on Neg. Insts., section 656; Chicopee Bank v. Philadelphia Bank, 75 U. S., (8 Wall.) 641. But this is that in such case no demand at all is necessary, not that a demand can be made only at that time. A demand on the maker in person is in no case necessary. If no place of payment is stipulated, a demand at the maker's usual residence, or place of business of his wife or agent, is sufficient, for it is his duty to be present or leave provision for payment (Daniels, section 588; Parsons, 438), and if a place of payment is specified, it is equally his duty to make provision there for payment, and the reasons why demand of payment of a note payable at a bank may be made at any time during banking hours on the day of maturity, are just as strong as those that give rise to the rule where no place of payment is specified, for the holder is not obliged to place his note in the bank for collection, and to require him to make demand at the bank at the close of banking hours would be just as likely to result in the release of the endorers as, in cases where no place is specified, to require demand at the residence of the maker at the last moment of the last day.

The judgment is affirmed.

PROBATE COURTS.

[Franklin Circuit Court, January Term, 1901.]

Summers, Wilson and Sullivan, JJ.

JONES, ADMR., v. GREEN.

PROBATE COURT—ADMINISTRATORS—ORDER CORAM NON JUDICE.

The probate court is not expressly vested with jurisdiction to order an administrator, against his objection, specifically to perform an agreement alleged to have been made by his intestate; and such an order so made merely on motion of a party to the agreement and not necessary to effectuate some power expressly conferred, is *coram non judice*, and void.

HEARD ON ERROR.

W. A. Garst, for plaintiff in error.

Wilbur E. King, for defendant in error.

On April 22, 1899, Paul Jones was appointed and duly qualified, by the probate court of Franklin county, as administrator with the will annexed of the estate of Lucinda Jenkins, deceased. On June 21, 1899, William H. Green filed a motion in said court representing that on March 18, 1899, he and his wife, in consideration of four hundred dollars to them paid by said Lucinda Jenkins, had agreed to make a home for her with them and to support and care for her during the remainder

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of her life, and that to insure the performance of the agreement on their part, they had executed and delivered to her their promissory note for that amount and a mortgage securing the same on certain real estate, and that they had performed all upon their part to be performed, and moving the court for an order directing said administrator to surrender said note and to cancel said mortgage.

The administrator filed a motion to strike from the files the motion filed by Green for the reasons, among others, that Green was not a party to any case or proceeding in that court, and because the court had no jurisdiction to hear and determine the question raised by the motion. This motion the court overruled and made the order asked for by Green. The administrator prosecuted error to the court of common pleas, where the judgment was affirmed, and he now prosecutes error to this court.

SUMMERS, J.

The question to be determined is whether the probate court has jurisdiction against the objection of an administrator to adjudicate a claim made against an estate by a claimant other than the administrator, and to order its payment by the administrator, or to order him specifically to perform a contract alleged to have been made by his decedent.

The probate court is a court of delegated powers, having only such jurisdiction as is conferred upon it by the constitution and statutes, and it has not the inherent general jurisdiction of common law and chancery courts. *Davis v. Davis*, 11 Ohio St., 386, 391; *Gilliland v. Admsrs. of Sellers*, 2 Ohio St., 223; *Jones v. Savings Assocn. Co.*, 10 Circ. Dec., 41.

The reason is well stated in *Woerner's Am. Law of Admin.*, Sec. 142:

"We have seen that by the common law the entire scope of jurisdiction over the estates of deceased persons vested in the ecclesiastical, common law and chancery courts. Hence, there being no ecclesiastical courts in America, all such jurisdiction, in so far as it became a part of the juridical system of the states, necessarily vested in the common law and chancery courts, to the extent in which it was not lodged elsewhere by statute. It follows from this, that although in many of the states the constitution establishes or provides for the establishment of courts of probate, yet they take all their powers from the statutes regulating them. From this circumstance arises an important rule to be observed in ascertaining the extent of the power lodged in any one of this class of courts; they can exercise such powers only as are directly conferred upon them by the legislative enactment, or necessary to carry out some power so conferred. Unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, given either expressly or by implication, the whole proceeding is void; but where jurisdiction is conferred over any subject matter, and it becomes necessary in the adjudication thereof to decide collateral matters over which no jurisdiction has been conferred, the court must, of necessity, decide such collateral issues."

Article 4, Sec. 8 of the constitution provides that the probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, and such other jurisdiction as may be provided by law.

Section 524, Rev. Stat., provides that the probate court shall have exclusive jurisdiction, among other things, to direct and control the con-

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duct and to settle the accounts of executors and administrators, and to order the distribution of estates. Section 525 confers concurrent jurisdiction in certain specified matters, and Sec. 539 provides that the probate judge shall issue all warrants, attachments, commissions, rules and orders not contrary to law, that are necessary and proper to carry into effect the powers granted to him.

It is not contended that power to make the order here complained of is specifically given except by that provision of Sec. 524 above quoted. The contention is that the administrator acquires title by virtue of his appointment; that he holds the estate merely as an agent of the court, and that he must therefore dispose of it as the court directs. That the conduct of an administrator touching the management of an estate, where not prescribed by statute, is by the provision of Sec. 524 subject to the control of the probate court is not doubted, but that such ample power, as is contended, was intended to be vested in the probate court by that provision, is inconsistent with the practice in this state and with other provisions of the statutes.

The statutes relating to executors and administrators provide that claims against the estate, other than those owned by the administrator, must be presented for allowance to the administrator; that he may reject them or refer them to arbitration; that rejected claims shall be barred if a suit for the recovery thereof be not commenced within six months; that the administrator shall not be liable to the suit of a creditor excepting upon a rejected claim until after eighteen months from the date of his administration bond; that a creditor whose right of action will not accrue within two years after the date of the administration bond may present his claim to the probate court, and that the court, if it appears that the same is justly due, may with the consent of the creditor and the administrator, order the same paid, or order that the administrator retain sufficient assets to pay it; but it is expressly provided that the decision of the court shall not be conclusive against the administrator, and that he shall not be compelled to pay the same unless an action thereon be commenced within six months after it becomes due; that upon complaint made to the probate court or court of common pleas by any person interested that the administrator or any person is suspected of having concealed any of the assets, the court shall cite such person forthwith to appear before it to be examined on oath, and where the complaint is made to the probate court and a jury is demanded by either party, the court may forthwith reserve the case to the court of common pleas.

These provisions specifically require a suit or an action to establish a rejected claim, and necessarily negative any intention to vest jurisdiction in the probate court by the provision giving it authority to control the conduct of administrators. A suit or an action must be commenced in a court having general jurisdiction of suits or actions, unless otherwise expressly provided.

Such jurisdiction is conferred by statute upon the court of common pleas, but not upon the probate court.

"Since the functions of probate courts are limited, in respect of executors and administrators, to the control of the devolution of property upon the death of its owner, it is not their province to adjudicate upon collateral questions. The right or title of the decedent to property claimed by the executor or administrator against third persons, or by third persons against him, as well as claims of third persons against creditors, heirs, legatees, devisees, or distributees, must, if an adjudication

becomes necessary, be tried in courts of general jurisdiction, unless such jurisdiction be expressly conferred on probate courts." Woerner's Am. Law of Admin., Sec. 151.

Again he says, Sec. 153: "The power to adjudicate upon claims against deceased persons is in most states conferred upon the courts having control over the administration of their estates, either exclusively, or concurrently with other courts; but unless such power is expressly granted, the probate courts cannot exercise it. Thus it is held in Maryland, that authority in the orphan's court to pass such claims, and authorize and approve their payment, does not include the power to ascertain their validity and amount; hence the orphan's court has no power, against the protestation of the administrator, to decree the payment of any claim until a court of law shall have definitely pronounced on its validity. And in New York the delegation of authority to surrogates to decree distribution to claimants 'according to their respective rights,' and 'to settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share,' is held to give them no power to ascertain what such rights were, and they are utterly without jurisdiction either to allow or reject any claim whose validity, not having been established in some competent tribunal, is disputed by the executor or administrator."

In the original act defining the jurisdiction and regulating the practice of probate courts, passed March 14, 1853, 51 O. L., 167, it was provided that the probate court should have exclusive jurisdiction "to direct and control the conduct and settle the accounts of executors and administrators" and "to enforce the payment of the debts and legacies of deceased persons, and the distribution of the estates of intestates." This was amended May 1, 1854, 52 O. L. 103, to read "to direct and control the conduct, and to settle the accounts of executors and administrators, and to order the distribution of estates; and Ranney, J., in *McLaughlin v. McLaughlin*, 4 Ohio St., 508, 511, commenting upon these provisions, says: "The act did not extend so far as to permit the executor or administrator to sue in that court for a debt due to the estate or to subject him to be sued there for a debt disputed by him; but when the funds were in his hands, and the creditors were ascertained, and their debts liquidated, it conferred full power upon the court to compel him to do his whole duty in disbursing the fund, as well as to legatees and distributees as to creditors."

This amended provision still exists unchanged as a part of Sec. 524, Rev. Stat., and certainly it cannot be that the probate court did not have jurisdiction under the broader provision of the original act to adjudicate a claim disputed by the administrator, but has such jurisdiction under the narrower amended provision.

The conclusion reached finds support also in the analogous provision as to the bringing of suit against the assignee of an insolvent upon a rejected claim, Sec. 6452, Rev. Stat.; and in *Kennedy v. Thompson*, Assignee, 2 Circ. Dec., 254, where that section was under consideration, it is held that neither the probate court, nor a justice of the peace has jurisdiction of such a suit; that it is not a special proceeding, but a civil action, of which the court of common pleas has original jurisdiction, and in which neither party is entitled to a trial by jury.

What has been said is in relation to a claim or debt against the intestate, but the reasoning is equally applicable to an application for an

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order directing the specific performance of an agreement alleged to have been made by the intestate.

The reason is not that probate courts have not the power to grant equitable relief, for "while they possess no original chancery powers, yet within the scope of the jurisdiction conferred upon them their powers are not confined to either legal or equitable rules, but are to be measured by the statutory grant alone," Woerner, section 392; Doan v. Bitley, 49 Ohio St., 588; Clapp v. Banking Co., 50 Ohio St., 528; but the reason is that jurisdiction of the subject matter has not been conferred.

The probate court is given power to compel the performance of a written contract for the conveyance of an interest in real estate, Secs. 5800, 5802, Rev. Stat. But this is not such a contract. Section 6076, Rev. Stat., provides that premises mortgaged to the intestate and the debt secured thereby shall be considered as personal assets in the hands of the executor or administrator, and Sec. 6071 provides that in the case of the redemption of any such mortgage, the money paid thereon shall be received by the administrator, and he shall thereupon cancel the mortgage; and Sec. 6072 provides that the administrator may foreclose any mortgage belonging to the estate in the same manner the decedent might have done. Here there has been no money paid to the administrator upon this mortgage, and if he questions the right of the mortgagors to its cancellation, it is not his duty to release it. Should he bring suit in foreclosure, the mortgagors then may have their rights adjudicated; and should the administrator refuse to cancel the mortgage or neglect to bring suit in foreclosure, then a remedy may be found in Sec. 6202, Rev. Stat., which provides that an administrator may maintain a civil action in the court of common pleas asking the direction or judgment of the court in any matter respecting the trust estate, or property to be administered, and the rights of the parties in interest, in the same manner and as fully as was formerly entertained in courts of chancery; and in case he fails to do so after being requested in writing by any creditor, legatee, distributee, or other party in interest, then such party may commence such action.

The judgments of the court of common pleas and of the probate court are reversed, and the case is remanded to the probate court with instructions to overrule the motion, and the costs are adjudged against the Greens.

PUBLIC CONTRACTS.

[Hamilton Circuit Court, 1901.]

Smith, Swing and Giffen, JJ.

ISAAC H. GILBERT V. BOARD OF EDUCATION ET AL.**CONSTRUCTION OF SUBDIVISIONS 6 AND 7, SEC. 3988, REV. STAT.**

Subdivision 7 of Sec. 3988, Rev. Stat., relating to school-houses, providing that "any part of a bid which is lower than the same part of any other bid shall be accepted, whether the residue of the bid is higher or not; and if it is higher, such residue shall be rejected," is apparently in conflict with subdivision 6 of said section, which provides that "none but the lowest responsible bid shall be accepted; but the board may, in its discretion, reject all the bids, or accept any bid for both labor and material, which is the lowest in the aggregate for such improvement or repairs," but if possible said subdivisions should be reconciled. Therefore, where the discretion vested in the board by subdivision 6 is not exercised, then in the consideration of bids containing two separate items or more, any part of a bid which is lower than the same part of any other bid should be accepted.

INJUNCTION.

Chas. L. Hopping and W. A. Hicks, for plaintiff.

GIFFEN, J.

The letting of this contract, which is for the erection of a school house, is governed by Sec. 3988, Rev. Stat., except as the provisions of Sec. 794, not inconsistent therewith may apply. Subdivision 6 of Sec. 3988 is as follows:

"None but the lowest responsible bid shall be accepted; but the board may, in its discretion, reject all the bids, or accept any bid for both labor and material, which is the lowest in the aggregate for such improvement or repairs."

Under this provision, although some items in a bid for the entire improvement may be higher than the same items in another bid, still if the bid is the lowest in the aggregate the board may, in its discretion, accept it.

Subdivision 7 of Sec. 3988 is as follows:

"Any part of a bid which is lower than the same part of any other bid shall be accepted, whether the residue of the bid is higher or not; and if it is higher, such residue shall be rejected."

This provision is apparently in conflict with that of subdivision 6; but if possible they should be so construed as to reconcile this apparent inconsistency; and we think the only reasonable construction is that in the event the discretion vested in the board by subdivision 6 is not exercised, then in the consideration of bids containing two separate items or more, any part of a bid which is lower than the same part of any other bid shall be accepted.

If the construction contended for by counsel for plaintiff were correct, then the provision of subdivision 6 would be meaningless, because if every part of a bid which is the lowest must be accepted, the aggregate will necessarily be the lowest, and the board could exercise no discretion.

Injunction denied.

INJUNCTION—QUO WARRANTO.

[Cuyahoga Circuit Court, December 17, 1900.]

Caldwell, Marvin and Hale, JJ.

STATE EX REL. VAIL V. W. E. CRAIG ET AL.

1. INJUNCTION CANNOT TAKE THE PLACE OF QUO WARRANTO.

Injunction cannot be made to take, directly or indirectly, the place of *quo warranto*. Therefore, an action, under secs. 1277 and 1278, Rev. Stat., authorizing taxpayers to sue when the prosecuting attorney, upon request, fails to do so, will not lie to restrain a county auditor from paying salaries to deputy supervisors of elections on the ground that the law (sec. 2966-3, Rev. Stat.), under which they assume to act, is unconstitutional.

2. NOT AUTHORIZED BECAUSE TAXPAYER IS WITHOUT OTHER REMEDY.

The mere fact that a proceeding in *quo warranto* can only be brought by a designated public officer, and that if such officer should decline to bring such proceeding, a taxpayer is without remedy, is not sufficient to authorize an action under secs. 1277 and 1278, Rev. Stat. Taxpayers are left in many cases without remedy except by the faithful performance of duty by public officers, the law presuming that such officers will properly perform the duties incumbent upon them.

APPEAL.

Samuel Doerfler, for relator.

P. H. Kaiser and *F. L. Taft*, for defendants.

MARVIN, J.

This case comes into this court by appeal from the judgment of the court of common pleas. The suit is brought under favor of sec. 1278, Rev. Stat.

Section 1277 provides: "The prosecuting attorneys of the several counties of the state, being satisfied that the funds of the county or any public monies in the hands of the county treasurer, * * * are about to be * * * misapplied * * * may apply by civil action in the name of the state, to a court of competent jurisdiction to restrain such contemplated misapplication of funds."

Section 1278 provides: "In case the prosecuting attorney fails, upon a written request of any taxpayer of the county, to make the application * * * contemplated in the preceding section, such taxpayer may * * * institute such civil action in the name of the state * * *."

The petition sets out that the relator is a taxpayer of Cuyahoga county; that he has requested, in writing, the county solicitor and the county prosecutor of said county to bring a suit for the same purpose for which he brings this suit; and that each of such officers has declined to bring the suit.

The petition further alleges, that the defendant Craig, as auditor of Cuyahoga county, will, unless restrained by the order of the court, issue his warrant for the payment of salaries to John G. Fisher, Daniel G. Gindlesperger, John Bell and Clark E. Miller, members of the board of deputy state supervisors of elections, and to Clifford A. Neff as clerk of such board; and that the defendant, the board of commissioners of such county, will, unless restrained, make a levy of taxes to meet such payments. The prayer is for a perpetual injunction against such auditor and board of commissioners.

The claim made on the part of the plaintiff is that sec. 2966-3, Rev. Stat., under which said board of supervisors and the clerk of such board have been appointed and assume to act, is in contravention of the constitution of the state. This is the only ground on which it is claimed that the injunction prayed for should be allowed. To this petition a general demurrer is filed by the defendants.

In support of this demurrer, it is urged that the question sought to be raised by the relator cannot be determined in this action; that the *real* purpose of the action is to oust the parties, the payment of whose compensation is sought to be enjoined, from the several offices which they assume to hold.

On the other hand, it is urged that even though the right of these parties to hold their official positions is necessarily involved in a determination of the questions raised in the petition, still, that as the result, even if the prayer of the petition should be granted, would not be a judgment of ouster, the relator is entitled to the relief sought in his petition.

It is certain that only by a determination of the right of these parties to hold their several offices and that they are not so entitled to hold, could the court grant the relief prayed for in the petition. This, there-

fore, presents directly for the consideration of the court the question of whether in an action of this kind such determination can be made.

Without doubt, the right of these parties to hold their positions as members and clerk respectively of the board of deputy supervisors of elections, could properly be tested by a proceeding in *quo warranto* brought directly against them. But it is urged on the part of the plaintiff, that he can obtain no relief by any such proceeding in any action which he can bring, because *quo warranto* can only be brought by a public officer designated in the statute; and that in case such officer declines to bring such proceeding, a taxpayer is left without remedy. And this is, doubtless, correct; but this fact alone is not sufficient to authorize in this action the trying of the question which would be tried by proceedings in *quo warranto*. The taxpayer is left in many cases without remedy except by the faithful performance of duty by the public officers. The law presumes that the officers will properly perform the duties incumbent upon them.

In Meacham on Public Officers, at sec. 994, in speaking on the subject of injunctions, this language is used: "It is well settled also as has heretofore been seen (sec. 477), that the writ cannot be made directly or indirectly to take the place of *quo warranto* and other similar remedies in trying the title to public offices. It will, therefore, not be granted to prevent one alleged to have no legal title, from exercising the functions of an office during a trial to determine the title, or for qualifying for, or on entering upon the exercise of the office, or from receiving the salary or fees attached to it."

To the same effect is sec. 850 of Throop on Public Officers, the language being:

"It is well settled that an injunction will not lie to oust a usurper from a public office, and to put the rightful officer into possession, as that relief can be obtained by information in the nature of a *quo warranto*. Nor will it lie in aid of an information, or other proceeding to try the title, by restraining the person in possession, from exercising the functions, or receiving the emoluments of the office, even upon an allegation of insolvency. * * *

The case of Tappan v. Gray, 9 Paige's Ch., 507, was an action brought by Tappan, in which he charged that Gray had intruded into the office of flour inspector; that he (Tappan) was entitled to such office, and that Gray had no title thereto, or right to perform, or receive the compensation for the duties of such office. The complaint also alleged that Gray was insolvent and wholly unable to respond to Tappan for the fees and emoluments of the office. The case was first tried before the vice-chancellor who held with the complainant; but, upon appeal to the chancellor, the holding of the vice-chancellor was reversed solely upon the ground that the court of chancery had no jurisdiction to try the questions raised. The chancellor found that the complainant was entitled to the office, and that the defendant was an intruder without any authority whatever to exercise the functions of the office.

The concluding part of the opinion in this case reads: "I conclude, therefore, that the defendant, at the time of the filing of complainant's bill, had intruded himself into an office which he was not then legally entitled to, under the provisions of the Revised Statutes, and that the complainant is entitled to the fees and emoluments of the office until he is superseded by the valid appointment of a successor. But upon the ground that at the time of the filing of this bill the court of chancery

had no jurisdiction nor power to afford him any relief, the decree of the vice-chancellor must be reversed and the decree allowed."

The case of *Stone v. Wetmore*, 47 Ga., 601, was an action brought by Stone alleging that he was the ordinary of Chatham county; that the defendant Wetmore, without any authority of law, had intruded himself into such office and was assuming to act as ordinary and receive the fees of the office. The petition was in the nature of *quo warranto* to eject Wetmore from the office and, as some time must elapse before the matter could finally be disposed of, the plaintiff prayed for an injunction against Wetmore to restrain him from receiving the fees of such office. And in the opinion, on page 602, this language is used by the court:

"For the purposes of public policy it is a settled rule that an officer *de facto* may do legal acts though his title to the office may be defective * * *. The same public policy which establishes this rule, prevents the courts from interfering to disturb the *de facto* officer in the receipt of the fees. If he works, he must live."

In *Prince v. Boston*, 148 Mass., 285, the syllabus reads: "The title to office of the board of police of the city of Boston, appointed by the governor under the statutes of 1885, c. 323, can only be impeached directly by an information in the nature of a *quo warranto*, and not collaterally by a petition in equity, under the Pub. Statutes, c. 27, sec. 129, to prevent the raising and appropriation of moneys by the city to pay the salaries and expenses of such board, and the expenses of the police department upon its requisition."

This action was brought by ten taxable inhabitants of the city of Boston. It was originally brought against the city alone to restrain it from raising or appropriating moneys to pay the salaries or expenses of its board of police, and the expenses of its police department, upon the requisition of such board. Later the petition was amended by making the board of police and its members parties defendant. The defendants demurred to the petition for want of equity. The ground upon which the plaintiffs sought to maintain their bill was that the statute under which the board of police assumed to act, was unconstitutional.

The statute under favor of which the plaintiffs brought their action, reads:

"When a town votes to raise by taxation or pledge of its credit, or to pay from its treasury, any money for a purpose other than those for which it has the legal right and power, the supreme judicial court may, upon the suit or petition of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint, hear and determine the same in equity."

In the opinion, on page 287, this language is used:

"The case at bar, we think, presents a strong illustration of the wisdom of the rule that the title to a public office cannot be collaterally impeached. If we should enter a decree in favor of the plaintiffs, it could not remove the board of police; they would still retain their office, and thus would be produced confusion and a conflict of authority between them and the old commissioners of police, or the mayor and aldermen, and, probably, disorganization and disorder in the police department, upon which the peace of the city largely depends. All difficulties will be obviated by trying the title to the office in the proper way, by an information in the nature of a *quo warranto*, the result of which would finally adjudicate and settle the rights of all parties.

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"We are of opinion that it was not the intention of the legislature or the purpose of the statute that such questions should be tried in proceedings under it, in which neither the commonwealth nor the holders of the office need be parties."

We feel that the authorities to which attention has been called in this opinion and the reasoning used is sufficient to warrant us in holding that the demurrer to the petition in this case should be sustained.

If the demurrer were to be overruled, and no answer filed by the defendants or either of them, and a decree entered granting the prayer of the relator, it would not have the effect to dispossess either the board of deputy supervisors or its clerk from holding the offices which they now assume to hold. They might go on and work without pay, which they probably would not do, and if they should refuse to work, or should resign their several offices, matters in connection with elections would be left in great confusion. The question would remain open as to what officer should perform the necessary duties incident to the public elections, and, until such question should be settled in a proper case, the whole matter would be left at sea.

The judgment of the court, therefore, is that the demurrer be sustained.

PUBLIC OFFICERS—FEES.

[Cuyahoga Circuit Court, December 14, 1900.]

STATE EX REL. VAIL V. WM. E. CRAIG, AUDITOR.

Caldwell, Hale and Marvin, JJ.

1. PAYMENT OF ASSISTANT TO DEPUTY SUPERVISORS OF ELECTIONS.

In an action to enjoin payment of compensation to a person acting as assistant to the board of deputy state supervisors of elections, in which it does not appear what services such assistant performed, an answer averring that such person was acting "as assistant to said board and that his compensation * * * is one of the necessary expenses in the performance of the duties of said board," is sufficient to bring such expenditure within sec. 2966-4, Rev. Stat., providing, after specific provisions, for "all proper, necessary expenses in the performance of the duties of such supervisors."

2. COMPENSATION SHOULD BE ALLOWED BY COMMISSIONERS.

Compensation to an assistant to the board of state supervisors of elections, authorized under sec. 2966-4, Rev. Stat., providing, in addition to specific provisions, for "all proper necessary expenses," is within sec. 894, Rev. Stat., requiring, where the amount is not fixed by law, allowance by the county commissioners.

APPEAL.

Samuel Doerfler, for plaintiff.

P. H. Kaiser and *F. L. Taft*, for defendant.

MARVIN, J.

This is an appeal from the court of common pleas. The action is brought under favor of sec. 1278, Rev. Stat., providing that a taxpayer may, when the proper officer has been requested in writing to bring the action and has refused to do so, himself bring an action in the name of the state to restrain the misapplication of public funds.

The petition shows that the plaintiff is a taxpayer of Cuyahoga county; that the defendant is auditor of such county and that unless

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restrained by the order of this court, he will issue his warrant upon the county treasurer for the payment of one H. A. Beckerman, as compensation for services as assistant to the board of deputy state supervisors of elections of such county. The prayer is for an injunction to prevent the issuing of such warrant.

To this petition the defendant answers, admitting that unless restrained by order of the court, he will issue his warrant upon the treasurer of the county for the payment stated in the petition.

The answer further sets out that the said Beckerman is acting as an assistant to said board, and that his compensation of \$25.00 per month is one of the necessary expenses in the performance of the duties of said board, and that said board has found such payment to be a necessary expense in the performance of its duties.

To this answer the relator files a general demurrer. One of the questions raised by this demurrer is, whether under sec. 2966-4, Rev. Stat., the compensation for a necessary assistant to the board of supervisors may be allowed and paid under this clause of the section :

"The compensation above provided for, and all proper necessary expenses in the performance of the duties of such deputy supervisors, shall be defrayed out of the county treasury as other county expenses, and the county commissioners shall make the necessary levy to meet the same."

"The compensation above provided for," as used in the foregoing clause, refers to the compensation of the deputy supervisors and their clerk. So that, if the payment sought to be restrained in this action can be made at all, it is by reason of the words, "and all proper necessary expenses."

As has already been said, the answer avers that the compensation to be paid to Beckerman is for proper necessary services rendered by said Beckerman to them, and that such board has found and determined the same to be necessary.

It is urged on behalf of the plaintiff that the word "expenses" as used in this section does not include any compensation to be paid to any person for services rendered.

The second definition of this word as found in Webster's Dictionary is: "That which is expended, laid out, or consumed; cost, outlay, charge, as the expenses of a war."

It cannot be doubted that included in the expenses of war would be compensation to the men in the prosecution of such war.

In the case of *Matthews Manufacturing Co. v. Trenton Lamp Company*, 78 Fed. Rep. 212, 215, where a construction is given to sec 4929, U. S. Rev. Stat.; which section authorizes the issuance of a patent to any person who, by his own industry, genius, efforts and expenses, has invented, the court uses this language: "No authority can be found to compel the limitation of the word 'expense' in the construction of this statute to the 'expenditure of money.' It may, indeed, be defined as a disbursement of money, but it is as well the employment and consumption of time and labor."

In *Swartzell v. Rogers*, 8 Kan., 382, which required the construction of a statute for the partition of lands, in which it was provided that: "The court before whom any partition should be made, should tax the costs and expenses which might accrue, according to equity."

In passing upon this the court uses this language: "The word 'expense,' used in this section, undoubtedly includes those charges

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incurred in the proceedings to obtain partition, which are not included in the word costs. * * * In Ohio the charges allowed to the sheriff, the freeholders or commissioners, and the surveyor and his assistants employed in making partition, are fixed by law, and would therefore be included in the term 'costs.' There would be some grounds in such a state of law for deciding that the term 'expenses,' included all allowance for services of others as the attorneys of the parties respectively employed in making the partition."

It has always been held that the statute providing for treating the expenses of the last sickness of a decedent includes the payment for professional attendance of a physician and for nurses. There is nothing in the pleadings in this case to show what services Beckerman performed for this board; for all that appears he may have been a janitor, a messenger or an assistant to the clerk, the employment of either of which may be necessary for a proper discharge of the duties of these officers, and such compensation may as well be included in the word "expenses," as may lights, fuel and the like.

It follows from what has already been said that unless for some other reason this answer is bad, the demurrer should be overruled.

But there is another ground about which little was said in the argument, which requires consideration, and that is a construction of sec. 894, Rev. Stat., which reads in part:

"No claims against the county shall be paid otherwise than upon the allowance of the county commissioners upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law or is authorized to be fixed by some other person or tribunal, in which cases the same shall be paid upon the warrant of the county auditor upon the proper certificate of the person or tribunal allowing the same."

There is no claim here that the amount to be paid to Beckerman is fixed by law. Nor is there any allegation that the same has been allowed by the county commissioners, neither is there any law which authorizes any person or tribunal to fix the amount of such compensation.

We hold, therefore, that without the allegation that the amount to be paid has been allowed by the county commissioners the answer in this case is bad, and for this reason and this reason alone, the demurrer is sustained.

FIRE DEPARTMENT—REMOVAL OF MEMBER.

[Cuyahoga Circuit Court, December 22, 1900.]

STATE EX REL. HUSSEY V. HERBERT H. HYMAN, DIRECTOR.

Caldwell, Marvin and Hale, JJ.

1. MUNICIPAL DEPARTMENTS—FAILURE OF MEMBER TO PAY DEBTS.

Section 1545, Rev. Stat., of the federal plan law of Cleveland, providing that no member of the "police, fire or sanitary police force, shall be removed or reduced in rank, except for cause" contemplates, to authorize removal, a proper and sufficient cause. The mere fact that a member of a department owes a small debt, which he has neglected to pay, would not justify his removal, under a rule of the department requiring members to promptly pay their debts, particularly where it does not appear how long he has owed the debt or that he has ever refused to pay it.

2. EVIDENCE RESTRICTED TO CHARGES IN SPECIFICATIONS.

Where the member of a municipal department is charged with the violation of a rule of the department requiring members to promptly pay their debts, and the specification filed charges the failure to pay a certain claim, evidence that such member has failed to pay other debts is incompetent.

APPEAL.

J. H. McCormick, Noble, Pinney & Willard, counsel for plaintiff.
T. H. Hogsett, Beacom, Excell & Gage, counsel for defendant.

MARVIN, J.

The case of the state of Ohio on relation of Hugh O. Hussey, against Herbert H. Hyman, director of the fire service of the city of Cleveland, is here on appeal from the court of common pleas on proceedings in mandamus, brought for the purpose of having the relator, who was an officer in the fire department of this city, and was removed by the defendant, the director of the fire service of this city, restored to his position in the fire department.

A charge, with the specifications, was filed with the director against the relator, and the charge was "violation of rule 15 of the rules governing the fire department of the city of Cleveland."

The specification sets out upon what facts it is claimed that the rule has been violated. The rule, speaking of the members of the fire department, provides that a member shall:

"Not sell or assign his salary, or incur or contract any debts or liabilities which he is unable or unwilling to pay, or neglect or refuse to honorably discharge and promptly pay all indebtedness, claims and judgments, and satisfy all executions that may be held or issued against him, or commit any assault or breach of the peace, or do any act by which he can be arrested, confined or imprisoned and prevented from performing his duty as an officer or member of the department * * *."

That is not the entire rule, but I have read enough to cover the point that, it is claimed here, was violated.

The specification, setting out the particular fact which, it is claimed, constituted the particular violation of the rule, reads:

"That one Hugh Hussey, a member of the Cleveland department, is now, and for some time past has been indebted to the Peoples' Ice Company in the sum of eight and ten one-hundredths dollars for ice purchased of me; that the said Peoples' Ice Company has often requested said Hugh Hussey to pay the same, but that said Hugh Hussey has neglected and refused to pay the same or any part thereof."

And this is signed by Samuel N. Feskley.

The rule, or rather the authority to act under the rule, is derived from sub-sec. 24 of sec. 1545, Rev. Stat.; Section 1545, being what is known as "The Federal Plan Law," reads:

"The head of any department, may, by written order, giving his reasons therefor, remove or suspend any officer or employe of such department, provided the same shall not be done for political reasons, and such written orders shall be recorded in the records of the department and a copy thereof filed with the mayor, and provided that no member of the police, fire or sanitary police force, shall be removed or reduced in rank, except for cause, to be assigned in writing after due notice and a public hearing, if demanded by the accused, before a tribunal composed of the mayor, who shall be chairman thereof, the director of law and the president of the city council, but the head of the police,

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fire or sanitary police force, as the case may be, may suspend the accused pending the hearing of the charge preferred against them."

What is claimed on the part of the relator here, is, that he was removed without cause; that he was removed for political reasons; that the specification upon which the charge is based, is not sufficient, in itself, to bring him within the rule properly construed; that the facts are such as not to establish the truth of the specification.

After this charge had been preferred against him, he demanded a hearing. That hearing, demanded by the relator, was had before the board provided for in the statute, consisting of the mayor, director of law and president of the fire department, and that tribunal found him guilty as charged, and the sentence was, that he "be and he is hereby discharged from all further service in the Cleveland Fire Department;" the sentence was pronounced by the director and not by the committee.

It is clear that the statute does not authorize a removal except for a proper cause, a sufficient cause. The language of the statute is, that he "no member * * * shall be removed * * * except for cause;" but, of course, that means some proper cause.

This specification charges that the officer owed \$8.10 for ice furnished to his family, which he has neglected and refused to pay; that he has owed that sum for some time past; the specification not alleging what length of time that debt has stood, and, therefore, not how long he has neglected to pay it; but it is charged that he has refused to pay it.

The majority of the court are of the opinion that the specification itself does not state such facts as would be a proper cause for the removal of an officer from the department.

The simple fact that a member of the force was indebted for \$8.10, and that he neglected or refused to pay it, it would seem to us, was a matter that ought not to arise to the dignity of requiring the removal of an officer from the force. Of course, it can well be said that the failure of a member of the department to pay his debts might be very annoying to the head of the department and might be sufficient cause for removal; but the simple fact that a man owed one small debt that he had not paid would not justify his removal from the department.

The court are unanimous in the opinion that under the evidence the specification is not sustained. It is established that he owed the debt of \$8.10 to the man, but that he has ever refused to pay it does not appear from the evidence. He has not paid it; but the evidence of the ice-man himself and the relator is to the effect that he promised to pay, he did not refuse to pay. Of course, the director did not know that he did or did not refuse. The director was called upon by the ice-man, and was somewhat annoyed, thereby.

It is probable, as appears from the arguments, that there was some additional reason; and our other reason is, that there were other debts which this man owed, but the court heard enough of that to be satisfied that it was incompetent. It is clear that the man is entitled, when he demands a trial upon a specification, to have the trial upon that specification and nothing else.

These are proceedings somewhat akin to court-martial proceedings, where a charge is set out in general terms and the particular facts relied on are set out by specifications, and the evidence must be confined to such specifications, and the fact that other things are known to those trying the accused will not justify the bestowing of the penalty thereon;

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they cannot come into a general trial. Where a man is entitled to a trial, he is entitled to be notified of the things which it is claimed, he has done to justify punishment. *People v. Humphrey*, 156 N. Y., 281, sets out well the reasons for that proposition.

Entertaining these views, the order of the court will be that the prayer of the relator be granted; and that he be restored to his place in the fire department.

NEGLIGENCE.

[Lucas Circuit Court, January 12, 1901.]

Haynes, Parker and Hull, JJ.

SAMUEL HUNT, REC., v. FRANK H. CALDWELL.

1. RULE AS TO BRAKES UPON FREIGHT CARS.

Ordinary care requires a railway company to see that the brakes on freight cars, its own or those received from other roads, are strong and substantial, but the mere fact that an eye-bolt, the part of a brake going through the shaft, with a nut on one end to hold it and on the other end an eye to to which the chain is attached, is a fraction or half an inch longer than the eye-bolts in a majority of brakes, does not of itself constitute negligence or make the machinery defective or dangerous.

2. WHERE ACCIDENT NOT NECESSARILY RESULT OF NEGLIGENCE ALLEGED.

Where it appears, in an action against a railroad company for injuries to a brakeman, that the accident complained of might just as well or probably have been caused in some way other than that claimed, and which would relieve the railroad company from the charge of negligence, as where an accident claimed to have been the result of the use of a brake with too long an eye-bolt might just as probably have resulted from the winding of a chain upon itself, a jury is not warranted in finding that the accident was caused in the manner alleged.

3. WITNESS HELD TO BE UNWORTHY OF CREDIT.

An employe of a railroad company, who claimed to have discovered the cause (a defective brake,) of an injury to a fellow brakeman immediately after the accident, and who remained silent during an investigation by the company and for fifteen months afterward, and then (being no longer in the employ of the railway company) appeared as a witness for plaintiff in an action against the company, and it also appeared that when his testimony was about to be taken he sought an interview with officers of the railroad company, in a somewhat peculiar manner, and wanted to know if they wished to see him before he testified, and whose positive testimony as to the location of a certain car in a train is contradicted by records made when there could be no inducement to make them false, held to be unworthy of credit.

4. VERDICT NOT SUSTAINED BY EVIDENCE.

Where a verdict for plaintiff in such action was based wholly upon the testimony of the witness referred to and upon the assumption that the accident happened in a certain way, when in fact it might reasonably have happened in a way relieving the company of liability, such verdict should be set aside as not sustained by the evidence.

5. IN ABSENCE OF ACTIONABLE NEGLIGENCE COURT SHOULD DIRECT VERDICT.

There being no evidence of actionable negligence on the part of the railroad company, the court should have directed a verdict for the defendant.

Brown & Geddes, for plaintiff in error.

Hurd, Brumback & Thatcher, for defendant in error.

HEARD ON ERROR.**HULL, J.**

This action is brought by Hunt, receiver of the Clover-Leaf railroad, so-called, to reverse a judgment of the court of common pleas. Frank H. Caldwell, the plaintiff below, defendant-in-error here, was a brakeman in the employ of the Clover Leaf road on and prior to October 14, 1896. On that day he was injured by falling from the top of a car, where he was engaged in the performance of his duties. For the injuries then sustained he brought suit, claiming negligence on the part of the company in the construction of a brake. The case was tried once in the common pleas and a verdict returned in favor of the plaintiff for something over \$3,000. A motion for a new trial was allowed, on the ground that the verdict was not sustained by sufficient evidence. The case was tried again and a verdict returned in favor of the plaintiff for \$4,000. After the latter trial a motion for a new trial was overruled and judgment entered against the railroad company; to which judgment, error is prosecuted in this court.

The negligence complained of is, that certain parts of the brake were improperly constructed and in a defective condition at the time of the accident and that this caused the injury that the plaintiff below suffered. The things particularly complained of were, that the brake-chain was somewhat too long and that the eye-bolt which holds the chain and to which the chain is fastened was too large and too long and that, on that account, the brake was defective and that the chain wrapped around the eye-bolt and slipped off while the brake was being operated by Caldwell and that he was in that way jerked and thrown off the car.

The accident happened at the city of Marion, Indiana, about daylight on the morning of October 14, 1896. Caldwell was the head-brakeman on the train, and as they were passing through the city of Marion it was noticed that he did not open a gate, which it was his duty to open, and, on investigation being made, it was found that he had disappeared from the train. Search was made and he could not be found, after which the train proceeded eastward without him, and he was afterwards found lying near the track in a street of Marion, in an unconscious condition, he having been injured about the head by his fall from the train. The conductor of the train went over the train after they left Marion, and a witness by the name of Danner, who was also a brakeman on the train, testified that at the town of Vanburen, about ten miles from Marion, he looked over the train. The lantern of Caldwell was found on the fifth car from the locomotive and it was supposed that he fell from that car.

There were no reasons discovered at the time of the accident, that is no reasons made known, accounting for the accident, for his falling off the train. Mr. Danner, the witness to whom I have referred, was at that time in the employ of the company, but some three days after that he was discharged from the service of the railroad company. He testified that he looked over the car on the morning of the accident and he claims that he found heel-marks or scratches on the top of the fifth car, indicating that Caldwell had slipped on that car. He also claims that he discovered at that time that the eye-bolt was too long and the chain somewhat too long. He said nothing to the conductor or to the engineer, or to any other person, about these things, if he discovered

them as he claims to have done. He, himself, claims only that he *did* say, that he could tell, or knew, what was the cause of Caldwell falling off the train. This is denied by the engineer and the conductor, to whom he claims he stated it and he does not claim that he stated to any person upon this train what he says he discovered at that time, nor, so far as the record discloses, did he say anything at all about it to any one until about the time this action was commenced, which was some fifteen months after Caldwell's injury.

Caldwell's injuries, as it appears from the record of course were not fatal and he afterwards recovered so as to be about, but he claims to have sustained serious injuries.

Danner's deposition was taken and he testifies that at Vanburen, Indiana, shortly after Caldwell disappeared—after it was found that he had fallen from the train—he went back over the train and that the fifth car from the engine was a double-decked stock car, that being the car upon which it was said that Caldwell's lantern was found and he says that he examined the brake and turned it and the chain appeared to be somewhat longer than they usually were, and he says further that the eye-bolt was larger and longer than they usually were; he testifies that it was larger than was necessary and longer than was necessary. Upon that being ruled out and he being pressed, upon cross-examination, he stated that he did not measure the length of the eye-bolt, but he should think it was four and a half inches long, and he says that he tried the brake and when he turned it the chain would wrap around the eye-bolt and after he had given it a few turns the chain would be thrown off from the eye-bolt and that would jerk him off the brake, and the claim of the plaintiff below was that it was in this way he was jerked off the train.

The chief ground of complaint here is, that the verdict is not sustained by sufficient evidence, is contrary to law, and, further, that there is no evidence in the record to show negligence on the part of the railroad company, or to show if there was any defect in this brake, that Caldwell's injury was caused by such defect.

Caldwell himself does not testify to any defect in the brake of this car. No witness testified upon this subject except Mr. Danner. Caldwell testifies that he was turning the brake on the car from which he fell, which appears to have been the fifth one from the engine, and he says: "The last I remember doing on the car is that I gave the brake a turn or two of the wheel to take the slack out of the chain, then I applied my strength to the wheel to turn it tight as much as I could, and when it became tight, as it required all the strength I had, something gave way and gave me a terrible jerk and I fell off the side of the car. That is the last I remember anything about it."

So that, as appears, he had no knowledge of the cause of this jerk which he says threw him off the car. Danner testifies that the dog was in the ratchet and the brake set on this car when he went back there.

Danner was asked whether he examined the eye-bolt, and he says "I did after I found out how the brake acted."

"Q. How long was this eye-bolt?" "A. I didn't measure."

"Q. Well, about?" "A. Well, sir, I should judge that the entire bolt was about—oh, four inches and half."

"Q. How long are eye-bolts usually on other cars?" "A. Well, it is not necessary for them to be over three inches."

We think the record shows that this eye-bolt must have been at least three inches and a half long to perform the service for which it was intended.

Then he was asked this: "I am not asking what is necessary, I am asking you how long they usually are?" "A. I never measured them."

"Q. Then you never measured any other eye-bolts?" "A. No, sir."

"Q. And you don't know from actual examination how long the usual eye-bolts on cars are, do you?" "A. Well, I know from experience they are not all the same length."

"Q. That is, some are longer and some shorter?" "A. Yes, sir, for I have put them in quite a number of times and I know some are not quite long enough to go through the stem and catch the nut and others are a little bit longer than necessary and some the eye is larger than on others."

In regard to the brake chain, he is asked: "You say the brake-chain was loose?" "A. Yes, sir. * * *

"Q. Brake-chains on cars are frequently a little loose, aren't they?" "A. Yes, in some they are looser than on others."

"Q. Isn't it a fact that there is not a car on the road on which the brake-chain pulls on the brake as soon as you start turning the wheel?" "A. No, sir."

"Q. Isn't it a fact that there is some slack, a certain amount of slack now, in every brake in every car?" "A. Yes, sir, there is some." * * *

"Q. Then you don't know how they hung on this car?" "A. No, sir, I don't know how they hung on this car."

"Q. This was not a Clover Lear car?" "A. No, sir."

And he was asked this question: "Now, haven't you as a fact, Mr. Danner, often seen cars on which the chain was so loose that it would wrap upon itself for one wind and then fall over?" And he says he has seen that frequently. "A. Yes, sir, I have seen it wrap two winds and fall over."

"Q. How often have you seen that?" "A. Oh, a number of times."

Danner testifies that this car was a Nickel Plate car—the one he examined—that it was the fifth car from the locomotive. The records of the railroad company which they kept, setting down when cars were put into a train and their order in the train show that the Nickel Plate car at the time of the accident was the second car from the locomotive, it having been put into the train after leaving Frankfort, and the weight of all the testimony is that the Nickel Plate car was not the fifth car, but that the fifth car a Union Pacific car and that the Nickel Plate car at the time of the accident, was the second car from the locomotive. No witness testified that it was the fifth car except Danner; but he might be mistaken as to the order in which this car was in the train, it is argued, although his testimony was based entirely upon the fact that this car which he examined was a Nickel Plate car; he was questioned very fully and swears positively that it was the fifth car from the locomotive.

The claim of negligence against the railroad company, and of the cause of Caldwell's injury so far as any evidence of the transaction itself is concerned, rests entirely upon the testimony of Danner and the plaintiff, and without Danner's testimony it is clear there is no negligence

shown against the railroad company, causing or contributing to the injury to Caldwell.

A large number of witnesses were called on this question of brakes and the way they are, and should be made, and it appears from their testimony that these eye-bolts were of various lengths upon cars, that they were often as long as four inches, or four and a half, and in some instances longer. The eye-bolt is simply a bolt going through the shaft of the brake, with a nut on one end to hold it, and at the other end an eye to which the chain was attached; the chain, in this case, being a half-inch chain, and this eye-bolt held the chain so that it could be wrapped around the shaft of the brake to stop the car. It was necessary, of course, that these eye-bolts should be strong, substantial, the whole apparatus of the brake: the shaft, the chain, the eye-bolt and key-bolt below the eye-bolt, all must be strong, substantial and of good size, and if they were not, that in itself would be negligence on the part of the railroad company, in not supplying machinery and apparatus of sufficient strength. This Nickel Plate car was not a car manufactured by the Clover Leaf road, nor a car owned by them, but a car which had come on to the road from another railroad, nineteen days prior to the accident. At that time it was inspected and it was inspected from time to time when necessary thereafter; there is no evidence that it was not carefully and properly inspected and no evidence that the inspectors were not proper and careful men.

The jury having returned a verdict for the plaintiff in this case and they being the judges of the facts, the verdict can not and should not be disturbed in this court unless it is clearly and manifestly against the weight of the evidence, or unless there is no evidence tending to show negligence on the part of the railroad company.

After careful examination of this record, we are of opinion that it does not show negligence on the part of the railroad company—that there is no evidence in the record tending to show want of ordinary care on the part of the railroad company with reference to this car or this brake. It was made in the proper way, that is, it had the shaft chain, eye-bolt, key-bolt, dog and all the other things that were necessary and proper for a brake. No complaint is made as to the plan or method of construction. It was made of good material and strong enough, and all that. Now that being a heavy, substantial piece of machinery, as this was, if this eye-bolt was a fraction of an inch longer than the eye-bolts in perhaps a majority of brakes were, or some other brakes were, we do not think that would constitute want of ordinary care on the part of the railroad company in taking this car upon its tracks and permitting its men to use and operate the car.

Holding, as we do, that there is no evidence here to show negligence against the railroad company, we, of course, hold that the verdict is against the weight of the evidence, as we think it clearly is.

The testimony of Mr. Danner does not commend itself very favorably to the court, he having, as he claims, noticed this defect on the night of this accident, when all were looking for the cause of this man's injury, when a fellow trainman had fallen off and sustained a serious injury, he claims that he at that time discovered this defect, that he experimented with the brake and learned the cause of this man's injury, and yet said nothing to any one about it, keeping it an entire secret, although as he claims, at the time he discovered this, he carefully set down in a book the number and description of the car and the defect

which he discovered. It does not seem to us that the conduct of Danner was, that of an honest and a truthful man. He says it was not his duty to make a report, but it was his duty at the time when investigation was made to disclose to the conductor anything that he might have learned which would throw light upon this subject. But he said nothing. His conduct on that occasion and afterwards, impeaches his testimony as a witness. When his deposition was finally about to be taken, the record shows that he sought an interview with the officers of the railroad company in a manner somewhat peculiar just before he gave his testimony, and wanted to know whether they wished to see him before he testified.

So far as this Nickel Plate car being the fifth car from the engine is concerned, all of the other testimony is against that of Mr. Danner. The records of the company which were put down by the men as the car passed through their hands, when there was no interest to make a false record, all show that this Nickel Plate car was the second one from the engine, and not the fifth.

Now, we are of the opinion, that if this eye-bolt was a little larger than many other eye-bolts, a fraction of an inch, or perhaps a half an inch, which would be a quarter of an inch on each side of the shaft, that, considering the nature of the apparatus and the machinery and the work it was to do and its character, and all that, we think that it would not constitute negligence on the part of the railroad company to take such a car as that upon its tracks and permit its men to use it. If the eye-bolt was too small, it would have been too weak, and that would be a defect.

And, furthermore, it does not appear from this record that Mr. Caldwell's injuries were due to any defect in this eye-bolt. According to the undisputed testimony, a brake-chain is liable at any time to wind upon itself, as they call it, and pull up on itself and then slip off and thus cause such a jerk as occurred in this case. And the dog is liable to slip out of the ratchet and cause such a jerk; but if this was in place when Danner examined the car, as he claims it was, that was not the cause here. The chain is, of course, liable to wrap around any eye-bolt whether it is four inches or four and a half inches long; it is a thing that is common to all brakes of this kind, but there must be some way of fastening the chain, which is a necessary part of a brake. There is no claim made here that the eye-bolt was not necessary or that the plan of construction of this brake was not a proper one, and the fact that the bolt may have been a fraction of an inch longer than some others, would not, in our judgment, constitute negligence on the part of the railroad company.

Even if this were true, if this were longer than it ought to have been, even if that constituted a defect, still before Caldwell would be entitled to recover against the Clover Leaf railroad company it would be necessary for him to prove by evidence that the injury was caused by this defect. All that Caldwell knows about it is, that when he was setting this brake there was this sudden jerk and he was thrown off. But this chain may have wound or piled upon itself and been thrown off and Caldwell jerked and thrown the same as he would have been if the chain was wrapped around the eye-bolt; no one can tell from the evidence which it was that caused this brake to jerk; and as the Supreme Court has recently said of negligence, this must be proved, it cannot be guessed at.

As was said by the court in its charge to the jury in this case, if it might just as probably have been caused in some other way than that claimed, then the jury would not be warranted in finding that this was the cause of the injury. And in our judgment it is not shown that any defect caused the injury. So that, laying aside those things which it seems to us impeach the testimony of Mr. Danner and render him a witness unworthy of belief and giving his testimony full consideration, we are of the opinion that there is no evidence in this record showing negligence or want of ordinary care on the part of the railroad company; and, more than that, if there was any defect, the evidence does not show that Mr. Caldwell's injury was caused thereby.

For these reasons the court of common pleas erred in overruling the motion to direct a verdict for the defendant, at the close of plaintiff's testimony, and this motion should have been allowed when it was again renewed at the close of the case.

The judgment of the court of common pleas will therefore be reversed and the cause remanded for a new trial.

NEGLIGENCE—TRIAL.

[Cuyahoga Circuit Court, January 21, 1901.]

Caldwell, Hale and Adams, JJ.

(Judge Adams, of the fifth circuit, sitting in place of Judge Marvin.)

SUSAN LEBER V. KELLEY ISLAND LIME AND TRANSPORTATION CO.
ET AL.

1. RULE AS TO DIRECTING VERDICTS.

Where, in actions for personal injuries, the facts relating to the contributory negligence of plaintiff are undisputed, or free from doubt, and from such facts only one proper inference can be drawn, that of negligence of plaintiff, the judge may direct a verdict. But if the facts are doubtful, or such that different minds might differ about the proper inference to be drawn therefrom, the case should go to the jury.

2. RULE APPLIED—ERROR IN DIRECTING VERDICT.

In an action against a property owner and a city to recover for personal injuries from falling on an icy sidewalk, at a point where water was discharged from a spout and ice had accumulated, where plaintiff explicitly stated that the sidewalk was covered with snow and that she did not know that the ice was there, and the evidence must be weighed to determine the question of contributory negligence, it was error for the court to direct a verdict for defendant.

3. EVIDENCE NOT CONCLUSIVE OF CONTRIBUTORY NEGLIGENCE.

Evidence, in such an action, of prior knowledge of the accumulation of ice at a point where a spout discharged water on the sidewalk, bears on the question whether plaintiff knew of the dangerous condition of the sidewalk at the time of the accident, but is not conclusive evidence of contributory negligence.

HEARD ON ERROR.

Olds & Willett, for plaintiff in error.

Squire, Sanders & Dempsey, for defendants in error.

ADAMS, J.

Susan Leber was the plaintiff below. The action against the defendants in error was to recover damages for personal injuries received by

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her on February 26, 1898, by falling on an icy sidewalk in front of the premises of the Kelley Island Lime and Transportation Company, on Purdy street in this city. She alleges that the building of this defendant was provided with three pipes or down-spouts, which conducted the water from the roof of the building and discharged it on the sidewalk, where it froze, about a month prior to the accident, and that on the date of the accident the ice was covered with snow. That she had no knowledge of the dangerous condition of the sidewalk at that point, and that she stepped on the ice; slipped and fell and was injured.

The petition charges that the Kelley Island Lime and Transportation Company was negligent in maintaining the pipes and discharging the water on the sidewalk so as to cause the accumulation of ice dangerous to persons passing along the sidewalk.

The city of Cleveland is charged with negligence in that it failed to clear the sidewalk of the ice after it knew, or had opportunity to know, that dangerous condition of the sidewalk.

The defendants, by separate answers, deny all the allegations in the amended petition, except the incorporation of defendants, and allege contributory negligence, which is denied by the reply.

At the close of plaintiff's testimony, the defendants moved the court to arrest the testimony from the jury and to direct a verdict for the defendants. The court directed a verdict for the defendants; and plaintiff saved her exception and filed her motion for a new trial, which was overruled. Final judgment having been rendered, error is prosecuted, and the sole question is the action of the court in directing a verdict.

The questions argued do not relate to the negligence of the defendants, but to the contributory negligence of plaintiff.

No question was made, and probably none could be made, as to the sufficiency of the evidence of the negligence of the defendants to entitle the plaintiff to go to the jury on that question.

In *Shaeffer v. Sandusky*, 38 Ohio St., 246, the court lays down the rule that one who voluntarily attempts to pass over a sidewalk of a city, which he knows to be dangerous by reason of ice upon it, which he might easily avoid, can not be regarded as exercising ordinary prudence, and therefore can not maintain an action against the city to recover for injuries sustained by falling upon the ice, even if the city would otherwise be liable.

Again, in *Village of Conneaut v. Naef*, 54 Ohio St., 529, the same holding is made, "if the source of danger is plainly visible."

This case against the city of Cleveland is not controlled by *Chase v. Cleveland*, 44 Ohio St., 506. There the ice and snow accumulated on the sidewalk from natural causes; here it is otherwise.

If the facts relating to the contributory negligence of plaintiff are undisputed, or free from doubt, and from them only one proper inference can be drawn, that of negligence of plaintiff, it is a question for the court and the court may direct a verdict; but if the facts are doubtful, or such that different minds might differ about the proper inference to be drawn therefrom, it is a case to be submitted to the jury. *Railway Co. v. Murphy*, 50 Ohio St., 185; *McCarty v. B. & O. Ry. Co.*, 11 Circ. Dec., 229.

The evidence tended to show that plaintiff knew these spouts discharged water on the sidewalk for a long time prior to the accident, causing accumulations of ice when the weather was cold enough. The

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statement in her original petition, "that she attempted to walk over said icy sidewalk and used great care in so doing to avoid falling," was in evidence. There was evidence tending to show that she had no other convenient way to go from her home to Lorain street.

The questions to be determined were: At the time of the accident did she know of the dangerous condition of the sidewalk, or was the source of danger plainly visible?

Evidence of prior knowledge would bear on these questions although not conclusive.

On the other hand, plaintiff says that the sidewalk was covered with snow and she says explicitly that she did not know the ice was there. Under these circumstances, the evidence must be weighed to determine the contributory negligence of plaintiff. This the court may not do.

It follows that the court erred in directing a verdict, and the judgment is reversed with costs; and cause remanded for a new trial.

PARTNERSHIP—SALES.

[Cuyahoga Circuit Court, January, 1901.]

Caldwell, Hale and Adams, JJ.

(Judge Adams, of the fifth circuit, sitting in place of Judge Marvin.)

N. C. PLIMPTON V. G. H. TAYLOR ET AL.

1. INVALID SALES BY ONE PARTNER.

One partner has no right to sell property belonging to the firm, other than that in which the firm is engaged in dealing.

2. PURCHASER PUT UPON INQUIRY BY FIRM NAME.

The name "The Taylor Coal Company" is of a character to put a would-be purchaser of property of the firm, other than that in which such company is dealing, on inquiry as to the nature of the concern, whether a corporation or a partnership.

3. PARTNER MAY RECOVER FROM PURCHASER.

A person purchasing property, other than that in which such firm is engaged in dealing, of a partnership doing business under style of The Taylor Coal Company, from one partner without knowledge or consent of the other, does so at his peril, and if, as between such partners, such sale was unlawful, the purchaser may be required to account to the other partner.

APPEAL.

Hile & Horner, for plaintiff.

Athey & Sanders; Sanders & Wilson; J. F. Clark; Wilcox & Friend, for defendant.

ADAMS, J.

Plimpton and Taylor were partners for about six months in the retail coal business under the firm name of the Taylor Coal Company. Plimpton's action is for a dissolution of the partnership and for an accounting.

In a second cause of action he seeks to charge the Zettelmeyer Coal Company with \$350, the value of wagons, horses, office furniture and a lease, the property of the partnership, sold to it by Taylor without the knowledge or consent of Plimpton.

Plimpton v. Taylor.

The coal company admitted the purchase but denied all other allegations.

The account between Plimpton and Taylor has been settled, and counsel agree that there is a sum due Plimpton from Taylor greatly in excess of \$350, and Plimpton has paid the debts of the partnership. The lease was in Taylor's name. As a matter of law he had no right to sell any of this property without Plimpton's consent, because it was not property held for sale in the ordinary business of the firm.

Plimpton did not consent and had no knowledge. On the other hand the Zettelmeyer Coal Company had no actual knowledge that Plimpton was a partner, but the company did know that the business was carried on in the name of the Taylor Coal Company and its officer had his suspicions aroused as to Taylor's ownership, but relied on Taylor's statement that he was the owner and the fact that Taylor's name alone appeared on the lease.

In *Rogers & Sons v. Batchelor*, 87 U. S., (12 Pet.) 221, the holding is made that want of knowledge on the part of one taking firm property of this character from one partner does not relieve from liability. While in 124 Mass., 1, it is held that where one partner places the business in charge of the other and the managing partner sells such property to a purchaser for value who does not know of the partnership, the sale is valid, on the ground that between two innocent parties that one must suffer who placed it in the power of the third party to do the wrong.

In this case we are not compelled to determine which case we would follow. The controlling fact here is that the business was done in the name of the Taylor Coal Company. That name puts the would-be purchaser on inquiry as to who compose the Taylor Coal Company. Is it a corporation? Is it a partnership? And if he purchases from one partner, without the knowledge or consent of the other, property of the firm, other than that in which the firm is dealing, he does so at his peril.

There may be the same decree entered as in the common pleas.

PUBLIC WAYS.

[Stark Circuit Court, February Term, 1900.]

Adams, Douglass and Voorhees, JJ.

MARGARET MADDEN V. PENNSYLVANIA RAILWAY CO.

1. PROPERTY OWNER MAY ENJOIN CLOSING PRESCRIPTIVE WAY.

A property owner has a property right in a public way, whether the fee to such way be in the municipality in trust for public uses or in an abutting owner. Such property owner is, therefore, unless compensated, entitled to an injunction against the closing or the obstruction of a public way, obtained by prescription, across railroad tracks.

2. NOT NECESSARY THAT PROPERTY SHOULD ACTUALLY ABUT.

It is not essential, in order to entitle such property owner to an injunction, that his property should actually abut upon such way. It is sufficient if it is near enough to be materially affected by closing or obstructing such way.

3. TO DEFEAT, INTERRUPTION MUST BE FOR STATUTORY TIME.

Where it appears that a way has been traveled continuously and by the public generally, whenever they saw fit, for more than twenty-one years, a prescriptive right is obtained which cannot be defeated by an interruption for less than the statutory period.

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4. INTERRUPTION INCIDENT TO MOVING TRAINS NOT SUFFICIENT.

The interruption to the use of a footway across seven or eight railroad tracks, incident to the moving of many trains, is not such an interruption as will defeat a prescriptive right.

5. RIGHT EXTENDS CLEAR ACROSS STREET.

The right of an abutting property owner is not simply to the center line of a street, but extends across the street.

APPEAL.

Lynch & Day, for plaintiffs.

Carey & Mullins, for defendants.

ADAMS, J.

The two cases of Margaret Madden against the Pennsylvania Company, No. 449, and Margaret Welsh against the Pennsylvania Company, No. 448, are in this court on appeal. The cases involve substantially the same questions, both of law and fact, and have been submitted to the court together.

Margaret Madden owns property as described in her petition, situated on Webb street in the city of Alliance. Margaret Welsh and the other plaintiffs own property described in her petition, situated on Main street in the city of Alliance; and while the title of the plaintiffs in each of these cases was denied by the railway company, in the answers, yet on the trial it is admitted that the plaintiffs were the owners of their respective properties, as alleged in their petitions. And in the Welsh case, the defendant admits the relative location of the railways and the property of the plaintiff. I may say here that the Welsh property is situated on Main street, near the eastern end of Main street, close to the line of the Cleveland & Pittsburg railroad; and that the Madden property is situated at the southern end of Webb street, and a little northeast of the Pittsburgh, Fort Wayne & Chicago railroad, or a little northeast of the eastern end of Main street; and the object and the prayer of both petitions is to restrain the Pennsylvania Company from closing up, by fence or otherwise, a right of way claimed by the plaintiffs in each of these cases, across the tracks of the Cleveland & Pittsburg railroad, and the tracks of the Fort Wayne Company, both of these railroads being controlled and operated by the Pennsylvania Company.

There is no claim made in the petition that this is a public highway, or a part of the street by statutory dedication, or by any dedication in fact, except what arises out of the claim made by plaintiffs, that by long use this space between the end of Main street and the end of Webb street has become a public way for foot passengers. The claim being that for a great many years, more than the period of twenty-one years, that the public generally, and these plaintiffs and their predecessors in title have traveled across this space at will; that the travel has been large, and in that way they have by prescription secured a title and right of way across the tracks of the defendant railway company.

The railway company denies the allegations of the petition as to this way; and that is the main question of fact to be determined in this case. Counsel for the railway company claim that the plaintiff is not entitled to the relief prayed for, even if she has established the fact of a way by prescription, because, as they say, neither of the properties of these plaintiffs touches or abuts on the way claimed. That the plat and the evidence shows that the Welsh property is a little west of the end

of Main street where this way begins; and that what is called Front street extends between the northern end of this way and the Madden property. And they make the further claim, that even though it be admitted that the plaintiffs have this right of way across these tracks, as they claim it, that they are not entitled to the relief of an injunction, because they have an adequate remedy at law; and the further claim is made that, by reason of an overhead bridge in the neighborhood, these parties have a reasonable means of access to their properties, and a reasonable way for going from their property to the principal parts of the city. And it is said that if this be a public way, then that the plaintiffs can have no private right in a public way; that the action, if maintainable at all, must be maintained by the public authorities, and not by the individual.

In *McQuigg v. Cullins*, 56 Ohio St., 649, it was decided that where the township trustees had ordered a township road vacated, and it appeared that the road so vacated was the only outlet that the owner of a farm at one end of the road had to the county road, that he had an easement in the township road. He and his predecessors in title had used the road for a great many years; and that the vacation of the road did not deprive him of his right to use the township road as a way. The syllabus says:

"The order of vacation of a township road by the township trustees, in a proceeding conducted under chapter 3, title 7, of the Revised Statutes, has the effect to relieve the public from any duty to keep such road in repair. But such order does not authorize the closing up or obstructing of the road against the objection of one who has acquired an easement in it.

"Where, in such case, the trustees and others threaten to obstruct or close up such road, injunction will lie. And if it appear that such threatened action will destroy the easement of an owner of adjacent land in such road, and no other road reasonably suitable to meet the necessities of such owner has been provided, injunction forbidding such obstruction or closing up of such road will be granted."

That, as it seems to the court, would answer the claim made, that the private individual can have no easement in what has heretofore been a public road.

The question of fact to be determined by the court is a difficult one, because the way claimed is across seven or eight railway tracks, across the tracks of two different railroads, and there are numerous switches and side tracks.

From the very nature of the business carried on by these two railway companies, the use of this ground by foot passengers was necessarily interrupted. That is, the foot passengers of necessity had to give way to the passing of trains and the shifting of cars in the yard there, and the proof showed that there were a great many cars and trains there daily.

The claim is made that the use of this way was interrupted by the construction in the way of the telegraph office; but it appears that that telegraph office was kept there some ten years, from 1879 or 1880 to 1890; and this evidence, as we think, shows that the passing of people across this ground began before the railroads were laid out at all, in 1852, and has continued up until the building of the fence complained of in this case.

It is true that at one time part of the travel from the south end of Webb street was over to the station, and that there was travel from the end of Main street to the station; but still the evidence establishes, as we think beyond controversy, that everybody, the public generally as well as the plaintiffs, and those who occupied their property, traveled from Webb street to Main street whenever they saw fit. And that had been going on continuously for more than twenty-one years before the telegraph office was located in 1879 or 1880, and if the prescriptive right had been gained at that time, its interruption for less than the statutory period would not destroy the right.

A good deal of evidence was introduced on the subject of cutting of trains there so as to enable people to pass; and also there was evidence that warnings had been posted there against trespassing; and the proof shows that at one time a fence had been built across the southern end of Webb street, and had been torn down by parties unknown and the travel resumed.

The testimony of the different witnesses as to the cutting of trains there, we think, is unimportant, owing to the character of it, that trains were cut frequently, and at other times they were allowed to stand there a greater period of time than that provided for by the statute. But, taking all this evidence, we have come to the conclusion that it does establish the fact that there had been a public use of this way for a great many years more than the time required to gain title by prescription, before it was interrupted by this telegraph office, and that it has continued ever since until the present time; and that there has been a public way for foot passengers established from Main street to Webb street by prescription; and that the claim made by the plaintiff is, in fact, correct; and that the public way is of such a nature that it can be best described as an extension from Main street to Webb street for foot passengers. *Pavey v. Vance*, 56 Ohio St., 162.

Then the question made by counsel for defendants, is, have the plaintiffs such rights in that way or street extended that they can have the remedy by injunction?

We think that *Railway Co. v. Lawrence*, 88 Ohio St., 41, has established the law in this state, and it reaffirms the doctrine announced in *Cincinnati St. Ry. Co. v. Cummins*, 14 Ohio St., 523, and other decisions, that the abutting property owners have a property right in the street, no difference whether the fee to that street be in the municipality in trust for public uses, or whether the fee be in the abutting property owner; and that case decides that injunction is a proper remedy. It is a property right, as much as the lot itself; and under the constitution of the state a property right cannot be taken for public purposes unless compensation be first made; so that a court of equity will protect the property owner in his property right by injunction; and if a public or quasi-public corporation wishes to take the property, it must first make compensation in money, either by private agreement or by condemnation.

But it is said that these properties do not abut upon this particular part of the street; do not abut on this way, and the claim is made broadly that the property owner has only these property rights in that part of the street that would be included between or within his lot lines extended across the street.

To say that a man who buys a lot, where the owner of the property has platted and laid out streets and alleys, on the faith of the ability to

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get to and from his lot by the streets as laid out upon the plat, can be deprived of all of that right, and simply be allowed to go from his lot to that part of the street immediately in front of him, is to say that his right in the street is a nullity. The right of ingress and egress to and from the bed of the street that is immediately in front of this property would add little to the value of the property if he is cut off from other parts of the street. It is of course true that if the lot were on a street in a large city, where the street was many miles in length, the closing of the street at a great distance from the property might not affect the property to any extent; and there would be no remedy, because there would be no injury.

But where the closing of the street, either by vacation or by obstruction by steam railroads, or in any other way, is near enough to the property to materially affect its value, then the property owner has a right to be compensated before the street is so obstructed or closed, and he can prevent such closing or obstruction by injunction.

An examination of Cincinnati Street Railway Co. v. Cumminsville, 14 Ohio St., 528, and especially pages 546 and 547, will show that the Supreme Court of Ohio has taken advanced ground upon the rights of abutting property owners in a street; and they say that while a great many other courts in the country have seen fit to differ from the Supreme Court of Ohio, still that is the law for the state. And that is also indicated by Sec. 2654, Rev. Stat., relating to the vacation of streets, wherein it is provided that the right of way and easement therein of any lot owner shall not be impaired by the vacation of the street.

These Ohio cases are also collected and commented on in Cohen v. Cleveland, 43 Ohio St., 190, 193; and in Baltimore & O. R. R. v. Lersch, 58 Ohio St., 639, it clearly appears that the right of the abutter is not simply to the centre line of the street, but goes clear across the street. In 10 L. R. A., 276, in the foot note, there is a collection of cases along the same line.

Counsel have been diligent in citing authorities, and we have examined these authorities at great length, but we think the law of this case is settled by the decisions in Ohio, which differ from those of many of the other states.

Now, in the Madden case there was also a claim for a part of Front street running south of the Madden property; and we think that the proof shows that that has been used by the public generally, and by those who occupied this property for more than twenty-one years.

Finding the facts and the law as indicated, the injunction sought is made perpetual, and the same decree entered as in the court of common pleas.

CONTRACTS.

[Hamilton Circuit Court, 1901.]

Smith, Swing and Giffen, JJ.

FREDA JAKOWENKO, ADMX., V. DES MOINES LIFE ASSOCIATION.**1. REQUISITES OF RECORD ON ERROR.**

When objections are sustained to questions asked a witness on the trial, and exceptions are reserved to the ruling, the record on the reviewing court should show what the answers to such questions would have been.

2. DAMAGES FOR BREACH OF CONTRACT—EVIDENCE.

In an action by an insurance agent against his company for breach of contract of employment, by which he was to be allowed a commission on business secured, without any allowance for expenses, such agent cannot prove as part of the damages for the breach, any expenses he was put to in conducting the business.

3. CONTRACT EMPLOYING INSURANCE AGENT—CONSTRUCTION.

When such contract provided that an average of a certain amount of insurance should be furnished by the agent annually, and such contract is broken by the company after running eighteen months, the annual average during that time cannot be determined, and instruction to the jury what it would be or how to determine it, would be erroneous.

4. USE OF MORPHINE NO CAUSE FOR BREAKING CONTRACT.

The habitual use of morphine by the party to a contract for services, who is to perform the services thereunder, is not of itself sufficient cause for terminating the contract, unless its effect is to prevent the performance of such services, and evidence of the general effect of the drug is sufficient.

HEARD ON ERROR.*Otto H. Fish*, for plaintiff in error.*Robert Ramsey*, contra.**GIFFEN, J.**

This action was commenced by plaintiff's intestate to recover damages for the breach of a contract of employment as general agent of the defendant insurance association. The original contract of April 1, 1895, provided for his appointment as manager for the association in certain counties in the state of Kentucky; that he devote his full time and attention to the association; that he receive seventy per cent. of the first year's business, also a renewal of one dollar per thousand annually thereafter, "providing an average of three hundred thousand dollars of insurance is furnished annually from said counties." Subsequently three counties in Ohio were added to his territory with the proviso that an average of one hundred thousand dollars of insurance be furnished annually.

On October 5, 1896, the defendant canceled the agency. Plaintiff avers full performance of the contract, and that defendant without good cause terminated the agency.

There being a verdict and judgment for the defendant, error is prosecuted by the plaintiff upon a number of grounds. Many exceptions are reserved to the ruling of the court in sustaining objections to questions asked by plaintiff's counsel; but in all such cases, except perhaps two, there is no statement in the record of what the answer would be if the witness were permitted to answer, and hence it can not be determined

whether the ruling was prejudicial. In one of the excepted cases at page 82 of the bill of exceptions the court modified its ruling at page 76, and thereby cured the error if any was committed.

At page 49 Mr. Jakowenko was asked this question: "How much expense did you incur in prosecuting this business for the company?" By the terms of the contract he was prohibited from incurring any indebtedness in the name of the association, and was to receive as compensation a per cent. only on the business secured. His expense might be much or little, but could not be charged to the association, nor was it competent evidence in ascertaining the damages sustained. The item of \$190.50 for renewals at one dollar per thousand was not expense, but represented commissions due, and might have been shown as such.

It is claimed that the court erred in charging the jury, in substance, that if the plaintiff failed to secure at the rate of \$300,000 of insurance annually during the existence of the contract, the defendant was justified in rescinding the same. The court said: "To illustrate, if it was two years, it would be \$600,000 in one case and \$200,000 in the other; and if it was a year and a half, it would be \$150,000 in one instance and \$450,000 in the other, and so forth. In determining the average you will take the time during which the contract was in existence into consideration."

If the illustration given by the court is followed no annual average is ascertained, but only a fixed sum for one year and a proportionate amount for a fraction of a year. If, on the other hand, the contract continued for two or more years, with different amounts each year, the sum of all divided by the number of years would give the annual average, so that although the receipts the first year were less than \$300,000, and those of the second year as much more, still the total amount would produce an annual average of \$300,000. "Average" is defined to be "mean proportion," and in order to determine it there must be two or more units of which it is the mean. This contract was in force only one year and about six months, hence it was impossible to determine at the end of that period what the annual average would be, and we think the court erred in its charge on this point.

There was no exception taken to such charge, and hence it is claimed that the error will not avail the plaintiff. Our Supreme Court has said:

"Where the ground of error is the refusal of the court to grant a new trial, in a case where the verdict is alleged to be against the law or evidence, and a bill of exceptions is taken, * * * which embodies the charge * * * as well as all the evidence, the court, in determining whether a new trial ought to have been granted, will look to the charge in connection with the evidence," whether it was excepted to or not, "with a view of determining under all the facts and circumstances of the case whether substantial justice has been done or a new trial ought to be granted." *Marietta & C. R. R. Co. v. Strader & Co.*, 29 Ohio St., 448, 452.

Applying this rule to the case before us and we are satisfied that substantial justice has not been done, as the evidence tended strongly to prove, if it did not fully establish, a waiver by the defendant of the provision of the contract for a certain annual average, and the court in no way qualified or limited the effect of such provision of the contract by reason of this evidence.

It is urged, however, that Jakowenko used morphine habitually, which alone was cause sufficient for his discharge. The evidence abundantly shows that he daily took morphine, and he himself offered to tell the jury why he did so, but the court, upon objection by defendant, refused to allow him. It is not so clear that this practice or habit prevented him from performing the things required of him by the contract. He agreed to devote his time and attention to the business of the association, and the witnesses who testify on this point do not say that, by reason of the use of morphine, he failed to devote his time and attention to the business, but that the general effect of the drug is to prevent one from giving proper attention to business. The essential fact to be shown was his failure to perform, and not the cause of such failure. The better evidence would have been the facts showing how and when he neglected his duties as agent.

If we eliminate from the case the evidence of the use of morphine and the question of average insurance, it is not probable that the jury would have returned a verdict for the defendant, and we think, therefore, that the judgment should be reversed.

REAL PROPERTY—PAROL LICENSE.

[Union Circuit Court, February Term, 1900.]

Price, Norris and Day, JJ.

JOHN D. MATHER V. WILLIAM A. WRIGHT ET AL.

1. EFFECT OF POSSESSION OF LAND UNDER PAROL PURCHASE.

The exception to the operation of the statute of frauds requiring a contract for the lease or sale of real estate to be in writing, if the case where the purchaser enters into possession under the parol contract, does not dispense with a conveyance, but such possession may be used as the basis to enforce a proper conveyance.

2. RIGHT TO MAINTAIN DAM UNDER LICENSE.

Where two persons own land on opposite sides of a creek each tract extending to the center of the creek, and one give the other verbal permission, without consideration, to erect a dam across the creek, one side of the dam extending on his land, and after the erection of such dam, the party granting the permission dies, after which the second party without any other license erects a new dam in place of and fifty feet below the old one, the purchasers at judicial sale of the land of the licensee cannot maintain such dam against the wishes of the grantees of the licensor.

HEARD ON ERROR.

Cameron & Son and *Broderick*, for plaintiff.

Porter & Son and *Wright*, for defendants.

PRICE, C. J.

The plaintiff and defendants own lands in Union county which are divided by Bokes Creek, and the tract of each party extends to the center of the stream. The plaintiff holds title and possession under conveyance from the heirs of Stiles Newhouse, executed in 1897. The defendants have title to and possession of their lands on opposite sides of the stream under John E. Newhouse, the title resting in them through judicial sale.

The latter tract consisted of fourteen acres, and that of the plaintiff contains sixty acres.

In 1884-5, John E. desired to convert his fourteen acres into a pleasure resort, afterwards named "Maple Dell Park," and to this end, built a dam one hundred feet in length across the creek, one-half of which would be on his own land, and the other half on the land of Stiles Newhouse. These respective owners held a conversation on the subject, and John E. obtained verbal permission to construct the dam, upon the condition, that if it had caused no damage by the end of a year, it might remain; and it was constructed of cheap material, such as brush and earth, but of no permanent character, and while this was replaced with better material during the third or fourth year, it seems that the central part of the dam washed out, during freshets each spring season.

During the first year John E. dredged the creek channel above the dam to deepen the water for the use of row boats, as well as to constitute an ice pond during the winter; and also laid out drives and walks and planted shade trees. Stiles made no complaint of being damaged at the end of the year, and John E. proceeded to erect a dwelling house, ice house, a creamery, and placed row boats and toboggan slides on the pond, the expense aggregating about \$11,000. The land cost him \$100 per acre before these outlays. Stiles N. knew of all these outlays and improvements and the use made of them. He died in the year 1888, leaving heirs who, in 1897, conveyed their lands to the plaintiff.

After the death of Stiles N., John E. put in a plank dam, but it is fifty feet further down the stream, and he abandoned the old dam, and this was done without any new or other arrangement with the heirs. They, however, made no objections to the change. This plank dam is the subject of the controversy between the parties to this suit.

The defendants became the owners of the fourteen acres through judicial proceedings in 1896, for a consideration of about \$100 per acre. The same had been used as a pleasure resort until a year before the sale, and defendants desire to continue such use, which they assert cannot be done, unless this dam is maintained.

Before plaintiff purchased his sixty acres, in company of one of the heirs of Stiles Newhouse he looked over the farm and at what could be seen of the dam, a portion of which had washed out. He inquired if there was any writing or legal right that would continue the dam, and was assured that it had been abandoned, and he purchased believing and relying upon this statement.

After he went into possession, defendants sought to repair the dam, which was objected to by plaintiff, and after some acts of violence, this action is brought to settle the rights of the parties.

The plaintiff avers and proves that this obstruction of the stream causes the overflow of part of his farm at times, and thereby serious damages to his crops on the lower lands, and he denies the right of defendants to longer encumber his premises with any part of the dam. On the other hand, defendants assert this right as existing under the parol license given Stiles Newhouse to John in 1884.

This we deem a fair and sufficient statement of the facts to present the field of contention, and we have the question: is this license still valid and binding on the plaintiff?

It was given without any consideration in 1884 or 1885, and was so far executed as to allow the licensee, John Newhouse, to build fifty feet of the dam on land then owned by Stiles Newhouse, but now by the

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plaintiff, and the pleasure resort on the opposite side was prepared and expensive improvements made for that purpose, with the expectation that the dam would remain, but there was no definite time spoken of, or mentioned in the parol arrangement. And it is equally true, that to maintain it, so obstructs the stream, that the lands of plaintiff are frequently overflowed to his damage and injury, and it becomes a permanent burden and incumbrance on his premises, and which, to some extent, deprives him of their free use and control, and all this is insisted upon the theory that the license is still in force, because executed, and therefore is irrevocable.

We observe, that unless it be the law, that such executed license constitutes an exception to the operation of our statute of frauds and perjuries, the plaintiff is entitled to the full and free enjoyment of his property, and, to that end, the removal of the dam therefrom.

This statute (Sec. 4198, Rev. Stat.) is very comprehensive, and provides, that

"No lease, estate, or interest, either of free-hold, or term of years, or any uncertain interest of, in or out of lands, tenements, or hereditaments, shall be assigned or granted, except by deed or note in writing signed by the party so assigning or granting the same, or his agent thereunto lawfully authorized by writing, or by act and operation of law."

And Sec. 4199, Rev. Stat., provides that no action shall be brought to charge a defendant upon any contract or sale of lands, tenements or hereditaments, or any interest in, or concerning them, unless the agreement, or some memorandum or note there is in writing and signed by the party to be charged therewith. We have also, statutory provisions as to the manner of conveying real estate, or any interest therein, and a registry law, requiring the filing and recording of such instruments of conveyance.

There is one exception to the operation of the statute of frauds, so far as a contract for the lease or sale of real estate or an interest in or concerning the same is concerned, and that is where the purchaser enters into possession under the parol contract; but in such case, a conveyance is not dispensed with, but possession may be used as the basis to enforce a proper and lawful conveyance, just as a written contract might be used for the same purpose.

But in this case, no such possession of plaintiff's land was taken by John E. Newhouse, as to take the case out of the statute of frauds. The only possession had at any time was the construction of one end of the dam and its presence there afterwards. It was not a living, actual possession, and the defendant's rights are not saved by it because of possession taken under parol contract. The other exception to the operation of the statute of frauds and perjuries, and which is confidently urged in this case, is that the parol license to erect the dam was executed, and is therefore irrevocable at the instance of the licensor, or his grantees; and the authority for this view is *Wilson v. Chalfant*, 15 Ohio, 248, where it is expressly declared that a parol license executed is irrevocable. The action was trespass, and based on the fact that Wilson, under a parol contract with Chalfant, and for a consideration agreed upon, gave Chalfant license to enter upon lands of Wilson and construct abutments for a dam, which was done, and that after the same had been maintained several years, Wilson caused them to be taken out. Chalfant asked damages for the trespass, and the Supreme Court held that he could recover. The opinion was not of a unanimous court, Judge

Birchard doubting the correctness of the holding, it being in the face of our statute of frauds and perjuries. And we may add, that as a broad and sweeping declaration of the principle, that case stands almost alone among the decided cases, especially those of modern times. We do not hesitate to say that it is against the current of authorities of other states as well as against the views of our eminent text writers on the subject, and while it is not our province to criticise or disregard the decision, we will not recognize it as authority beyond the particular facts upon which it was rendered.

The facts of the case at bar are somewhat different. There was no consideration paid as in that case, and there the contest was between the parties to the parol contract, while here, the licensor had died, before the licensee lost his property at judicial sale. It is held in some cases that the death of either the licensor or licensee, revokes the license. Again, the plaintiff is an innocent purchaser of his lands; he made inquiry of his grantor as to the presence of a part of the dam, and was assured it had been abandoned. It was then partly destroyed and not in actual use.

We prefer to follow the doctrine of a much later case than *Wilson v. Chalfant*; the case of *Wilkins v. Irvine*, 38 Ohio St., 138. In that case a written license had been given to enter upon and imbed water pipes on the land of another, with privilege to repair them, but the writing was unacknowledged and without a seal, and it was held that it created no interest in or incumbrance on the land, such as disabled the owner from making a good and sufficient deed conveying title thereto.

On page 144 the court say:

"An interest in or permanent incumbrance upon land in this state, can only arise from some of the modes provided for or recognized in law. If it exists in this case, the incumbrance was created by a writing without seal and unacknowledged, and unaccompanied by actual possession. * * * It has none of the characteristics and sanctions provided by the statute creating an incumbrance that could possibly impart to the instrument a quality to run with the land. * * * If its terms had been violated by Brooks or his grantees, the jurisdiction of a court of equity could not have been successfully invoked to enforce specific performance."

"A license to do a particular thing, does not in any degree, trench upon the policy of the statutes requiring that contracts respecting the title to lands shall be by deed or other written instrument under seal. They amount to no more than an excuse for the act, which would otherwise be a trespass. A permanent right to enter upon and hold another's land for a particular purpose without his consent, is an important interest which should pass only in the mode and by the instrumentalities provided by law."

It seems difficult to reconcile this case with *Wilson v. Chalfant*, *supra*.

Among the very many cases in other states, is one decided by the Supreme Court of Minnesota, *Johnson v. Skillman*, 43 Am. Rep., 192, where it was held:

"Where one orally promised others that if they would erect a good custom mill on a certain point on their own lands, he would give them the privilege of flowing his land so long as they would maintain such mill, and they relying on that promise and partly induced by it, erected

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a dam and mill accordingly at large expense, the promise was a mere license, and revocable even after it had been acted on."

The notes appended to the report of that case, collate the authorities from other states in support of the above proposition.

And in *Lawrence v. Springer*, (24 Atl. Rep., 933; 81 Am. St., 702; 49 N. J. Eq., 289), is another review of the decided cases, and the principle is laid down that the death of the licensor, or a conveyance of the premises made by him, will revoke a parol license. The notes to that case are a valuable array of authorities.

But there is another consideration which is decisive of this case. After the death of Stiles Newhouse, the licensor, the dam erected under his license was abandoned, and the one in dispute was erected fifty feet further down the stream. The heirs of Stiles knew of this change, made no objection; but there was no express arrangement or license for it. The plaintiff is the grantee of these heirs, and we cannot believe the original permission so elastic as to include any point on the creek where the licensee might choose to locate the obstruction; and we have found no authority so broad as to sustain the right to continue this incumbrance on plaintiff's lands.

Moreover, the improvements and outlays made under the original license were all made on the lands of the licensee, now owned by defendants, and when they purchased, they paid but the price paid by John Newhouse, their grantor, before improvements and outlays were made, which was about \$100 per acre.

So, from any point of view, we find that defendants have neither legal or equitable right to longer maintain the dam on plaintiff's property, and we decree accordingly.

CONTRACTS.

[Hamilton Circuit Court, 1901.]

Smith, Swing, and Giffen, JJ.

FRED. W. WOLF CO. V. SHERIFF STREET MARKET & STORAGE CO.

1. PETITION IN ACTION FOR BREACH OF WARRANTY.

In an action for damages for breach of guaranty in a contract of sale, it is not sufficient to allege that the article sold and guaranteed was broken or refused to act, without plaintiff's fault, but it must also be alleged that such occurred through the fault of defendants or of defects in manufacture.

2. SAME—ALLEGATION OF DAMAGES.

In such action the different items of damage need not be alleged, but may be lumped and pleaded in gross.

3. ACCEPTANCE OF ARTICLE NOT WAIVER OF DEFECTS.

The test and acceptance of an ice plant by the purchaser is not a waiver of defects therein, when the contract of sale guaranteed, in case of its acceptance, that it would accomplish the results specified therein for one year.

4. RESERVING SPECIAL EXCEPTION TO CHARGE.

Where a charge correctly states the general rule of damages applicable to the case, if any particular part is objectionable, a special exception should be reserved. Sec. 5298, Rev. Stat.

HEARD ON ERROR.

Louis J. Dolle, for plaintiff in error.

Peck, Shaffer & Peck, contra.

GIFFEN. J.

The defendant in error commenced an action against plaintiff in error upon a contract of sale of an ice making plant and a guaranty of its proper operation for a period of one year from its acceptance after trial of sixty days. It avers a breach of the guaranty, in that the pipes, on two occasions, were broken, and the use of the plant lost whereby damages resulted.

This averment is in substance as follows: "On or about the 27th day of October, 1894, one of the pipes in said tank became fractured and broken, whereby without fault on the part of the plaintiff, the charge of ammonia contained in such pipe escaped, and was lost, and the plaintiff lost the use of such plant for a period of three days, and that thereafter and some time during the month of January, 1895, said plant became broken, and the use thereof was again, without its fault, lost to it for about three days."

The defendant filed a motion to require the plaintiff to make its petition more definite and certain, and afterwards a general demurrer, both of which raised the question of the sufficiency of the petition and particularly the above allegation. Each and both were overruled, and we think erroneously.

While there is a manifest attempt to aver that the pipe, on October 27, and the tank, in January, were *broken without fault* of the plaintiff, the allegation will not bear that construction; and even if it would, the same would be insufficient. The defendant guaranteed the proper operation of the plant; but not against any and all acts not occasioned by the plaintiff. One of the breaks in the plant occurred during the night. It may have been caused through the violent and malicious act of an entire stranger. Certainly in that case there could be no liability on the defendant. The plaintiff was required to aver a breach of the contract before he was entitled to recover.

The break in the pipe or plant is alleged as such breach, and it was incumbent on defendant to further allege facts showing that the same was occasioned by the fault of the defendant in the construction of the plant or otherwise. The objection that the petition did not separately state the amount of each item of loss and expense, is not well taken, as there is but one cause of action or claim for damages.

The principle is well stated in *Shepherd v. Pratt*, 16 Kas., 215, cited in brief of counsel for defendant in error as follows:

"It is unnecessary in most actions where the demand is unliquidated and sounds wholly in damages, and where there is but a single cause of action, to state specifically, and in amounts, the different elements or items which go to make up the sum total of the damages, it is enough to claim so much in gross for the wrong done."

The test of the plant and its acceptance after a trial of sixty days was not a waiver of the guaranty, because the contract provided that "In case of acceptance, however, we guarantee the proper operation of the plant and its accomplishing the results specified for the term of one year." The general rule of damages applicable to this case is correctly stated by the court in its charge to the jury, and if any particular part was objectionable a special exception should have been reserved. In this case there was a general exception only to the entire charge, and the case was pending at the time Sec. 5298, Rev. Stat., was so amended as to permit a general exception. We find no other errors.

The judgment will be reversed, for the reasons stated, and the cause remanded.

Henry Circuit Court.

STREETS.

[Henry Circuit Court, October Term, 1900.]

Price, Norris and Day, JJ.

MARY DURBIN V. NAPOLEON (VIL.).

1. RIGHT TO PRESUME CITY HAS REMEDIED DANGEROUS EXCAVATION IN STREET.

In an action against a village for personal injuries by falling into a dangerous excavation in a street, which had been there for some months and which plaintiff had known of several months before the accident, the questions whether she was or was not chargeable with remembering its existence, or whether she had not the right to presume the city had made the place safe in the meantime, are to be measured by time, circumstances and conditions, and are for the jury under proper instructions.

2. ERROR IN DIRECTING VERDICT.

In such case it is error for the court, at the close of plaintiff's case, to take it from the jury, and direct a verdict for defendant.

3. DUTY OF MUNICIPAL CORPORATIONS IN KEEPING STREETS SAFE.

A municipal corporation is not an insurer that its streets are free from danger, but it is required to keep them in such condition that a person exercising ordinary care in passing over them may be reasonably safe from injury arising from their condition.

4. NOT NEGLIGENCE PER SE TO CROSS STREET WHERE NO CROSSING.

A pedestrian in crossing a village street at a place other than a regular crossing is not guilty of negligence *per se* which will preclude her from recovering for injuries sustained by reason of the negligence of the village in leaving the street in a dangerous condition. Such person does not assume the risk of injury, without his fault, from defects, obstructions or nuisances which have been negligently permitted to remain in the streets.

5. RULE NOT IN CONFLICT WITH SUPREME COURT DECISIONS.

The rule that a pedestrian is not guilty of negligence *per se* in attempting to pass over a street at a place other than a crossing, which will defeat a recovery for injuries from defects, obstructions or nuisances which have negligently been permitted to remain in the streets, is not in conflict with *Dayton v. Taylor's Admr.*, 62 Ohio St., 11.

HEARD ON ERROR.

W. W. Campbell, for plaintiff in error.

F. M. Hall, for defendant in error.

NORRIS, J.

Mary Durbin filed her petition in the common pleas of this county against the village of Napoleon, seeking to recover for injuries which she claims to have suffered without fault upon her part and wholly through the negligence of the defendant.

She says that on the evening of July 8, 1899, there was a hole in Clinton street in the village of Napoleon, which defendant village knowingly and negligently suffered to remain there, and for three months and more had neglected to repair, so as to make the street at said point reasonably safe for travel. The excavation was unguarded and no light or signal of warning was provided and kept there to give notice that it was a place of danger.

On the evening of July 8, after dark, while passing along said street at that point, without fault on her part, she fell into this hole and received injury for which she seeks to recover.

The defendant answers and makes denial, and says, that if plaintiff was injured it was through her own fault and negligence. This the plaintiff denies by her reply.

The issues thus made up came on for trial to a jury in common pleas, and after the plaintiff had submitted her evidence, the court upon motion of the defendant, arrested the evidence, and directed a verdict in favor of the defendant. The plaintiff's motion for new trial was overruled and judgment was entered for defendant on the verdict so directed. Error is here prosecuted for reversal.

The reasons urged for reversal are :

First—Error in rejecting evidence offered by the plaintiff.

Second—Error in arresting plaintiff's evidence and directing verdict of the defendant.

Third—Error in overruling the motion for a new trial.

The error relied on is, that the court was not warranted in arresting the evidence and directing a verdict.

The accident which resulted in plaintiff's injury, happened in the night season, on Clinton street, at its intersection with Scott street, at a place where the village had not provided a street crossing. It is not disputed that there was an excavation at the point in Clinton street where the injury occurred, which had been made by the servants of the defendant in the driveway of the street some months before.

That it was there was well known, and had been known to the defendant, for a sufficient length of time in which to repair the street and make it safe. It was a defect in the street, and a dangerous one. That by walking into it one might sustain injury, is evidence by the hurt which plaintiff received. The defect was at a place much used both by day and by night, and it was not barricaded or guarded so as to prevent one from stepping into it, or to warn one that it was a place of danger. And the plaintiff in attempting to cross the street after dark fell into the hole, so negligently suffered to remain there unguarded, and sustained the injury of which she complains. Of all this there is no dispute.

The controversy here arises as to plaintiff's knowledge of the existence of this dangerous place, and thus knowing, in not having taken proper care for her own safety ; which defendant claims appears from the evidence by her introduced.

And as to whether in attempting to cross the street at a point where no crossing was provided by the municipality, she in so doing was guilty of negligence.

Defendant claims that the act of attempting to cross a street in a village at a place other than a street crossing, was of itself, without other fault or circumstances, an act of negligence, which precluded recovery for injury under such circumstances sustained.

As to the first proposition ; whether or not she did know or had good reason to know of this dangerous place at the crossing of Clinton and Scott streets.

A Mr. Hughes, a witness called for the plaintiff, on cross-examination, in response to defendant's question, says that plaintiff called his attention to this condition of the street a long time before the accident. Her conversation with Hughes had been so long before the injury, that the village, which at all times had knowledge of the defect, might with reasonable diligence, have in the meantime made the place safe. The conversation of itself would at once furnish ground for the following speculation: Had she under the circumstances presented by the

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evidence a right to presume that the village would, with its ample opportunity to do so, repair this dangerous place, and had repaired it. Did it under the circumstances devolve upon her to carry in her memory the fact that a hole had been made in the street there, some months before. Whether she was or was not chargeable with remembering its existence; whether she had or had not the right to presume the city had made the place safe in the meantime, would be measured by time and circumstances and conditions, which altogether made it a question for the jury under proper instructions from the court. See *Kane v. Northern Central Railway Co.*, 128 U. S., 91 (9 S. C. Rep., 16). She swears that she did not know that the excavation was there when she received her injuries by falling into it. So that there was some evidence that she was not aware of the condition of the street, and she had the right to have the matter submitted to the jury.

It is claimed upon authority of the proposition announced by the Supreme Court in *Dayton v. Taylor's Admr.*, 62 Ohio St., 11, that to attempt to cross a street at a place other than a crossing, provided that pedestrians may go safely over, is an act of negligence *per se*.

It is conceded that the excavation at which plaintiff in this case received her injury, was in the street outside of the curb and at a place where no street crossing was provided; yet at a point shown by the evidence, to have been by custom used to pass over Clinton street.

While a municipality does not insure its streets and public places to be free from danger, the law does require that they be kept in a condition that a person exercising ordinary care in passing over a street, may be reasonably safe from injury arising from its condition. It is true the court in the *Dayton* case, and speaking from the facts present in that case says, "a pedestrian who without necessity and for his own pleasure and convenience departs from the sidewalks and street crossings, upon which he would have avoided injury, and crosses a street intersection diagonally, and is injured by slipping into a catch basin, which lay between the crossings, must be held to have assumed the risks which lay in the path which he thus chooses." But by no construction can that opinion be tortured into a declaration that a pedestrian takes his life in his hand and forfeits it to the negligence of a municipality, when he steps off the curb onto the driveway of a public street. Or that, in order not to share the responsibility for whatever might occur, or for whatever might be in the street through negligence of the city authorities, he must go to a crossing however far, and to whatever inconvenience it may put him, and there on a path to which the law gives character of sanctuary, cross the street and thank his stars that he is safely over.

In *Dayton v. Taylor, Admr.*, *supra*, as shown by the record, in the night with the streets iced and slippery and dangerous, Taylor went diagonally across the street and made directly for a catch basin. The catch basin was a part of the drainage system of the city of Dayton, and was guarded and made safe as well as the same might be.

The only way Taylor could get into the catch basin was to slide into it. And he did slip down and did slip his legs into the catch basin. *Dayton v. Taylor, Admr.*, 62 Ohio St., 11, 17.

The application of that decision is to that state of facts. And its application is no broader than the facts presented in that case. In that case the city was no more responsible for Taylor's injury than it would have been had his injury been occasioned from contact with the slippery

surface of the street when he fell. The hole at the catch basin was an ordinary danger of a street reasonably well kept. The risk of injury there was the ordinary risk of a danger ever present upon a reasonably safe street.

In the case at bar the hole was not the ordinary danger ever present in a street reasonably well kept. It was a danger which at the point where it existed, and as long as it did exist, destroyed the street itself for the purpose for which the street was dedicated and maintained. It was not an improvement and a necessity as was the catch basin. It was an unnecessary danger and obstruction and a menace and a nuisance. So that the case at bar is far from all fours with the Dayton case.

Viewing the record as we view it, we are of the opinion that the court was in error in taking the case from the jury and in directing the verdict.

While the jury probably upon this record would have returned the same verdict, yet the case should have been submitted, and not to do so was in prejudice of plaintiff's rights.

We find no other error in the record. Judgment in the common pleas is reversed. A new trial is granted, and the case is remanded for new trial.

EJECTMENT—CONSTITUTIONAL LAW.

[Hamilton Circuit Court, 1901.]

Smith, Swing and Giffen, JJ.

STATE OF OHIO V. CINCINNATI TIN & JAPAN Co.

1. EJECTMENT—WILL NOT LIE WHERE POSSESSION CANNOT BE CLAIMED.

A suit in ejectment, cannot be maintained where there is an outstanding title (property had been leased for an unexpired term), for the reason that under such circumstances the right to immediate possession cannot be claimed.

2. ACT 86 O. L., 270, DOES NOT APPLY TO EXISTING CAUSES.

The act of April 12, 1887, 86 O. L., 270, to amend the act of March 28, 1888, providing a commission to establish boundaries and lines of canals, etc., of the state, by accurate survey, cannot under the rule that laws have prospective, not retroactive, operation be applied to causes of action existing at the time of the passage of the act.

3. IF RETROACTIVE, WOULD BE UNCONSTITUTIONAL.

If the act of April 12, 1887, 86 O. L., 270, above referred, should be held to apply to a cause of action existing at the time of its passage, the law would be in contravention of Sec. 28, Art. 2 of the constitution, providing that the general assembly shall not pass retroactive laws, and Sec. 19, Art. 1 of the bill of rights providing that private property shall ever be held inviolate.

HEARD ON ERROR.

J. M. Sheets, Attorney General, and Smith W. Bennett and Scott Bonham, of counsel, for the state.

Peck, Shaffer & Peck and Wm. Worthington, contra.

SWING, J.

This cause is in this court on error to the judgment of the court of common pleas. In that court the plaintiff in error brought an action in ejectment against the defendant in error, and on the trial a verdict and judgment was rendered for the defendant. A bill of exceptions was

Hamilton Circuit Court.

taken embracing all the evidence. A great many errors are assigned for the reversal of the judgment as to the admission and rejection of evidence, but in our opinion it is not necessary to consider these, for the reason that these do not become material under the view that we have as to the rights of the parties in this action.

The judgment should be affirmed.

First. The plaintiff was not entitled to recover because the undisputed evidence shows that the plaintiff was not entitled to the immediate possession of the property, there being an outstanding title in Brown and others, the state having leased to these persons the property in question for a term of ninety-nine years with the privilege of renewal. This was a valid lease, the state board of public works, under the act of 1866, having been granted this right.

Second. The only evidence offered by the state which supported the claim of the state was made competent under the act of the legislature, passed April 12, 1889, 86 O. L., 270. The cause of action existed at that time in favor of the state, and there being no provision in the act that it should apply to causes of action pending at the time under Sec. 79, Rev. Stat., the act could not apply to this cause of action. *C. H. & D. Ry. Co. v. Hedges*, 63 Ohio St., 339.

But aside from Sec. 79, under the well settled rule of construction that the law is prospective rather than retrospective, the law would not apply to this action. Judge Ranney, in *Kelley v. Kelso & Loomis*, 5 Ohio St., 198, 200, quotes with approval from 1 Denio, 180, the following:

"There is nothing in the statute under consideration which either in terms or by necessary implication makes it applicable to the case in hand, and we ought in decency to conclude that the legislature did not intend it should have the retrospective and unjust effect which is claimed for it by the plaintiff."

And even if it could be held to apply, we are of the opinion that it would be in contravention of Sec. 28, Art. 2 of the constitution which provides that "the general assembly shall have no power to pass retroactive laws."

It is very obvious that the effect of this law is to give to the state, as against the person claiming the property in question, a very important and material right which it did not possess at the time of the passage of the act, a right which in many cases, no doubt, owing to the difficulty of procuring evidence from a lapse of time, would be conclusive.

Third. We are of the opinion that the act in question, if held to apply to this cause of action, would be in contravention of Sec. 19, Art. 1 of the bill of rights, which says, "Private property shall ever be held inviolate." Judge Ranney, in the case above quoted, speaking of a retroactive law, says: "Although I think it would not be difficult to show that such an interference with private rights would be an infringement of the inviolability of private property."

CARRIERS—PASSENGERS.

[Lucas Circuit Court, January 21, 1901.]

Haynes, Parker and Hull, JJ.

JOHN WILT V. WABASH RAILROAD COMPANY.**1. RIGHT OF PASSENGER TO RECOVER FOR BEING EJECTED FROM TRAIN.**

A passenger who has purchased transportation between two places, and received a contract entitling him to a return ticket upon demand at the place of destination, which was refused when demanded, cannot recover, upon attempting to return without a ticket, for being ejected from the company's train. He can only recover for breach of contract to furnish the return ticket.

2. SAME—MEASURE OF DAMAGES.

In such case, unless special damages are alleged and proved, the measure of damages is the amount of money which the passenger actually loses and is compelled to expend on account of the failure of the railroad company to furnish him the return transportation upon his ticket as it had agreed to do.

3. SAME—PLEADING LOSS OF TIME.

In such case damages sustained on account of time lost cannot be recovered unless specially pleaded, and a general statement of plaintiff in his testimony as to value of time lost is insufficient.

James & Beverstock, for plaintiff in error.

Smith & Beckwith, for defendant in error.

HEARD ON ERROR.

HULL, J.

This action is brought by the plaintiff, John Wilt, to reverse the judgment of the court of common pleas. Wilt recovered a verdict for \$22.48 against the defendant, on which judgment was rendered, he having brought suit for \$10,000 against the railroad company. The action below was based upon failure of the railroad company to provide plaintiff with a return ticket, and upon the action of its conductor in putting him off a train. The plaintiff, in May, 1899, bought a ticket at North Baltimore, Ohio, for Joplin, Missouri, paying therefor the sum of \$22.35. This ticket and contract entitled him, at Chicago, Ill., to an exchange of tickets for Kansas City, by way of the Wabash railroad and over a connecting line from Kansas City to Joplin, said connecting line being the Kansas City, Pittsburg & Gulf Railroad, and further entitled him to a return ticket to Chicago and North Baltimore, Ohio, the contract requiring him to demand his return ticket at Joplin, Missouri, not less than three days nor more than twenty-one days from the date of purchase. He arrived at Chicago on May 17, and was given his transportation or the "going portion" of his ticket as it was called, to Joplin, Missouri, the understanding being that his return portion would be forwarded to the agent at Joplin, Mo., and furnish him there upon his presenting the "exchange coupon." After spending a few days at Joplin, more than three days having elapsed, as the contract required, and not more than twenty-one days, he presented himself to the company's agent at that point and asked for his return ticket, and he was told then that the tickets had not come, or, at least, they were not given to him. He waited a couple of days and then presented himself again and demanded

his tickets and was told again that the tickets had not come. He then demanded a return ticket, which was not furnished to him, and thereupon, with nothing but the portion of the ticket which he had left, the "going portion," and with the exchange coupon, he boarded a regular passenger train, at Joplin, Mo., and started for home. The conductor of the train asked him for his ticket and he explained the state of affairs to him and the conductor demanded that he pay his fare from Joplin to Kansas City. Wilt thereupon refused to pay and was put off the train, no more force being used, as it appears, than was necessary to effect this. This incident occurred at Gulfston, and there being no telegraph office there, he went to a station called Carl Junction, and there telegraphed for funds and purchased a ticket for Kansas City, paying therefor \$3.90. At Kansas City he bought a ticket for home, for which he gave \$12.50, and in addition to that he incurred expenses on account of this delay amounting to \$5.00, making in all \$21.40, expended. Defendant offered to confess judgment for \$50.00 and costs, before trial, and this was refused.

The case came on for trial before a court and jury in the common pleas and the judge of that court held that the plaintiff's cause of action was for breach of contract and that the measure of damages was the amount of money that he had actually lost and been compelled to expend on account of the failure of the railroad company to furnish him this return transportation upon his ticket, as it had agreed to do, and that he could not recover any damages for being put off the train, and holding further that he could not recover for any loss of time—plaintiff having claimed that he was detained three days—for the reason that that had not been properly pleaded in the petition, there being no allegation of special damages on account of his delay in Missouri; his time being still his own whether in Missouri or elsewhere, the court held that he was not entitled to recover anything on that account. The only testimony upon that point was Wilt's own testimony, in which he stated that the three days were worth \$100 to him; but there was no statement of any damage to his business and no statement as to what the real value of his time was. That testimony was finally ruled out and the court instructed the jury that his damages would be confined to the sums mentioned, which amounted to \$21.40 and that the jury could not go beyond that, and a verdict was returned for that amount, with interest, making \$22.48.

The real question in the case, and practically the only question, is as to the measure of damages. In our judgment, the ruling of the court of common pleas was correct. When the railroad company failed to deliver to Wilt his ticket, as they had agreed to do at Joplin, Mo., for his return passage, his cause of action arose, whatever the reason for such failure was, and it was a breach of the contract. The reason assigned by the railroad company for failure to deliver the ticket is, that the tickets had been stolen or lost in the mail on their way to Joplin. The contract having been broken, one of the natural and necessary results was that he was required and compelled to purchase a ticket for his return, and, if he had had the money in his pocket, he could have at once purchased another ticket and returned thereon. He was allowed, besides to the value of the ticket, additional expense which he incurred. Having no ticket, he had no right to get onto a regular passenger train or any train of the railroad company and demand passage. The conductor could not settle this dispute between him and the railroad

company or pass upon this question of breach of contract. According to the rules of the railroad company, a man who rode upon its trains either had to have a ticket or pay cash fare, and in default of either, get off, and that has been held by the Supreme Court of this state to be a reasonable rule. He could not, by getting on one train after another and being put off, thus create causes of action against the railroad company. The railroad company had broken its contract with him in failing to provide him with his return ticket, as they had agreed, and whatever loss ensued, on account of that breach of contract, he was entitled to recover, but he could not ride without a ticket or paying his fare. This position is fully sustained by the authorities in our own state and the law seems to be thoroughly established. We will refer to two or three cases that have been cited by counsel for defendant in error in their brief: In *Crawford v. Railroad Co.*, 26 Ohio St., 580, it was held in the syllabus:

"A railroad company has a right to prescribe reasonable rules for the government of its employees in the conduct of its business upon its trains, and passengers should conform to such rules.

"A rule requiring a conductor to eject from the train a passenger who refuses to produce a ticket or pay his fare on demand, is a reasonable one, and the purchaser of a non-transferable commutation ticket, who has lost it, and refuses, on account of such loss, to pay his fare upon a train, falls within the rule, and cannot maintain an action of tort against the company to recover damages for being ejected by the conductor for a non-compliance with it."

In another case, *Shelton v. Railway Co.*, 29 Ohio St., 214, it was held, in the syllabus, as follows:

"A railway company has the right to require passengers to pay fare, and a rule directing its conductors to remove from the cars those who refuse to comply with the requirement is reasonable."

"The fact that a ticket has been purchased by a passenger, which was afterward wrongfully taken up by a conductor of one of the defendant's trains, will not relieve the passenger from the duty of providing himself with a ticket, or paying fare on another train of the defendant in which he may be a passenger."

"In such case, the right of action of the passenger would be for the wrongful taking up of the ticket, and not for having been removed from a train by another conductor for refusing to pay fare."

And in the case of *Pennsylvania Company v. Hine*, 41 Ohio St., 276, a similar question was passed upon. The case went to the Supreme Court from this county. The plaintiff in that case bought a ticket from Washington to Toledo, which entitled him to transportation at any time up to midnight of March 10, 1881. He got on the train in Washington in time to have arrived in Toledo before his ticket expired; but the train upon which he rode from Washington to Pittsburg was late, through no fault of his, and reached Pittsburg too late for him to take the train which he should have taken out of Pittsburg. He got on for Toledo another train without a proper ticket and was put off. The Supreme Court held:

"The removal of H. from the train was a proper exercise by the conductor of the right of defendant, and for that removal it was not liable in damages. If the defendant was liable for breach of contract, because the train east of Pittsburg was so delayed that H. could not enter the train upon which his ticket gave him a right to ride, that lia-

bility did not confer upon H. a right to ride upon the train from which he was removed."

It is clear that the plaintiff, Wilt, had no cause of action against the railroad company except for breach of contract and was only entitled to receive the actual expense that he incurred on account of his ticket not being furnished to him; and was not entitled to any damages for being removed from the train, therefore the judgment of the court of common pleas will be affirmed.

MASTER AND SERVANT.

[Lucas Circuit Court, February 2, 1901.]

EDWARD FROLICH V. JOSEPH CRANKER.

Haynes, Parker and Hull, JJ.

1. GENERAL RULE AS TO LIABILITY OF LANDLORD.

A landlord or the owner of a building, of which his tenant has exclusive possession, is not liable to third persons for injuries resulting from defects in the property unless there is some contract or arrangement varying this liability.

2. FREIGHT ELEVATOR—USED BY EMPLOYEES—DUTY OF INSPECTION.

An elevator is in many respects a dangerous machine and though it may primarily be intended only as a freight elevator, yet if employees, in the course of employment are authorized or permitted to use the elevator as a means of transportation, the employer using or controlling the operation of the elevator is required to exercise care and caution, both in the construction and operation of the machine to render it as free from danger as careful foresight and precaution may reasonably dictate.

3. EMPLOYER'S FAILURE TO RESPECT—LIABILITY.

The lessee of a store room on the third floor of a building, having the use of an elevator, is liable as an employer for injuries sustained by an employee in the performance of his duties, by reason of defects in the cable of the elevator (which cable, in case at bar, broke, and the elevator dropped to the cellar, and caused the injuries complained of), where it appears that no inspection of such elevator was made by the employer, and that had a reasonable inspection been made the defect would have been discovered.

4. NO DEFENSE THAT HE DOES NOT HAVE FULL CONTROL.

An employer having leased the third floor of a building cannot avoid his duty and responsibility as such to his employees, and refuse to inspect or neglect to make examination of the condition of the machinery of an elevator of which he has the use, and which he requires or permits employees to use, by the claim that he did not lease the elevator and did not control that portion of the building where the propelling power was located.

5. EMPLOYEE DOES NOT ASSUME RISK, WHEN.

An employee, in the absence of knowledge of defects, who is required or permitted to use an elevator in a building leased by his employer, in conveying goods to the third floor, and who is permitted or directed to ride in such elevator, while in the performance of such duties, does not assume the risk of injury resulting from his employer's negligence in not performing his duty as an employer to furnish safe machinery and a safe place to work. And in the absence of directions to the contrary, the employees of such person would be justified in riding up and down in such elevator, in the performance of their duties, and would have a right to assume that it would be safe for such purposes.

6. QUESTIONS WITHIN PROVINCE OF THE JURY.

The question as to settlement of a claim for personal injuries having been submitted to the jury upon evidence of the defendant that the complainant accepted in settlement thereof the payment of full wages while he laid was up and his subsequent employment, the receipt of wages and employment being admitted by plaintiff, but denied as having been received in settlement of his claim, and employe having refused to sign a written agreement to that effect, a reviewing court will not disturb the verdict of the jury, finding against the employer.

HEARD ON ERROR.

King & Tracy, for plaintiff in error.

Southard & Southard, for defendant in error.

HULL, J.

This case comes here on petition in error to reverse the judgment of the court of common pleas. The action was brought to recover damages for personal injuries that were sustained by defendant in error, Joseph Cranker, about February 1, 1895, he being at that time in the employ of the plaintiff in error, the defendant below, and it being claimed that his injuries were due to and caused by the negligence of Mr. Frolich, the employer. The negligence complained of was, that Frolich was negligent in not furnishing a safe elevator, which it was claimed was being used by Cranker and other employes while performing their duties. It was claimed that the elevator cable was rusted and weak, and that it was not supplied with safety clutches, as it should have been. It appears from the record that upon the day and prior to the time of this accident Frolich was engaged in the paint, oil and glass business, at Toledo, and that Cranker had been in his employ, in Toledo, for some time prior to that, and on or about January 1, 1895, about a month before the accident, Frolich rented, from A. J. Smith & Co., for storage purposes, the third floor of the building known as 518 Monroe street, in Toledo, which was situated about opposite Frolich's place of business. The third floor only was rented, at a rental of \$10.00 per month, and Smith & Co. used and occupied the basement. There was a stairway running from the first floor to the third floor and there was also a freight elevator, but no passenger elevator, and, as appears from the pleadings as well as from the record in the case, by the contract between Frolich and Smith & Co., Frolich had access to and used along with the building, this elevator for his own purposes and those of his employes and for the purpose of taking goods up to the third floor. This elevator was operated by means of an engine which was situated in the basement, it being propelled by water and the machinery and that particular portion of the cable, which broke, were in the basement, that part of the building retained by Smith & Co. and not leased to Frolich. The cab or car of the elevator was operated and made to ascend and descend from the basement to the third floor by means of a wire cable which was suspended at the top of the hole or shaft, and one end of the cable was attached to the car and the other to a drum in the basement of the building, and the machinery was so adjusted that by pulling this cable in either direction it would raise or lower the car or cab as might be desired. It could be operated by a person standing on the floor, *i. e.*, when it was loaded with goods, it might be operated by a man standing on the floor and pulling the cable without going into the elevator, and it could

be operated by a man going into the elevator (and that appears to have been the usual way) and pulling the cable.

On the day of the accident, February 1, 1895, Cranker was employed about his duties as a drayman for Frolich, and he brought to this building a load of glass, twenty-four cases, and he and a man named Joseph Higgins put twelve cases of glass, weighing about seven hundred and fifty pounds, into the elevator for the purpose of taking them to the third floor. Cranker and Higgins both entered the car of the elevator, Higgins pulling the cables and operating them and Cranker taking his place somewhere near the middle or at one side of the car, with this glass piled up around and near him. When the elevator had reached nearly the third floor, the evidence is not quite clear just where it was, perhaps a little below the third floor, or perhaps it had gone a little above it, the cable broke in the basement and the car fell. Cranker was carried down with it to the floor of the cellar and fell and struck there with great force and violence, and the glass was thrown upon him and he was seriously injured. Higgins in some way jumped off, or fell off at the second floor and did not go down with the car, and on that account was not hurt. It was for the injuries so sustained that Cranker began his action, about two years after the injury occurred, and for which he was given a verdict and recovered judgment for \$500.00, which it is here sought to set aside and reverse.

The defendant pleads, first, that he settled with Cranker; accord and satisfaction; and, further, that Cranker's duties were only those of a drayman, that he had access to the stairs of the building, if it was necessary to go to the third floor, and that he had been instructed to use the stairs and not to use the elevator, and that his duties did not require him to use the elevator at the time of the accident or at any other time; and, further, the defendant pleads that he did not have any control over or direction of the engine or cables, or the elevator; that his rights were confined entirely to the third floor; that he was simply permitted to use the elevator by A. J. Smith & Co., from whom he leased the third floor, was simply given access to the elevator to convey his goods to that floor and that he, Frolich, had no authority or right to go into the basement for the purpose of examining the elevator machinery or make repairs thereon.

These, in brief, are the claims of the parties. The chief complaint of the plaintiff in error is, that under the undisputed facts in the case, the defendant below was not liable to Frolich as his employer, for the reason, that under the contract of lease by which he had possession of the third floor, he, Frolich, had no control over the elevator or machinery; that the elevator and machinery were operated by Smith & Co., and that the engine was in that part of the building over which Frolich had no control.

The chief defect complained of was, that the engine, in some way, had gotten out of repair, so that it leaked, and the water ran from the engine onto the cable in the cellar and thereby rusted it until it was gradually rotted and weakened, and, for that reason, on the day in question, broke. The testimony of witnesses tended to show that the dropping of water upon such a cable would, in from six months to a year, rust and weaken it in such a way that it would be liable to break with an ordinary load upon it.

It was further claimed by the plaintiff in error, that the defendant in error was himself guilty of contributory negligence in not seeing the

defective condition of the elevator, if it was out of repair, and that the danger which he was subjected to in using the elevator was one of the ordinary risks of his employment that he assumed when he engaged in this employment, if he used the elevator. And the plaintiff in error also relies upon the claim of settlement.

Taking up the last mentioned claim first: It appears from the record that the testimony upon that issue was conflicting; the defendant below, claiming that he paid to Cranker \$7.50 per week from the time he was injured until the following July, and then employed him for about two years, and that Cranker agreed to accept the \$7.50 per week while he was laid up, and his employment thereafter, in full settlement. This is denied by Cranker, who admits the receipt of the money and his subsequent employment, but he testifies positively that he refused to accept that as in full settlement and refused to sign any writing or agreement to that effect. That question was submitted to the jury and the jury found against the defendant below, and upon that state of the record, we would not feel warranted in disturbing the verdict upon that ground.

Coming to the other two claims of defendant: Was Frolich occupying the third floor and using this elevator under such terms and conditions that he was not liable to Cranker in case he was injured by reason of a defective condition of the elevator and was Cranker guilty of contributory negligence? A large number of authorities have been cited in the brief of counsel for plaintiff in error, a very full collection of authorities, bearing upon this question, and especially upon the liabilities of a landlord for defects in premises which have been leased and the liability of the tenant for defects in the premises, the liability to third parties. There is no dispute as to what the contract was between Frolich and Smith & Co.; it was made by Mr. Blair, who was the foreman of Frolich, and, under this contract Smith & Co. leased this third floor to Frolich to be used by him in his business and especially for storage, he paying a certain rental therefor, and as a part of the contract Frolich was to have access to and the use of that elevator. The allegation in the petition, and which is substantially admitted in the answer, is: "In said building there was located a freight elevator to which the said defendant and his employes had access at the first floor thereof for the purpose of conveying the goods and the merchandise of the defendant to the third floor of said building for the purpose of storing the same."

So far as the liability of landlord and tenant is concerned, the law seems to be well settled that a landlord or owner of property who is not in possession, but of which the tenant has exclusive possession, is not liable to third persons on account of defects in the property, but the liability for such defects rests upon the person in possession, unless there is some contract or arrangement that would vary this liability. And this has been settled and established by at least two or three decisions of the Supreme Court of this state.

It is urged by the plaintiff in error in this case, that Frolich was not in possession of this elevator or of this machinery, that he had no control over it, and that therefore he is not liable if there was any defect in the cable.

The testimony is somewhat conflicting as to the use that was made of the elevator and the instructions that had been given, if any, by Frolich in regard thereto, Frolich claiming that it was not his intention or purpose to have his employes ride on that elevator, that it was only intended for the conveying of goods and merchandise and that he had

notified his employes, including Cranker, not to ride in the elevator. On the other hand, Cranker and other employes testify that no such instructions had been given, and some of the witnesses testify, and Cranker among them, that Frolich himself frequently rode up and down in this elevator; also that Blair, who was the manager of the business, frequently rode up and down in the elevator and sometimes rode when there were goods in the elevator being conveyed to the third floor, and Cranker testifies that Blair directed him to ride in the elevator. The testimony of Cranker tends to show that the elevator was customarily used by the men in going up and down to and from the room on the third floor, and that the stairs were not used to any great extent for that purpose, although they were used sometimes, and we think that under the testimony in the record the jury were warranted in finding that Frolich, either by himself or his manager, Blair, authorized and permitted the use of this elevator by the men when conveying goods from the bottom to the third floor, and, if they believed the testimony of some of the witnesses, they would be authorized in finding that Blair directed them to ride in the elevator. In the absence of any direction to the contrary, there being no elevator but this one, it would be natural for the men to use it in riding up and down, and it would be natural for them to ride in the elevator with goods which were being conveyed. It seems that when a load of glass was taken up usually two men were employed in loading the glass into the elevator and in handling it at the top. The natural way of operating the elevator would be for the man to go inside of it rather than to operate it from the first floor, and, if there had been no instructions to the contrary, it does not appear to us that there would be any negligence in a man getting into the elevator and riding up with a load of glass; that this would be what a man would naturally do, and if he attempted to ascend by the stairs instead of the elevator, it would, cause delay and loss of time. Some of the men did go upon the stairs. But this whole question was submitted to the jury under this conflict of testimony, and certainly there was testimony enough offered by the plaintiff below to warrant the jury in finding that Frolich authorized and permitted the use of this elevator for that purpose, and that his manager, Blair, directed the men to use and operate it in performing these duties; and it may be presumed that they did so find.

And, so finding, were they warranted in returning a verdict against the defendant? The evidence shows that this cable broke not a great ways from the drum in the basement; that it was rusted; that the dripping of the water upon it had probably caused it to rust and break. There was a cable brought into the court room while the case was being tried below, but it turned out not to be the cable, or, at least, was not sufficiently identified as being the one, and all evidence in regard to that cable was excluded from the jury. Frolich testifies that he never examined this cable; that he made no inspection of it, and Blair, the manager, testifies that he did not. Frolich rented this building about thirty days before the accident. The jury have found, or were warranted in finding that his men were directed and authorized to use this elevator in doing their work.

Plaintiff in error, among other cases, cites us to *Sinton v. Butler*, 40 Ohio St., 158, where a landlord who was entirely out of possession was held not liable for injuries caused by or received in an elevator accident. Mr. Sinton was the owner of the building. There were three

buildings and but one elevator engine, and he leased the buildings under a contract stipulating that the lessees should have possession of the premises and keep the same in good order and condition, but this contract was afterwards so modified that Sinton was to keep the elevator in repair, pay for such repairs and furnish an engineer to run it. In the syllabus the court say:

"After January, 1874, the only change in conduct was that S. did not call upon the lessees for reimbursement for such repairs. On August 11, 1874, the rope broke. The elevator, with B., an employe of the lessees upon it, fell, and B. was injured. S. had not been notified that any repairs were needed. The engineer as he oiled the machinery had opportunity to see it. The elevator was exclusively operated by the lessees and their employes.

"Held: (1.) S. was not at the time of the accident in possession and in control of the elevator nor was he conducting or operating it."

It is not necessary to read any more of the syllabus. The court say, on page 166:

"Prior to 1874, the true meaning of the lease was a renting to the lessees of a building, including an elevator, and also the services of an engineer selected and paid by Sinton. The lessees had entire possession, with the entire duty of using care and diligence to keep the entire leased premises in good order."

The court, under this contract, placed the entire duty of keeping the elevator on these premises in repair upon the lessees, upon the ground that Sinton was not in possession of the building and had no right to enter the building at the time, and that therefore Sinton was not liable for the injury to this employe of the lessees. There was in that case no contractual duty resting upon Mr. Sinton as between him and the employe who was injured; the man who was injured was not in the the employ of Sinton. In this case, the man who was injured was in the employ of Mr. Frolich. Between Cranker and Frolich, as master and servant, or employer and employe, certain rights and obligations existed, one of which was that Frolich was bound under the law to use reasonable care in furnishing Cranker a reasonably safe place in which to work and reasonably safe appliances and machinery with which to do his work. It seems to us that this elevator, under the testimony here, might be regarded as and was one of the appliances furnished to Frolich's employes with which to do their work, and it was one of the places where they did work, and where, according to the testimony of the plaintiff, they were required to work. The principle stated in regard to the duty resting upon the employer, is well established and it is not necessary to cite authorities. Two sections in Shearman & Redfield on Negligence, 194 and 194a, state the law generally:

"Section 194. The master personally owes to his servants the duty of using ordinary care and diligence to provide for their use reasonably safe instrumentalities of service. Among those are a reasonably safe place in which to do their work or to stay while waiting orders, reasonably safe ways of entrance and departure, an adequate supply of sound and safe materials, implements and accommodations, with such other appliances as may reasonably be required to insure their safety while at their work or passing over his premises to or from work."

It is further urged here that this was one of the assumed risks, one of the ordinary risks, of Cranker's occupation, which he assumed in doing this work in the employ of Mr. Frolich. The case cited by counsel is Van Dusen Gas and Gasoline Engine Co. v. Schelics, 61 Ohio St.

298, where the Supreme Court seem to have laid down the rule upon that question. They say, in the first paragraph of the syllabus:

"A servant assumes only such risks incident to his employment as will happen in the ordinarily careful management of the business of the master; such as arise from the fault of the master are not assumed, and the servant may recover for injuries therefrom, unless his own fault contributed to the accident."

On page 307, at the beginning of the opinion, Judge Minshall says:

"It is well settled in the law governing the relation of master and servant, that the latter on entering the employment of the master assumes all risks incident to the employment; in other words, as is sometimes said, the master is not an insurer of the safety of his servant. But this, however, is meant no more than that, the servant assumes all risks incident to the employment, that may happen in the ordinarily careful conduct of the business on the part of the master—injuries that result from the culpable negligence of the master are not assumed, and he may recover therefor, unless his own fault contributed to the accident. It therefore follows that the servant can have no relief against his master for injuries resulting from known and obvious dangers, avoidable by ordinary care, however culpable the master may be in the matter. All such injuries, together with such as happen where there is no fault on the part of the master, are, in the ordinary language of the law, assumed by the servant."

Cranker did not assume the risk of injury resulting from Frolich's negligence in performing his duty, as an employer, to furnish safe machinery and a safe place to work.

This duty being imposed upon Frolich, were the jury warranted in finding that he failed in the performance of it? Mr. Frolich admits that he did not examine or inspect this cable. His defense here rests upon the ground that the elevator was not in his possession or under his control. It seems to us that an employer cannot avoid the duty of furnishing a safe place and safe machinery to his employes by permitting or requiring them to use machinery or appliance that are or may be to some extent in the possession of or under the control of others. The employe may have no knowledge of the contractual relations that exist between the employer and the persons from whom he leases the premises. In this case all that Cranker knew was that his employer was using the third floor, that he had the use of this elevator, that he was using it and that Cranker, according to his testimony, was required to use it in the performance of his duty in conveying goods to the third floor and was ordered by Blair, the foreman, to ride on the elevator when performing this duty, and Mr. Frolich could not avoid this duty and responsibility by the claim that he did not lease the elevator; he could not close his eyes to the condition of the elevator or refuse to inspect it, or neglect to inspect it, or to make any examination of it, for the reason that he only leased the third floor and simply had the use of the elevator. It was his duty, before requiring or permitting the men to use this elevator, to inspect and examine the machinery, to ascertain by a personal examination, or through agents, what the condition of the machinery was, and if he either knew, or by the exercise of ordinary care might have known, of the defective condition of the elevator, he would be liable for injuries resulting therefrom. We do not think that ordinary care required Cranker, the employe, to go into this basement and inspect and examine this cable. In the absence of any knowledge of its defective

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condition, he might rely upon his employer performing the duty that the law imposed upon him. We may conclude from the testimony as to the length of time that it would take this cable to become so rotten that it would break, that at the time Frolich went into possession of these premises the cable was in a defective condition, he having only been there about a month, and in such a defective condition that if an inspection and examination of it had been made, this condition would have been readily discovered.

The case of *Wise v. Ackerman*, 86 Md., 375, is in point. The court there say, in the second paragraph of the syllabus:

"But an elevator is in many respects a dangerous machine, and though it may be primarily intended only as a freight elevator, yet, if the employes, in the course of their employment, are authorized or directed to use the elevator as a means of transportation, the employer, controlling the operation of the elevator, is required to exercise great care and caution, both in the construction and operation of the machine, so as to render it as free from danger as careful foresight and precaution may reasonably dictate. Nothing short of this will excuse the defendant unless it appear that the plaintiff himself, or the person under whom the plaintiff is allowed to claim, was guilty of direct contributory negligence to the production of the disaster."

We are of the opinion that the judgment of the court of common pleas in this case is sustained by the evidence and that it is not contrary to law; the record shows negligence on the part of Frolich in failing to inspect or examine in any manner this machinery before it was put to this use, and negligence on his part in not supplying his employes with safe machinery and with a safe place to work, and the record does not show any negligence on the part of Cranker contributing to his injury.

Finding no error in the record, the judgment of the court of common pleas is affirmed.

NEGLIGENCE—EVIDENCE.

[Cuyahoga Circuit Court, February 11, 1901.]

SHAILER AND SCHNIGLAU CO. V. HUGH D. CORCORAN.

Caldwell, Marvin and Hale, JJ.

1. MOTION FOR NEW TRIAL—AMENDMENT PROPERLY REFUSED.

An application for leave to file an amendment to a motion for new trial, which relates to matters occurring after the rendition of the verdict and which were not claimed to have influenced counsel in arguing the motion for new trial (certain alleged threats made by plaintiff to counsel for defendant when about to argue the motion for new trial), was properly overruled.

2. NEGLIGENCE—EVIDENCE INCOMPETENT AS BASIS FOR RECOVERY.

Where in an action for personal injuries by a bricklayer who was injured by the falling of earth from the face of a tunnel in which he was at work, the negligence charged in the petition had reference solely to the material used and the manner of supporting the roof and sides of the tunnel, and the cutting off of the air pressure, no allegation of negligence relating to the condition of the face of the tunnel at the time of the accident being made, evidence descriptive of the face of the tunnel and feasibility of guarding against slides, is not competent for the purpose of laying a foundation for a recovery, although it might have been competent to describe the place where plaintiff was working; and if admitted it should have been limited to such purpose.

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3. LIBERAL RULE AS TO ADMISSION OF EVIDENCE UNDER PLEADING.

Under the liberal interpretation which must be given to pleadings under the code, there was no error in overruling an objection to the admission of evidence by the plaintiff below for the reason that the petition did not state facts sufficient to constitute a cause of action, there being allegations of negligence for failing to support the roof of the tunnel in question so as to prevent the earth falling, of failing to provide a safe place to work, of not using planks of sufficient strength, and not using a sufficient number of planks, and not sufficient heads or braces, in strength or numbers, to support the roof, and without notice or warning cutting off the supply of compressed air which assisted in supporting such roof.

4. CONDITIONS UNDER WHICH NO LIABILITY EXISTS.

A person employed in building a tunnel under a lake cannot recover for injuries resulting from the sliding of earth from the face of the tunnel, where it does not appear to have been caused by the negligence of which he complains, *i. e.*, non-support of the roof and withdrawal of air pressure, and it is not alleged and does not appear that there was negligence in guarding the face of the tunnel, but that the injuries were the result of an accident for which neither employer nor employee, each knowing the condition of the face of the tunnel and dangers incident to the work, was responsible.

HEARD ON ERROR.

Bentley & Vickery, for plaintiff in error.

McKisson & Dawley, for defendant in error.

This case was tried to a jury and resulted in a verdict for the plaintiff, Corcoran, for the sum of \$9,500. A motion for a new trial was made and when it was about to be argued by counsel, the defendant company asked leave to file an amendment or supplement thereto, setting up certain alleged threats made by the plaintiff, Corcoran, against the defendant company to defendant's counsel when about to argue the motion for a new trial, that "something would happen out there which would cost the company more than five times the amount of the verdict unless they paid that up etc." The application to amend was denied by the court of common pleas as relating to matters occurring after the rendition of the verdict and which were not claimed to have influenced counsel in arguing the motion for a new trial. The facts involved in the issues and the principal questions presented to the circuit court are briefly stated in the opinion.

HALE, J.

First. The court refused leave to the plaintiff in error to amend his motion for a new trial.

On the facts shown, we hold that this was not error.

Second. At the commencement of the trial the plaintiff in error objected to the introduction of any evidence by the defendant in error for the reason that the petition did not state facts sufficient to constitute a cause of action; which objection was overruled by the court, and an exception noted.

With some hesitation under the liberal interpretation which must be given to the pleadings under the code, we find that in this ruling, there was no error.

Third. It is insisted that the verdict of the jury was not supported by sufficient evidence and for that reason should have been set aside on motion for new trial.

The plaintiff in error was constructing under a contract a portion of the tunnel which the city was extending under the lake, to be used in supplying the city with water. The defendant was employed on that

work as a bricklayer and was on February 23, 1898, seriously injured by a large quantity of earth falling upon him from the face of the tunnel or from the face and roof thereof.

The situation is well defined in the petition, and need not be repeated here.

It was a dangerous, disagreeable and uncomfortable place to work. It was at all times a more or less hazardous employment.

The negligence charged in the petition is as follows :

"The said plaintiff says that his injuries were caused solely through the negligence of the defendant and without any fault on his part. That the defendant negligently failed to properly support said roof so as to prevent its falling and so as to prevent said earth from falling on this plaintiff. That said defendant negligently failed to provide this plaintiff with a safe place to work as it was its duty to do. That said defendant, in supporting said roof, negligently used planks which were not of sufficient strength, and did not use a sufficient number of planks. That the heads or braces used to support said roof were not sufficient in number or strength. That said defendant, without giving this plaintiff sufficient notice or warning, negligently withdrew and cut off the supply of compressed air which assisted in supporting said roof and strengthened the support of the same. That said defendant knew or by the exercise of proper care ought to have known of the dangerous condition of said roof, and knew, or by the exercise of ordinary care ought to have known, that the same was not properly or securely constructed."

The petition contains a further description of the tunnel and the manner in which the work was done, but no other charge of negligence.

The tunnel was circular in form. An excavation of sufficient size was first made for a space of ten to fifteen feet, leaving a face at the end of the excavation. The roof and sides of the tunnel after the dirt was removed, were supported by timber and planks until the brick walls were laid.

It will be noticed that the allegations of negligence have reference solely to the material used, and the manner of supporting the roof and sides of the tunnel; and this, with the further allegations that the air pressure was removed, constitutes the negligence complained of.

There is no allegation that there was the slightest fault on the part of the company in leaving the face or end of the tunnel as it was at the time the plaintiff was injured. Moreover, the condition of the face of the tunnel on that morning was exactly as the face had always been while bricks were being laid in the excavated section; and of this the plaintiff was fully cognizant.

The defendant in error was at work very near the face of the tunnel, from which the testimony very clearly shows that the earth fell which struck and injured him. The manner in which the roof was supported had no connection with the injury. From some cause not explained, the earth slid from this face, the conditions of which were equally well known both to the employer and employe.

The break may have extended slightly into the roof as it was, before the accident, but of that there is some doubt. Certainly, it is very clear that the non-support of the roof was not the proximate cause of the injury. It is equally clear that there was no withdrawal of the air pressure, which caused or contributed to this injury. The evidence falls far short of establishing any negligence in this regard on the part of the plaintiff in error.

It also seems very clear to us, that the negligence with which the plaintiff is charged, if it in fact existed, had no agency in causing the injury to the defendant in error.

It follows from what has been said, that the evidence permitted to be introduced descriptive of the face of the tunnel and the feasibility of guarding against slides, was not competent for the purpose of laying a foundation for recovery; no charge in that regard having been made in the petition. Possibly it was competent as affording an accurate description of the place where the defendant was working. But, without more critically examining that testimony and the ruling as to its introduction, we hold that if competent at all, its effect should have been limited to the purposes above indicated.

We recognize the fact that the employment in which the defendant in error was engaged at the time of his injury was at best attended with great peril, and that the employer should be held to a strict performance of his duty towards the employee. If, however, we are right in our conclusion as to the cause of this injury, neither of these parties was seriously at fault. The injury was the result of an accident for which neither was responsible.

A motion for a new trial should have been allowed for the reason that the verdict was not sustained by the evidence; and, in overruling such motion, there was error, and for that reason the judgment of the court of common pleas is reversed and the cause remanded for further proceedings.

ASSAULT—RAPE.

[Franklin Circuit Court, September Term, 1900.]

Summers, Wilson and Sullivan, JJ.

JOHN F. PATTERSON V. STATE OF OHIO.

1. PROOF REQUIRED TO ESTABLISH ASSAULT TO COMMIT RAPE.

To establish the offense of assault with intent to commit rape, the evidence must show beyond a reasonable doubt that the assault was made with intent to commit rape, against the will of the party assaulted, and to use whatever degree of force might be necessary to overcome any resistance she might make.

2. EVIDENCE OF CONDUCT AND ACTS OF ACCUSED.

The intent to use whatever force might be necessary to overcome resistance, may be shown by the conduct and acts of the accused in his efforts to attain his purpose; whatever these may have been at the time of the occurrence, or immediately thereafter, are proper to be considered to determine whether such intent existed in his mind at the time of perpetration of the offense charged was attempted.

HEARD ON ERROR.

C. D. Saviers, for plaintiff in error.

SULLIVAN, J.

The plaintiff in error, at the September term, 1900, of the court of common pleas, was found guilty of an assault with intent to commit rape upon the person of Eva Pike.

Motion for a new trial was made, which was overruled, and plaintiff in error was sentenced to the penitentiary for the period of five years.

Execution of sentence was suspended to enable the accused to prosecute error to this court from the judgment of the court below against him.

One of the several grounds of the motion for a new trial was that the verdict was manifestly against the weight of the evidence, which is assigned as one of the several grounds of error set forth in plaintiff's petition in error, and the only one insisted upon.

To establish this offense against the party accused, the evidence must show beyond a reasonable doubt that the assault was made with intent to commit rape against the will of the party assaulted, and to use whatever degree of force might be necessary to overcome any resistance she might make. To attempt to carnally know a female of the age of the party assailed in this case, without such intent, would not be an offense under the statute under which the accused was convicted. If the act was committed with her consent, then he would not be guilty of the offense charged against him. *Smith v. State*, 12 Ohio St., 466; *O'Mara v. State*, 17 Ohio St., 515.

The question then is, does the evidence, as presented in the bill of exceptions, show that the accused intended to ravish the assailed, against her will, and in his attempt, to use whatever force that might be necessary to overcome any resistance she might make to accomplish his purpose. This may be shown, as is necessary in nearly all cases of this character, by the conduct and acts of the accused in his efforts to attain his purpose; whatever these may have been at the time of the occurrence, or immediately thereafter, are proper to be considered to determine whether such intent existed in his mind at the time the perpetration of the offense charged was attempted. The testimony of the little girl is substantially this: That on the afternoon of the day that the offense is charged to have been committed, she was sitting on the front door step of the house where she lived, and the accused came and took her back into a shed just off and abutting the alley, not saying to her what he wanted with her; said he would give her five cents, which he did not do. After entering the shed he took down her panties and told her to kneel down, which injunction she did not obey. That he had taken down her drawers about two minutes before directing her to kneel down, and just as he directed her to kneel down two men came. Before this he had taken something out of his pants; outside of taking down her clothing, he at no time laid his hands upon her in any manner, nor did he attempt to touch her with what he took out of his trousers; said she didn't kneel down, because she did not want to. This constitutes all the evidence as to what he did or said to the girl, except the evidence of the witnesses who saw him taking her down the alley into the shed. When he was taking down her drawers, she does not say she resisted him, nor when she refused to kneel down, did he attempt to compel her to do so. Aside from taking down her drawers and asking her to kneel down, he made no further attempts to assault her. It is possible that she may have been too frightened to have offered resistance, but she was not interrogated by the state upon this point, nor is there any other evidence, tending to show that she was, except perhaps that of William Woodward, who followed them down to the shed, who says "she was crying," whilst the other witness, Boerer, who followed Woodward down, says "that she looked as though she had been crying." Aside from these witnesses, between whom there is a difference as to whether she had been crying or not, no evidence was offered to show the

mental condition of the girl immediately after the occurrence. She was not asked, when on the stand, whether she was frightened or whether she had cried whilst the accused was doing the things she states he did do, nor whether she resisted the taking down her drawers. Whilst it is possible that a girl of her age would be frightened at such liberties with her person, yet this, in the absence of evidence, in a criminal case at least, cannot be assumed. All these acts could have been committed by the accused without any intent upon his part to commit a rape upon the girl. No force at all was attempted as shown by her evidence, unless the taking down of her drawers could be construed as constituting force. She did not resist this. If she did not do so because she was rendered incapable of doing it by fright, or from some other cause over which she had no control, such fact should appear from the evidence. However harsh the rule may seem in a case so repulsive in its features as this one is, yet the intent to use the degree of force to constitute the offense cannot be presumed against the accused, it being one of the elements constituting the crime charged against him. There are several adjudicated cases in which the evidence was of much greater weight than the evidence of the girl in this, when the courts of last resort, recognized as the highest authority, held the evidence to be insufficient to sustain the charge. Notably among these is the *Commonwealth v. Orlando Merrill*, 14 Gray (80 Mass.), 515; *State v. Kendall*, 78 Ia., 225; *State v. Canada*, 68 Ia., 397.

We do not think the evidence of Boerer and Woodward is of any additional weight to that of the girl, upon the question of force.

However reluctant we are to disturb the verdict in this case, yet personal disinclination cannot be indulged at the sacrifice of duty. An outrage so repulsive, naturally inflames public sentiment against the perpetrator, and though it lacks the essential elements (or rather the evidence of it) of the offense charged, yet we think it is easy to be perceived how the jury could lose sight entirely of the lack of such element and convict from what they would regard an honest view of the case.

The judgment will be reversed and cause remanded for the reason that the verdict is so manifestly against the weight of the evidence as indicates bias and prejudice.

Let exception be noted. We find no other errors apparent upon the record prejudicial to plaintiff in error.

WILLS—EXECUTORS—TRUSTEES.

[Lucas Circuit Court, January 21, 1901.]

Haynes, Parker and Hull, JJ.

IN THE MATTER OF THE ESTATE OF MABEL CRAWFORD, DECEASED.**1. GENERAL RULE AS TO EXECUTORS AND SPECIAL TRUSTEES.**

To constitute the person named in a will as executor a special trustee, separate and apart from his office of executor, it is not enough that the powers granted to him, or the duties imposed upon him in relation to a particular fund, be such as are usual in the course of ordinary administration; it must also appear that the intention was to withdraw the particular trust from the management and control of the executor as such, and to create a separate office for its management; and this must appear in the face of the presumption that every provision made in the will for the management of the estate, and every part thereof before it passes into the hands of the beneficiary, was intended as a direction to the executor in his official capacity.

2. GENERAL RULE AS TO ACTING IN BOTH CAPACITIES.

Where an executor is to be held as acting in both capacities, as executor and as trustee, it must plainly appear that such was the intention of the testator. The executorship itself is a trust, and every provision in the will regarding the management of the assets, before they pass out of the executor's hands into those of the beneficiaries, will *prima facie* be held as coming within that trust; and the contrary intention must be made plainly to appear. As a general rule, the duties of the executor as such, are co-extensive with the provisions of the will; and it is only in cases of unmistakable intention, or of inherent necessity, that a separate character will be assigned to him.

3. RULE WHERE IT IS DIFFICULT TO DETERMINE CHARACTER OF THE TRUST.

Where the provisions of a will are so close to the border line that separates the office of trustee from that of the executor that it is difficult to determine to which class the office belongs, the general rule, above stated, resolves the question in favor of the view that the duty, or trust, devolves upon the executor or the trustee as executor, by virtue of his office as executor.

4. GENERAL RULE SUBJECT TO QUALIFICATIONS.

The general rule that where there is a devise or bequest to an executor in trust, the executor receives the property or fund at once as trustee, and the same never becomes assets, is subject to the qualifications, first, that if needed as assets the title of executor is superior to that of trustee, so that the former may take, use and account for the same as assets; and, second, if the property is not reduced to the form or condition in which it is to be distributed as trust property, the duty of thus transforming it may devolve upon and be exercised by the executor as such; and this will be the case unless the will distinctly provides that this duty shall devolve upon the trustee as such. In such cases, the same person being both executor and trustee, he will not take in the latter capacity until he has fully discharged his duties in the former capacity, and not until the fund or property has been distinctly set apart as trust property.

5. RULES APPLIED IN FAVOR OF EXECUTORSHIP.

Under a will, devising an estate consisting of both real and personal property, which, after directing payment of debts and funeral expenses, makes bequests of personal effects to relatives and friends, and certain sums of money to executors in trust, and then devises, "all my real and personal property of every kind and nature, save as specifically devised, to said above named executors, in trust for the execution of my will," with full power of sale, etc., in which case the property could not be at once applied to the purposes named in the will, the title which such executors take devolves upon them as executors, and their relations to the estate as trustees do not arise until the estate has been reduced to money and everything has been brought to a pass where nothing remains but to distribute and invest the funds as provided by the will.

6. LETTERS OF ADMINISTRATION NECESSARY IN SUCH CASES.

Under the will in question the executors may proceed to sell the property, real and personal, without any special order or license of any court other than that contained in ordinary letters of administration, but the titles and powers being vested by virtue of executorship, they must take out letters of administration.

7. LETTERS WHEN ADMINISTRATION NOT NECESSARY—NOT VOID.

Though it may not be strictly necessary and though its propriety or expediency may be doubtful or open to criticism, yet if authorized, the action of the court in granting letters of administration cannot be regarded as void or erroneous.

8. FULL CREDIT TO JUDGMENTS IN OTHER STATES.

Under Sec. 1, Art. 4, of the constitution of the United States, requiring that full faith and credit be given in each state to the public acts and judicial proceedings of every other state, the courts of Ohio are bound to recognize the judgments of the courts of Michigan upon the accounts of executors where such courts have jurisdiction in the premises, as conclusive upon matters involved therein, and as foreclosing any collateral inquiry into the same matters.

9. EXECUTORS REPORTS OF DOMICILLARY AND ANCILLARY ADMINISTRATION.

Where an executor has accounted, as he may be required to do, for so much of the estate as was located in another state, under ancillary administration there, the requirements of a general accounting in the court of domiciliary or principal administration, is fully met by reporting to such court the fact of the accounting in the court of such other state, together with the judgment of the proper court of such state approving the accounts, and by accounting to the domiciliary court for the balance due to the estate according to the judgment of the court of the state of ancillary jurisdiction.

10. STATEMENT UPON ERRONEOUS ASSUMPTION OF LAW.

A statement made by an executor in an application for letters of ancillary administration in Michigan, that an appeal had been taken from the order of probate in Ohio, which resulted in a delay in the appointment of himself and his colleague, based upon an erroneous assumption as to the effect of the laws of Ohio upon an appeal from such an order, where it does not appear to have been made knowingly or wilfully, does not constitute a false statement or one which will render the appointment invalid.

11. ERROR—EXCEPTIONS BY ONE PARTY AVAILABLE BY ANOTHER.

Exceptions by one party to the disallowance of exceptions to the accounts of an administrator in the probate and common pleas courts, are available in behalf of other parties who, in common pleas court, are allowed to come in and are recognized as excepting to such accounts. Such parties have, therefore, a right to prosecute error through such exceptions.

12. ERROR—EXCEPTIONS TO EXECUTORS ACCOUNTS—IN REM.

Proceedings in error upon disallowance of exceptions to accounts of executors, are not, as a rule, *in personam*, but *in rem*, and, if regular, are binding upon all persons equally, whether they are personally present to take part in the controversy, or hold themselves aloof; and this rule applies to judgments in an ancillary administration in another state as well as to judgments in the domiciliary administration in Ohio.

13. INVALID OBJECTION TO ALLOWING SUCH PROCEEDINGS.

Under the foregoing rules, an objection to allowing persons who first became parties to a proceeding in error to the disallowance of exceptions to the accounts of an administrator in the court of common pleas to prosecute error in the circuit court upon exceptions by other parties in the lower courts, on the ground that the original parties were parties to a contest of such accounts in an ancillary administration in another state, and that the parties who came in subsequently were not, and that judgments which would be *res judicata* as to original parties would not be so as to the others, is not tenable or valid; and particularly where the objections urged are upon the ground that the courts were without jurisdiction in the ancillary administration, which, if true, would render the judgment void as to all parties.

Estate of Mabel Crawford.

HEARD ON ERROR.

Rhoades & Rhoades and *Geo. W. Radford*, for plaintiffs in error.

Charles G. Wilson, Esq., and *E. F. Bacon*, for defendant in error.

PARKER, J.

Error to the judgment of the court of common pleas disallowing certain exceptions to the account of William R. Stafford, as executor.

In this litigation two cases have been consolidated, viz., Nos. 1412 and 1426. In the early part of 1891, Mabel Crawford died, leaving a will by which she made numerous bequests and by which she appointed Clay Crawford, of Toledo, Ohio, and William R. Stafford, of Port Hope, Michigan, executors.

On May 22, 1891, this will was admitted to probate in Lucas county, Ohio, and on the same day, on the application of Clay Crawford, letters testamentary were issued to said Crawford and Stafford by the probate court of Lucas county. No bond was required or given.

On June 19, 1891, a petition was filed in the court of common pleas of said Lucas county, attacking the validity of this will. This contest lasted until the January term, 1893, of that court when the validity of said will was finally established.

The great bulk of this estate was situated in Huron county, Michigan, and consisted mostly of real estate. After this will contest was commenced, and on July 8, 1891, William R. Stafford was duly appointed special administrator of this estate by the probate court of Huron county, Michigan, and qualified and acted as such special administrator until after the validity of said will was established in Lucas county, Ohio.

The statutes of Michigan provide for special administration in certain cases. One of the questions here is, whether this was a case coming within the purview of the Michigan statutes on the subject.

After the validity of said will was established, it was allowed, filed and recorded in the probate court of Huron county, Michigan, and on May 17, 1893, letters of administration were issued to said William R. Stafford by the probate court of Huron county. He had already been granted special letters of administration, but at this time he was made administrator with the will annexed, a general administrator. These letters were in the usual form, and among other things, required said Stafford to render a just and true account of his administration to said court, etc. He afterwards gave a bond in the sum of \$5,000.

On December 27, 1892, said Stafford filed a partial account of his doings as said special administrator in the probate court of Huron county, Michigan.

On August 4, 1896, said Stafford filed in the probate court of Huron county, Michigan, his final account as special administrator of said estate.

On August 4, 1896, said Stafford filed his first account as executor, or administrator with the will annexed, of said estate in the probate court of Huron county.

To all of these accounts exceptions were filed by Clay Crawford as executor, which exceptions stated that said Crawford represented himself and also the Protestant's Orphan's Home of Toledo, Ohio. These exceptions were heard in the probate court of Huron county, Michigan, and partially sustained. Both Crawford and Stafford appealed the whole

Lucas Circuit Court.

matter to the circuit court for said county of Huron. These accounts and exceptions were heard by said circuit court at its March term, 1897, and said circuit court overruled said exceptions and fully approved and sustained said accounts.

Said Crawford took the case to the Supreme Court of Michigan, which court, at its October term, 1898, affirmed the findings and judgment of the circuit court of Huron county, but the report of the case, in 118 Mich., p. —, shows that this was not on the merits, but because of certain omissions from the record, that is, certain defect in the steps taken by the appellant, whereby the case was not properly before the court on the merits. Mr. Stafford had very little to do with the estate situate in Ohio, Mr. Crawford attending to that branch of the administration.

On October 28, 1896, the probate court of Lucas county, Ohio, notified said Stafford, executor, to file his account as such executor, in that court.

On November 10, 1896, in pursuance of said notice, Stafford filed in the probate court of said Lucas county, a report of the proceedings of the probate court of Huron county, Michigan, whereby he was appointed special administrator of said estate, and also of the issuing of letters testamentary to him by said probate court of Huron county after the allowance, filing and recording of said will of said Huron county; and also reported therewith a full and complete copy of the several accounts that he had filed in said probate court of Huron county; and also therein stated that exceptions had been filed to said accounts and that the matter was then pending and undisposed of in the circuit court for said Huron county, Michigan.

It thus appearing to the probate court of Lucas county that these accounts of said Crawford were pending and unsettled in the courts of Michigan, it was ordered by that court, on January 12, 1897, that the hearing as to the same be continued until the further order of the court, which seems to have been intended to mean until the Michigan courts had passed upon said accounts.

After these accounts had been fully sustained by the courts of Michigan, the Protestant's Orphan's Home of Toledo, Ohio, a legatee under the will of said Mabel Crawford, filed its exceptions in the probate court of Lucas county, Ohio, to each and all the items contained in the copies of the accounts filed in Huron county, Michigan, as reported for the information of the probate court of Lucas county, Ohio, by said Stafford as above set forth.

Upon the hearing in the probate court of Lucas county, Ohio, that court held that said Stafford as executor under the Ohio appointment, was liable to account to it for the sum of \$29,835.51, being in full of the proceeds of the Michigan property, real and personal, without deduction of any credits, that had come into the hands of Stafford and had been accounted for by him as special administrator and as administrator with the will annexed, to the courts of Michigan.

This property had never been in Lucas county, or in the state of Ohio, and, according to the accounts of Stafford, approved by the courts of Michigan, the proceeds thereof had all been expended and paid out by said Stafford in the administration of his trust in Michigan. On the appeal of Stafford to the court of common pleas of Lucas county, Ohio, that court disallowed the exceptions of plaintiffs in error to so much of the report as applied to the assets of the Michigan property, and to so

much as had been approved by the courts of Michigan. On account of this action of the court of common pleas this proceeding in error is prosecuted here.

By the action of the court of common pleas of Lucas county, the American Missionary Association of New York City, New York, the American Board of Commissioners for Foreign Missions, of Boston, Massachusetts, and the Washington Street Congregational Church of Toledo, Ohio, were allowed to come in and be made parties and recognized as excepting to the accounts through the Protestant's Orphan's Home of Toledo, Ohio; so that proceedings in error are prosecuted here, not only on behalf of the Protestant's Orphan's Home of Toledo, Ohio, but on behalf of the other institutions named, all joining as plaintiffs in error.

The question whether the plaintiffs in error, through the Protestant's Orphan's Home, have a right to prosecute error here, though exceptions in the probate court and in the court of common pleas, were in the name of the Protestant's Orphan's Home only, has already been passed upon by this court in favor of said plaintiffs in error. On the hearing of that matter it was urged that this order might operate to the disadvantage of the defendant in error, because the Protestant's Orphan's Home, according to the record, appeared and contested the accounts in the Michigan courts, while the other plaintiffs in error did not, so that a judgment of the Michigan courts, it was thought, might be interposed under the plea of *res judicata* to the objections urged here by the Protestant's Orphan's Home, while the same may not be true as to the other plaintiffs in error. I will remark upon that, in addition to what was said in passing upon that question, that we do not regard this action of the court as having the effect apprehended by the defendant in error. Proceedings of the character here involved are not as a rule *in personam* but *in rem*, and if regular, they are binding upon all persons equally, whether they appear personally to take part in the controversies, or proceedings, or hold themselves aloof.

Besides, the objections urged here to the proceedings in and judgments of the courts of Michigan, are urged upon the ground that those courts were without jurisdiction over the subject matter, and if that is true such proceedings and judgments must be held to be null and void when attacked by parties who appeared as well as if attacked by those who did not appear.

That the courts of Michigan were without jurisdiction in the premises, is urged upon various grounds. In the first place it is said that even if ancillary administration in Michigan would have been authorized and proper under the conditions obtaining as to the location of the property, if the deceased had died intestate, or if she had not conferred upon the executors an estate and power different from and greater than that properly pertaining to the office of executor, it was unauthorized in this case because the title to the property in Michigan is by the will vested in Crawford and Stafford as trustees; and it is urged that as such trustees they were authorized to take possession of, sell and otherwise dispose of and deal with the Michigan property without probating the will in that state; without filing there a certified copy of the same and of the probate granted here; without taking out any letters as special administrators or as administrators with the will annexed; and that for the reason that the trust is of a character cognizable in the chancery courts only in that state, the probate courts there had no jurisdiction

over this trust, and that as a consequence, the taking out of letters as special administrators and the taking out of letters as administrators with the will annexed, was wrongful and unauthorized, and the orders and judgments of the court approving of the items of expenditure and credit in the accounts of Stafford, acting in those capacities are null and void and should be disregarded and he should be required to account *de novo* to the probate court of Lucas county, Ohio, for all the Michigan property, and should submit to that court the items of credit claimed, and abide by its findings and judgments thereon; and this not because such property is assets of the estate for which he should account as executor, but because it is a part of a trust fund for which he is accountable as testamentary trustee to the probate court of Lucas county, Ohio, which court, under our statutes, has jurisdiction of such trusts.

This claim makes it necessary for us to consider the provisions of the will and certain authorities bearing upon the question. It is, doubtless, true that a trust may be created by will and title vested in the executor as a trustee, and the duties with respect thereto imposed upon such trustee may be of a character making it unnecessary for the trustee to take out letters as executor in order to dispose of and deal fully with the property in the discharge of the trust; and it might be of a form and character that, according to the laws of Michigan, would bring all questions pertaining to the administration of the trust within the jurisdiction of the chancery courts of that state, and make it unnecessary and perhaps improper to go into the probate court of that state for any purpose.

I will call attention to certain general rules upon the subject which may serve to guide us in determining whether or not the will in question here is of that character. In Williams on Executors, at page 723, appears the following:

"Besides the interest which an executor or administrator in all cases takes in the whole personal estate of the testator or intestate, he may in some instances be seized of real property of the deceased as trustee or be *ex officio* invested with a power to dispose of it. It has been the subject of some discussion in what cases executors take a fee simple, in trust to sell, under a will, or are invested merely with a power of disposition. The distinction resulting from the authorities appears to be this: That a devise of the land to executors to sell passes the interest to it, but a devise that executors shall sell the land, or that lands shall be sold by the executors, gives them but a power. An eminent writer has concluded from an examination of all the cases, that even a devise of land to be sold by the executor, without giving the estate to them, will invest them with power only, and not give them an interest."

In many cases the provisions in question are so close to the border line that separates the office of trustee from that of executor, that it is difficult to determine to which class the office belongs, but in cases of doubt or ambiguity there is a general rule which is applicable to resolve the question in favor of the view that the duty or trust devolves upon the executor, or upon the trustee as executor, by virtue of his office of executor. This is very well stated in the case of Matthews, Admr., v. Meek, 23 Ohio St., 272: I read from the opinion of Judge McIlvaine, at page 289:

"It is undoubtedly true that a testator may, by his will, create a special trust as to a particular fund, over which the executor is not authorized or required to exercise his official control or management. But as a general rule, the powers of the executor are coextensive with the trusts created by the will. The office of executor is only that of a trustee, and the whole will is looked to for the purpose of ascertaining the nature and extent of the trusts created thereby, and the powers of the executor in relation thereto; and while the executor is engaged in administering any and all the trusts created by the will, it must be presumed that he is acting in the capacity of executor alone, unless it plainly appears that such was not the intention. To constitute the person named in the will as executor a special trustee, separate and apart from his office of executor, it is not enough that the powers granted to him, or the duties imposed upon him in relation to a particular fund, be such as are usual in the course of ordinary administration; it must also appear that the intention was to withdraw the particular trust from the management and control of the executor as such, and to create a separate office for its management; and this must appear in the face of the presumption that every provision made in the will for the management of the estate, and every part thereof before it passes into the hands of the beneficiary, was intended as a direction to the executor in his official character."

I read also a paragraph from *Gandolfo v. Waller*, 15 Ohio St., 251, from the opinion of Welch, J., he says:

"I admit that a testator may direct the continuance of a trade or business by his executor, as trustee, independent of his executorship; and such cases often occur. But they are always either where there is a devise or bequest to the executor in trust, or where part of the assets are specifically set apart, and directed to be invested as a trust fund. In the former case the executor receives them at once as trustee, and they never become assets. In the latter, they are received by him as executor, and remain assets of the estate till so set apart and invested. But the setting apart must be distinct, complete and final. It must separate the fund from the assets of the estate, and from the control of the executor as such, as perfectly as the payment of a legacy separates it from the estate, and casts the burden of managing and controlling it upon the legatee in trust. And where the executor is to be held as acting in both capacities it must plainly appear that such was the intention of the testator. The executorship itself is a trust, and every provision in the will regarding the management of the assets, before they pass out of the executor's hands into those of the beneficiaries, will *prima facie* be held as coming within that trust; and the contrary intention must be made plainly to appear. As a general rule, the duties of the executor as such, are coextensive with the provisions of the will; and it is only in cases of unmistakable intention, or of inherent necessity, that a separate character will be assigned to him."

A great many cases bearing upon this matter have, through the learning and industry of counsel upon both sides, been brought to our attention and we have examined them. It will be impossible, however, within the reasonable compass of an opinion in this case to undertake to review them and I shall not attempt to do so. The following authorities seem to us to clearly and fully sustain the construction which we put upon this will, which is that the duty of administration devolved upon the executors *virtute officii*. *Wall v. Bissell*, 125 U. S., 882; *Colt*

v. Colt, 111 U. S., 566; McArthur v. Scott, 5 O. F. D., 357; Newcome v. Williams, 9 Metc., 525; Drury v. Inhabitants of Nantic, 10 Allen, 169; Crocker v. Dillon, 133 Mass., 91; In re Higgins Estate, 39 Pac. Rep'r, 506, 15 Mont., 474; In re Estate of Hood, 98 N. Y., 363; Ever-son v. Pitney, 40 N. J. Eq., 539.

The general rule stated in *Gandolfo v. Walker*, *supra*, that where there is a devise or bequest to an executor in trust, the executor receives the property or fund at once as trustee, and the same never becomes assets, must be subject, we think, to the qualifications, first, that if needed as assets the title of the executor is superior to that of the trustee, so that the former may take, use and account for the same as assets; and, second, if the property is not reduced to the form or condition in which it is to be distributed as trust property, the duty of thus transforming it may devolve upon and be exercised by the executor as such, and that this will be the case unless the will distinctly provides that this duty shall devolve upon the trustee as such.

In such cases, the same person being both executor and trustee, he will not take in the latter capacity until he has fully discharged his duties in the former capacity, and not until the fund or property has been distinctly set apart as trust property.

I call attention to one other case entitled *In re Sanborn's Estate*, 109 Mich., 191. The court here held that by the will in question there was created a trust devolving upon the executor as such; also that if he had proceeded and set the trust fund apart distinctly, he might then have been held chargeable with it as a trustee under the will, and the court further held, which is important to the consideration of the case at bar, that until he had set the fund aside so that it became distinctly a trust fund to be held and managed by him as trustee and not as executor, he was accountable for its administration to the probate court of Michigan, and that until then it was not a matter within the jurisdiction of the chancery courts of that state.

The case of *Ford v. Ford*, 80 Mich., 42, is urged upon our attention by counsel for plaintiff in error, and it is contended by them that it is authority not only for the proposition that Stafford, with respect to this Michigan property, was acting as a trustee and could not exonerate himself from his obligation as trustee by undertaking to account to the probate court as executor; but in support of the other proposition which they advance, that it was not necessary to probate the will in Michigan or to file a certified copy of the probate that had been made in this state; or, if it were necessary or proper to go that far with respect to the matter, that it was not necessary or proper for Mr. Stafford to take out letters as said executor or as administrator with the will annexed or to account as executor.

We have examined this case carefully and are of the opinion that it does not sustain the propositions in support of which it is cited. It was a proceeding in the chancery court of Michigan merely to obtain a construction of a will. We do not understand that it was in the course of the administration of the estate any further than that, and it seems to us to have been a proceeding of the character that is authorized in this state, going into court to obtain a construction of a will, and that when the court proceeds to say that it would only be necessary for the executor and trustee in that case to do certain things and that he might at once bring the property to sale, the court is not there speaking, as we understand it, with reference to the legal steps that might be necessary

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under the statute in order to invest him with authority to thus proceed ; it is only determining his power under the will after he has taken proper legal steps.

As the decedent left no debts, if the contention of the plaintiff in error is well founded, it follows that it was not necessary for Crawford or Stafford named in the will as executors, to take out letters either in Ohio or Michigan to fully administer upon this estate, unless perhaps to attend to the charges incident to the burial of deceased, and some charges that may have arisen from her last sickness. Bearing in mind that a part of the property in Michigan was personalty and a part was realty, let us consider certain provisions of the will.

The will reads:

"I, Mabel Crawford, of Toledo, Ohio, do make, publish and declare this to be my last will and testament ; and I hereby revoke all previous wills by me made.

"Item I. I direct that all my just debts and funeral expenses be fully paid. I wish to be buried in or near Toledo, on some lot to be selected and purchased by my executors, and that a monument, to cost not over five hundred (500) dollars be erected thereon."

It will be noted that throughout this will the persons who are afterwards named as executors are uniformly designated as " executors," and by this item 1 it is apparent that certain duties devolved upon them as executors that are not matters of trust at all, of paying debts and buying a burial lot and monument.

"Item II. I give and bequeath to my aunt, Sarah G. Crawford, of Toledo, Ohio, and to her heirs, my piano and all my books, paintings, works of art, silver ware, watches, jewelry, clothing and household property, I may own at the time of my death."

"Item III. I give and bequeath to my uncle, Clay Crawford, and his wife, Sarah G. Crawford, or to the survivor of them, the sum of five thousand (5,000) dollars to be paid them by my executors as provided below—subject to this condition, viz: If I outlive both said Clay and Sarah, and there be no child of theirs living at the time of my death, then said \$5,000 shall revert and be added to and divided between the bequests specified in items numbered four (4), five (5) and eight (8) herein, each bequest in said three items to receive its proportional share thereof.

"Item IV. I give and bequeath to William R. Stafford of Port Hope, Michigan, and to his heirs, the sum of two thousand five hundred (2,500) dollars."

It will be observed that items two, three and four contain bequests of money and personal effects, the title to which would not devolve upon the legatees until the probate of the will and administration of the estate. That we think is true according to the law of Ohio and according to the law of Michigan as well. In a sense, the title is derived from or through the executors, who take and hold the property under the will subject to the claims of creditors, costs of administration, reduction of the property to the condition in which it is to be when distributed, the distribution thereof, etc. When this is all accomplished, but not before, the title of the legatees which originated in the will, is perfect.

"Item V. I give and bequeath to my executors the sum of ten thousand five hundred (10,500) dollars in trust for the five (5) purposes following, to-wit:

"First—To pay to the person who at the time of payment shall act as treasurer of the American Missionary Association of New York City, New York, the sum of two thousand (2,000) dollars to be used and applied under the direction of the executive committee of that association, to its charitable uses and purposes."

The other paragraphs of the above item are of like character and provide for the payment of certain sums to the Methodist Episcopal Church at Cassville, Michigan, to the treasurer of the Washington Street Congregational Church of Toledo; the treasurer of the American Board of Commissioners for Foreign Missions, and to the treasurer of the Protestant's Orphan's Home of Toledo, Ohio.

"Item VI. I give and bequeath to my executors the sum of five thousand (5,000) dollars in trust as follows, viz: They to keep said sum carefully invested in good securities, and annually pay all the interest thereof (less taxes and costs and expenses of investing said sum) to my mother, Amanda Yale, during the balance of her natural life; and after her death said \$5,000 to be equally divided between the children born to her since she married Eugene Yale, this bequest to the children of Amanda and Eugene Yale to be subject to the two conditions following," etc.

Item VII is also a bequest in substantially the same form.

Item VIII starts out: "I give and bequeath to my executors the sum of five thousand (5,000) dollars, in trust for the following purposes, viz.," and then the purposes are set forth. The terms of Items five, six, seven and eight are "I give and bequeath to my executors," in each instance certain sums of money in trust, which they are to pay to certain persons, institutions and objects.

Now it appears that the estate did not consist of moneys which the executors could at once take and hold and apply to the designated persons and objects, but it consisted in real and personal property, in Ohio, Michigan and elsewhere, which must be reduced to funds to be thus available. Thus far, therefore, it seems clear to us that something must be done with this estate before it could be brought to that condition, and that kind of property which may be and is to be treated as trust funds. In this respect the conditions are like those obtaining in *Gandolfo v. Walker*, 15 Ohio St., 251, and in *In re Sanborn's Estate*, 67 N. W. Rep., 128; 109 Mich., 191, *supra*.

The tenth item of the will (passing by the ninth for a moment) clears up and emphasizes this condition of the estate and these duties devolving upon the executors as such. It reads:

"Item X. After said executors have converted the property herein conveyed to them into money, and after they have paid the costs and expenses of the administration hereof and the debts as provided in item one (1) herein, and after they have put at interest the full amount of the two funds specified in items six and eight herein—and after paying as provided in item seven (7) herein—then out of the entire balance remaining I desire the bequests mentioned in items three (3) four (4) and five (5) herein, to be fully paid. * * *"

Then there is further provision as to what shall be done in the event that there shall be a deficiency or a surplus, as to how the loss or gain shall be distributed among the beneficiaries.

Now, does item nine change all this? We think not. We think the title which Stafford and Crawford took under item nine and the power with which they were thereby invested devolved upon them as execu-

tors and that their relations to the estate as trustees did not and could not arise until the estate had been reduced to money and everything had been brought to a pass where nothing remained but to distribute or invest the funds as provided by the will. Item nine reads:

"Item IX. I hereby nominate and appoint said William R. Stafford and Clay Crawford executors of this my last will and testament; and I hereby give, devise and bequeath all my real and personal property of every kind and nature (save and except as specified in item two herein), to said above named executors, in trust for the execution of my will, with power and full authority to sell and dispose of the same at public or private sale at such times, [within three (3) years after the date of my death], and upon such terms and in such parts as to them shall seem best, and I hereby authorize said executors or either of them, who shall qualify, to sell as above or lease or mortgage any part of my property, if in their opinion it is advisable so to do, and to execute and deliver any instruments or writings necessary or proper to carry into effect any powers granted in this will, and to sell and convey any or all my real estate in fee simple, without being required to obtain any orders of court therefor; and with full power to settle, compromise, arbitrate or adjust any claim due either to or from my estate on such terms as they may deem best. I request that no bond be required of said executors or either of them."

That they might proceed, by virtue of the titles and powers vested in them by the will, to sell the property, real and personal, without any special order or license of any court other than that contained in ordinary letters of administration, we think is clear, but that these titles and powers were vested in them in virtue of their executorship, and that, therefore, they must take out letters of administration, we think is equally clear.

I may add that in a case of doubt, where another court of competent jurisdiction, though of another state, has put this construction upon the will, and has required or permitted the executors as such to account to it, and the proceedings and judgments are not attacked on the ground of fraud, we would be loth to treat all that has been done as a nullity, and would not do so unless we were fully convinced that the case required such action. In other words all doubts should be resolved in favor of the propriety, regularity and legality of the proceedings and judgments of the courts, though of sister states. Many cases have been brought to our attention through the industry of counsel, where the provisions of the wills in question were in many respects similar to those of the will under consideration here, in which it has been held by courts of last resort of different states that such wills vested the title to the property in the devisee or legatee as trustee, so that it never became a part of the assets to be administered by him or another as executor, but in those cases the ultimate question was whether a person taking title from such devisee or legatee without the intervention of an executor, took a good title, or whether sureties of such person in his office as executor should respond for his delinquencies as trustee, etc.; and in all cases the question seems to have been so resolved as to attain the ends of justice, but we have been cited to no case in which one who at certain stages of his administration, or with respect to certain property, must act as executor, and at a later stage, or with respect to certain other property, must act as trustee, and who has accounted fully as executor for that which devolved upon him in both capacities, and has had his administration

approved by a court of general probate jurisdiction, and yet whose accounting and judgments have all been brought to naught, all overturned and set aside on the mere ground that the court erred in proceeding too far, in requiring him to account too fully; and we think that an extremely strong case must be presented to induce or justify such action at the hands of another court. What might be accomplished in a proceeding in equity, to bring the trustee to account for said fund, if fraud were charged, even though he may have obtained the sanction of a court to his acts as a part of his scheme of fraud, we are not called upon to consider. A large part of the estate seems to have melted away and come to almost nothing in the hands of this executor, and there seems to have been very large sums paid as expense incident to his administration, but into these matters we cannot and are not asked to inquire. The sole question here is whether the judgments of the probate court of Huron county, Michigan, affirmed by the circuit court and again by the Supreme Court of that state, relieve the executor from obligation to render an account of his stewardship to the probate court of Lucas county, Ohio, with respect to that part of the estate which was all along in the state of Michigan?

There are other objections to the conclusiveness of the judgments of the courts of Michigan, to be noted.

It is urged that even though this executor was authorized to act in the capacity of executor in dealing with the Michigan property, he might so act without probating the will or taking out letters as special administrator, or as administrator with the will annexed in or accounting to the probate court of that state, and that the action of Stafford in thus proceeding was unauthorized and should be ignored here. That that court had no jurisdiction in the premises, and that the judgment of the Michigan courts upon his accounts is null and void.

It is also said that in his application, upon which he was appointed special administrator, he made a false statement of a material matter, As to this latter claim I call attention to the provisions of Sec. 5851. Howard's Annotated Statutes of Michigan, under which he made application and was appointed such administrator.

Section 5851 reads as follows:

"When there shall be a delay in the granting of letters testamentary or of administration, occasioned by an appeal from the allowance or disallowance of a will, or from any other cause, the judge of probate may appoint an administrator to act in collecting and taking charge of the estate of the deceased, until the question of the allowance of the will, or such other question as shall occasion the delay, shall be terminated, and an executor or administrator be thereupon appointed; and no appeal shall be allowed from the appointment of such special administrator."

It appears that in his application he stated that there had been an appeal from the order of probate entered by the probate court of Lucas county, Ohio, and that the appeal resulted in a delay in the appointment of himself and his colleague as executors and in their exercise of their office, and it appears that that would have been true if the same proceeding had taken place in Michigan, or under their statute, upon an appeal of that sort, as the judgment of probate is suspended and the appointment of an executor, if any appointment has been made, is suspended, and everything is held *in statu quo* pending the settlement if the question of the validity of the will, but a special administration is authorized, to preserve the property. And it is said that when Stafford in his application stated that there was delay in

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obtaining letters of administration or letters as executor because of the proceedings in the courts of Ohio questioning or contesting the validity of the will, that he made a statement that was materially false; that the action in which the validity of the will was challenged did not delay the appointment of executors in Ohio; that they might have proceeded to administer upon the estate in Michigan or take charge of the property in Michigan as such executors.

It is not made to appear that even if this was an incorrect statement upon the part of Mr. Stafford, it was made wilfully or knowingly; that is to say, there is a fair presumption that he and his attorneys there assumed and believed that the law of the state of Ohio upon this subject was the same as that in the state of Michigan. But we think that this statute applied to the case and operated upon the condition existing with reference to the property in Michigan; that with reference to that property, the statement might have been truthfully made, that there was a delay in the matter of obtaining general administration or authority to act as general administrators upon that property; we think it is quite apparent that the courts there would not have admitted this will to probate and would not have issued any letters upon it when advised of the pendency of proceedings in the courts of this state contesting its validity; and yet the necessity existed for the preservation of the property in Michigan and he might have truthfully said that that situation resulted in a delay in the granting of general letters testamentary with respect to the part of the estate then in the state of Michigan.

Now was the probate and granting of letters unauthorized? Such action, though it may not be strictly necessary, and though its propriety or expediency may be doubtful or open to criticism, yet if authorized, cannot be regarded as void or even erroneous. I will read briefly from the statutes of Michigan upon the subject.

"Section 5805. Sec. 21. All wills which shall have been duly proved and allowed in any other of the United States, or in any foreign country or state, according to the laws of such state or country, may be allowed, filed and recorded in the probate court of any county in which the testator shall have real and personal estate on which such will may operate, in the manner mentioned in the following sections:

"Section 5806. Sec. 22. When a copy of such will, and the probate thereof, duly authenticated, shall be produced by the executor or other person interested in such will, to the probate court, such court shall appoint a time and place of hearing, and notice shall be given in the same manner as in the case of an original will presented for probate.

Section 5807. Sec. 23. If, on hearing the case, it shall appear to the court that the instrument ought to be allowed in this state, as the last will and testament of the deceased, the copy shall be filed and recorded, and the will shall have the same force and effect as if it had been originally proved and allowed in the same court.

"Section 5808. Sec. 24. When any will shall be allowed, as mentioned in the preceding section, the probate court shall grant letters testamentary, or letters of administration with the will annexed; and such letters testamentary or letters of administration shall extend to all the estate of the testator in this state; and such estate, after payment of his just debts and expenses of administration, shall be disposed of according to such will, so far as such will may operate upon it; and the residue shall be disposed of as is provided by law in cases of estates in

this state belonging to persons who are inhabitants of any other state or country."

It will be noted that the condition upon which the statute operates is the existence of real and personal property upon which the will may take effect. That condition existed here. The existence or non-existence of debts seems to be immaterial, so far as the admitting of the will to probate and the granting of letters of administration are concerned.

Under Sec. 5808 and other sections, it is held in *Dickinson v. Seaver*, 44 Mich., 624, 629: "Whatever may be done with the *final balance*, where the testator's will has been previously probated at his domicile, the estate must be administered, up to the time of distribution, under the state probate laws." Now it was competent for the state of Michigan to pass and enforce this legislation. The general doctrine upon the subject is stated in a great many cases that have been cited to us. I call attention to an extract from *Story on Conflict of Laws*, pages 876-7-8:

"It is exceedingly clear that the probate grant of letters testamentary or of administration, in one country gives authority to collect assets of the testator or intestate only in that country, and do not extend to the collection of assets in foreign countries; for that would be to assume an extra territorial jurisdiction or authority, and to usurp the functions of the foreign local tribunals in these matters. It is no answer to the objection to say that the effects of the testator or the intestate are assets wherever they are situated, whether at home or abroad; and that such effects as are in a foreign country at the time of the death of a testator or intestate, although they remain and are wholly administered there by the executor, are equally assets. Doubtless this is true; but the question is not, whether they are assets or not, but who is clothed with the authority to administer them; and this must be decided by the local jurisdiction where they are situated, for the original administration has no extra territorial administration."

I think the last word of the extract quoted should be "jurisdiction." See also *Wills v. Cowper*, 2 Ohio, 124, 128. This language by Sherman, J., delivering the opinion of the court.

"But the very appointment, as well as the power of an administrator over the estate of a decedent, emanates from the laws of the country where he receives his appointment. The extent of his authority, and the manner in which it shall be exercised, depend upon legislative enactments, and is confined to the jurisdiction of the country granting the administration. *Doe v. McFarland*, 9 Cranch, 151. An administrator as such, cannot intermeddle with the effects of his intestate in another state, unless permitted to do so by the laws of that state; otherwise it would be in the power of one state to regulate the distribution of property situated in another. And the rule is the same, whether the administration be general or with the will annexed. In either case the authority of the administrator emanates from the law, and cannot extend beyond the jurisdiction of the power conferring the authority; and the will being annexed to the grant of administration, does not change the tenure by which the administrator holds his office."

Dickinson v. Seaver, 44 Mich., 624; *Mower's Appeal*, 48 Mich., 441; *Reynolds v. McMullen*, 55 Mich., 568; *McIntyre v. Conrad*, 93 Mich., 526; *Kerr v. Moon*, 9 Wheat. (U. S.), 565; *McCormick v. Sullivan*, 10 Wheat. (U. S.), 192; *Armstrong v. Lear*, 12 Wheat. (25 U. S.), 169; *Cabanne v. Skinker*, 56 Mo., 357.

Our attention is called by counsel for plaintiffs in error to Secs. 6057-6061, Howard's Statutes of Michigan, and it is said that the executor should have proceeded under these sections. Section 6057 provides:

"When an executor or administrator shall be appointed in any other state, or in any foreign country, on the estate of any person dying out of this state, and no executor or administrator thereon shall be appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the probate court of any county in which there may be any real estate of the deceased."

The next section provides that such executor or administrator may be licensed to sell real estate for the payment of debts and legacies. The next section is with respect to the bond required, and it is urged that that provides that the accounting in such cases is to be to the court of the decedent's domicile or the place of principal administration, but it does not say so, as I read it. It reads:

"If an authenticated copy of such bond shall not be filed as mentioned in the preceding section, such foreign executor or administrator, before making such sale, shall give bond with sufficient sureties to the judge of probate, with condition to account for and dispose of the proceeds of such sale for the payment of the debts or legacies of the deceased, and the charges of administration, according to the law of the state or country in which he was appointed."

Which we understand to mean that the provisions of the will and the provisions of the law as to the distribution of the estate in the country where the original bond was made, shall be given effect, but it does not provide where the accounting shall be, although the following section indicates that the accounting is to be in the courts of Michigan. It reads:

"When such foreign executor or administrator is licensed to sell more than is necessary for the payment of debts, legacies and charges of administration, as before provided for in this chapter, he shall, before making the sale, give bond with sufficient sureties to the judge of probate, with condition to account to him for all the proceeds of the sale that shall remain after payment of said debts, legacies and charges, and to dispose of the same according to law."

Now it is urged on behalf of plaintiffs in error, that if any action was required on the part of any Michigan court, in this instance, no more was required and no more was proper or legal than that provided for in these sections; and it is said that under these sections no accounting is required or authorized in the courts of Michigan, and that *Reynolds v. McMullen*, *supra*, supports this contention.

Section 6057 applies only where there has not been an executor or administrator appointed in Michigan upon the estate there of a person dying elsewhere. In this case there had been a Michigan administrator appointed in pursuance of the other provisions of the statute, so that Sec. 6057 did not apply to this case. The administrator had been appointed in pursuance of Secs. 5805 to 5808 inclusive and Sec. 6057 is not antagonistic to those sections, but is in harmony therewith and it, as well as the case of *Reynolds v. McMullen*, *supra*, recognizes the legality, if not the necessity of appointing an administrator in certain cases under Secs. 5805 to 5808. If there is personal property as well as real estate, which was the case here, administration is necessary and then the accounting goes on as held in *Dickinson v. Seaver*, *supra*, to final distribution. The remark in *Reynolds v. McMullen*, *supra*, at page 576.

the effect that in case of ancillary administration, that would proceed like any other up to the time of accounting, we do not construe as overruling what was expressly held, as above stated, in the case of *Dickinson v. Seaver*, *supra*; it does not go so far as to say that the accounting must be in the domicile of the deceased.

The case of *Battelle v. Parks*, 2 Mich., 531, is cited in support of the contention that it was not even necessary to take out letters of administration and that it was not necessary to probate the will. It is sufficient to say that it was not necessary for the court to hold anything of that kind in the case. It involved a domestic will which had been probated and under which letters of administration had been taken out. There is a remark of the court in the course of the opinion that would seem to imply that opinion, but it is *obiter dicta*, and we doubt if that was meant or intended, in view of the express provisions of the statutes of Michigan upon the subject.

The executor having accounted for so much of the estate as was located in Michigan, how far can he be required to go in the way of accounting for the same property to the probate court of Lucas county, Ohio? The great weight of authority, in our judgment, sustains the proposition that the court having jurisdiction of the ancillary administration may require an accounting to be made in Michigan to the extent held in *Dickinson v. Seaver*, *supra*, and that the requirements of the rule laid down in some of the cases, that there must also be a general accounting in the court of domicile, or of principal administration, is fully met by reporting to such court the fact of the accounting in the court of another state for the assets in such state, together with the judgment of the proper court of such state approving the accounts, and by accounting to the domiciliary court for the balance due to the estate according to the judgment of the court of the state of ancillary jurisdiction.

All this seems to have been done here, and we hold that under the provisions of Sec. 1, Art. 4 of the constitution of the United States, requiring that full faith and credit shall be given in each state to the public acts and judicial proceedings of every other state, we are bound to recognize the judgments of the courts of Michigan upon the accounts of the executor set forth in this record as conclusive upon the matters involved therein, and as foreclosing any inquiry into the same matters, when attacked collaterally in the manner here attempted.

Other questions presented as to the correctness of these accounts involving questions of error rather than want of jurisdiction of the subject matter are not open to inquiry here in this proceeding. Finding no error therein, the judgment of the court of common pleas will be affirmed.

RAILROADS—NEGLIGENCE—EVIDENCE.

[Lucas Circuit Court, February 2, 1901.]

Haynes, Parker and Hull, JJ.

MICHIGAN CENTRAL RAILROAD COMPANY v. WATERWORTH.**1. OMISSION OF MATERIAL PAPERS FROM BILL OF EXCEPTIONS.**

Where a diagram of railroad grounds, showing the place where an accident occurred, and the location and movement of cars, such evidence being material and used in the trial court, is omitted from the bill of exceptions, and from the papers in the case, though it was formally introduced in evidence and is referred to in the bill as an exhibit, the reviewing court is precluded from considering the case on the weight of the evidence. The same rule applies where an affidavit affecting the testimony of a witness or other material evidence or papers are omitted.

2. TESTIMONY IN THE FORM OF CONCLUSIONS—EXAMINATION OF CARS.

A switchman, in a suit for personal injuries, may testify, though in the form of a conclusion, as to the time which a person serving in that capacity has to couple cars, or to inspect or examine a car and coupling apparatus before making a coupling. Therefore, answers to such inquiries, that "he has got to work right along, quick and sharp," and "he does not have any time to examine couplings" are not objectionable.

3. EFFECT OF PREJUDICIAL TESTIMONY CURED BY EXPLANATION.

The effect of testimony of a witness that cars were sometimes moved and switched off while the process of inspection was going on, which would lead to the conclusion that a dangerous method was employed, is cured by subsequent explanation by evidence indicating that the cars actually being inspected were not moved, and cannot be regarded as having been prejudicial.

4. TESTIMONY AS TO TRANSACTIONS BETWEEN HUSBAND AND WIFE.

The testimony of a wife to the effect that her husband, plaintiff in the suit against a railway company for personal injuries, turned his wages over to her on certain occasions, introduced for the purpose of showing how much he was earning, though made when no third person, competent to be a witness was present, cannot be regarded as prejudicial to the railway company, where there was no dispute about the matter, and the husband testified to the same effect.

5. EMPLOYMENT OF CHIEF CAR INSPECTOR DOES NOT RELIEVE OF LIABILITY

The doctrine of fellow servants cannot be applied to car inspectors, and other employees, or woven into the statute, 87 O. L., 149, so as to defeat its provisions respecting presumptive knowledge of and presumptive negligence in the use of defective appliances. Therefore, the employment of a competent chief car inspector will not exonerate a railroad company from liability for negligence of his subordinates, on the ground that the latter are fellow servants of other railroad employees. Actual and proper inspection, or its equivalent, whether the inspector is a chief or a subordinate, is necessary to overcome the presumption arising from the law in question.

6. VERDICT NOT EXCESSIVE.

A verdict of \$4,000 in favor of a man forty-two years of age, in good health and sound in body, who was earning \$65.00 per month as a railroad employee at the time of his injury, is not excessive for the loss of a hand, even when consideration is restricted to his diminished earning capacity and no account is taken of his suffering, physical and mental.

HEARD ON ERROR.*Emory D. Potter*, for plaintiff in error.*Messrs. Hurd, Brumback & Thatcher*, for the defendant in error.

PARKER, J.

This action in the court below was brought by Waterworth against said railroad company, on account of personal injuries received by him while in the employ of the company as a brakeman, he having had his hand badly injured and practically destroyed, while he was coupling cars; and he avers this was due to a defect in the cars; that one of the bumpers or buffers was loose and out of condition and hung down in a somewhat twisted shape, so that when he undertook to couple the cars his hand was caught between the bumpers, whereas it would not have been caught had the bumpers been in proper condition.

The company denies that there was any defect or that it was guilty of any negligence in the premises and avers that plaintiff's injuries arose from his own negligence.

The case went to a jury, which returned a verdict in favor of the plaintiff below for \$4,000.

A motion for a new trial was overruled and judgment entered upon this verdict, and the railroad company now prosecutes error in this court.

One of the grounds of the motion for a new trial, and a ground that is now urged here on error, is that the verdict was against the weight of evidence. Upon looking into the bill of exceptions we find this condition; that there was a drawing used upon the trial, which appears to have been a diagram of the grounds where the tracks of the company were, showing the tracks, etc., where this accident occurred. This question of the location of the cars, and of their movements upon this occasion, became material. Witnesses were interrogated with respect to the position of certain cars, and in undertaking to state where the cars were situated and how they were moved, in order that their testimony might be understood by the jury, they were asked to indicate those positions and movements upon the map, which they did, and it appears from the record that in certain instances they made marks upon the map to indicate the positions about which they had testified, so that the map, after it had been thus identified and used, was a material document and piece of evidence in the case. At page 108 of the bill of exceptions it appears that the plaintiff offered this map in evidence and that it was marked "Plaintiff's Exhibit A." This map is not attached to the bill of exceptions nor filed with the papers in the case. The omission of this and certain other exhibits seems to have been due to the circumstance that the attorney for the railroad company, at the time of the making up of the bill of exceptions, was ill and practically blind, and that he was obliged by his condition to leave the matter of the preparation of this bill of exceptions to the stenographer and to his own subordinates, and by some mischance these exhibits were not attached within the time allowed for perfecting a bill of exceptions, or at all.

There were other papers, certain slips, introduced in evidence, indicating repairs which had been made upon these cars, and these seem to have been regarded by the parties as somewhat material; they may have been; without seeing them we cannot tell, and they are not attached. At page 192 of the bill of exceptions it appears that these slips, indicating repairs upon the cars, were formally introduced in evidence.

There was still another paper, perhaps even more important than the others: One Dorner was called as a witness on behalf of the railroad company, and testified with respect to the condition of this car,

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alleged to have been defective, saying, in effect, that the car was not deficient or was not defective in the particular alleged in the petition. He testified to some other defect in the car, but upon the opposite end from that at which the plaintiff received his injury. Upon cross-examination he was asked about certain statements made in an affidavit which he had made respecting this same matter at the solicitation of attorneys for the plaintiff. This affidavit appears to have been presented to him, and in the course of his cross-examination he was asked if he had not made the statements in that affidavit, and he assented that he had, but with respect to some of the statements he undertook to say that he did not understand them, did not understand that they were of the import that they appeared to be when the affidavit was exhibited. There was other testimony with respect to this affidavit to the effect that he had made it voluntarily, that it had been read over to him and that he appeared to understand it; that it set forth the statements as he had made them and in his own language; and after all this, at page 209 of the record, it appears that this affidavit was introduced in evidence and marked as an exhibit, plaintiff claiming that it tended to impeach the testimony of this witness upon certain points. This affidavit is not attached to the bill of exceptions.

We had occasion recently to pass upon a question like this, in a case which I believe has not yet been published, *Hohly v. Sheeley*. In that case a photograph had been used, practically as this diagram has been used in this case, but the photograph was not attached to the bill of exceptions, and we found that under the authorities we were therefore precluded from examining the case upon the question of the weight of the evidence, all of the evidence not being attached and made a part of the bill of exceptions. I shall not take time to read this opinion now, but all that was said in it with respect to the photograph, we think is applicable to the matter of the diagram here. There are other authorities still more distinct upon the question of such written evidence as the affidavit and the slips that I have mentioned. There is one case referred to in the course of that opinion where there was a diagram, which seemed to have served practically the same purpose upon the trial as the diagram in this case, *i. e.*, used in practically the same way (it being a personal injury case arising out of an accident occurring in a coal mine), and the diagram was not attached to or made a part of the bill of exceptions.

The circuit court held that the case could not be considered upon the question of the weight of the evidence. I refer to the case of *Foster Coal Co. v. Moherman*, 6 Circ. Dec., 487, and I will read a single short paragraph, at page 440, from the opinion of Judge Laubie. He says:

"So far as the verdict is concerned, we are not prepared to say but that it is right, but at all events we would not be at liberty to consider that question for the reason we do not have all of the evidence before us that was before the jury in the court below. They used a map largely in the testimony in this case, and witnesses pointed to it, pointed places out upon it, horse backs in the mine here and there, etc. It was patent and plain to the jury, but it is entirely unintelligible to us, so that in any event we could not examine the question whether the verdict was sustained by the weight of the evidence or not; but so far as it is disclosed, and treating these matters as to the map as immaterial, we do not see how the jury could have done anything else than what they did."

We take occasion to say here, that while we adhere to our holding in the case of *Hohly v. Sheeley*, because it seems to be required by the uniform holdings of the courts upon this subject, yet we do this with less reluctance in this case for the reason that it appears to us that it will not defeat the ends of justice.

We have had occasion, in examining other questions in this case, to look very carefully into this record, and without taking time to discuss the evidence we will say that so much as is presented here persuades us that the verdict was not against the weight of the evidence; whether our conclusions would be at all different or varied in any respect by having the additional evidence in the record, of course we do not say, but assuming that the exhibits were immaterial and assuming that they would not change our opinion, we say that this verdict is sustained by the weight of the evidence.

Judge Haynes suggests that this should be stated in a somewhat different form, and on his behalf I will put it in this form: Upon the material questions of fact, upon which hinge the question of liability of the company, there is a great deal of conflict in the testimony, and the nature of the case is such and the condition of the record upon the testimony is such, that we cannot say that the verdict is opposed to the weight of the evidence.

The plaintiff alleged that he received this injury while coupling cars. That one of the cars was standing upon the track and another was moving, so that they came together and when he attempted to make a coupling he was injured. Upon the question whether he was negligent in not observing the alleged defect in the bumper of one of these cars, he was inquired of as to the time that would be occupied in this operation of bringing the cars together and coupling them, and in the course of the examination, which was by the plaintiff's counsel, and was for the purpose of showing that he would not have had time to make the inspection or observation which would have apprised him of the faulty condition of the car, he was asked this question:

Q. "How much time did a man acting as a switchman have to do his work in? How rapidly did he have to work to get his work accomplished?" A. "He has got to work right along quick and sharp."

Q. "What opportunities does he have to inspect or examine the car and coupling apparatus before making a coupling? I mean as you did the work there in the month of November, 1898?"

That question was objected to and the objection sustained. Then he was asked:

Q. "How much time, as the work was customarily done, did a switchman have to examine the car apparatus before making a coupling?"

An objection on behalf of the railroad company was overruled and exception taken, and his answer was:

A. "He does not have any time to examine the couplings."

A motion was made to rule out that answer, which was overruled and exception taken. The ground of objection to this was that the witness was allowed to give his conclusion as to whether he would have time to observe the condition of the cars. There is more testimony of the same character at page 46 of the record. We think that in describing an operation of this character, which must take place in an extremely limited period of time, it is not practicable, that it is scarcely possible, for a witness to testify and bring out the point that was sought

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to be brought out by the plaintiff here, otherwise than as the witness did testify; in other words, that it would hardly be possible to make it intelligible to the jury (even if the witness were qualified to so state) if he should say that to observe the location of a link in the end of a drawbar would require a certain fraction of a second; that it would take another extremely short period of time to take hold of the link, in order that he might have it in position to insert it into the drawbar of the car that was coming up; and that he could proceed along with each movement required, describing the time that it would consume, and the time that would be occupied in the cars coming together, so as to allow the jury to reason out and conclude therefrom that the time would all be occupied in the operation, and that therefore he would not have time to make all of the observations which would apprise him of any defect about the car. We think that in a matter of this kind, it is competent for a witness to state, in effect, as he does here, that the operation requires such suddenness and quickness of movement as that his time would be all occupied and his attention all taken up in and about the performance of that duty, so that he would not have time to look out for anything else, or to do anything else, and that is about all this testimony amounts to. We conclude that there is no error in this.

Mr. LeBeau, a witness for the plaintiff, testified, at pages 95-96, to the manner in which they inspected the cars on this occasion; and, further along, to how they were in the habit of inspecting the cars in this yard, or how it was customary to do it, and said they sometimes moved the train of cars and switched off a part of the cars while the operation of inspection was going on, which would seem to be a dangerous, hazardous and negligent way of doing the business. Objection was made to his testifying, to this being customarily done, and it is urged that that testimony might have had a tendency to mislead the jury and give them a wrong impression as to what was actually done on this occasion, it being said by counsel for the railroad company that what they did in the way of moving cars from a train where the cars were being inspected, was simply to push away from the rear end of the train, without moving the whole train, certain cars which had already been inspected, and that the answer of the witness would indicate that they might be doing it in a more dangerous and negligent way, that would result in their not fairly inspecting the cars, or not having an opportunity to inspect them. But in looking into the testimony of this same witness, after he was taken in hand by counsel for the railroad company, we find that he clears the whole matter up. He was asked:

Q. "Was it not customary for an engine coming onto a train of cars, to give some signal of their approach, where they knew it was being inspected?" A. "When they would switch cars on the siding, they would be careful, and would not shove them forward at a high rate of speed, and they were careful enough not to shove them the other way against us."

Q. "Do you mean while you were in the process of inspecting cars, that the train would come down with their engine and move the particular cars you were inspecting?" A. "No, sir, others that had been inspected."

So that we do not think the jury could have been misled in any way to the prejudice of the railroad company by this testimony.

In the answer it is also averred that the accident was due to one of the ordinary perils of the service, the risk of which plaintiff assumed

when he entered upon such service. This is denied by the reply. Neither the petition, answer or reply contains any averment as to inspection or the omission thereof, or as to the employment or failure to employ competent inspectors. There was testimony introduced tending to show that the defendant employed competent inspectors and that they inspected the car in question, but failed to find the alleged defect therein. On the other hand, testimony was introduced tending to show that the persons who were put to the work of inspecting the cars on this occasion were not competent, and that they proceeded with their work in a rapid and negligent manner; this being in a measure due to a failure of the company to afford them time and facilities to make a proper inspection.

In so far as this testimony shed light upon the issue as to the existence of the defect it was competent. But the defendant claims for it that it discloses that defendant had taken such action in the premises as exonerated it from liability on account of the defect, if it existed; also that it disclosed that the fault, if there was a fault, was that of inspectors who were fellow servants of plaintiff, and that the negligence of fellow servants being one of the risks of employment that he assumed, he has no ground of action against the company.

Assuming that the pleadings present this issue, and that we may look into this defective bill of exceptions to determine this question (both of which assumptions seem to be unauthorized), we will discuss the point briefly.

How far the rule that car inspectors and brakemen are fellow servants, laid down in *Railway Co. v. Webb*, 12 Ohio St., 475, and *Railway Co. v. Fitzpatrick*, 42 Ohio St., 818, has been affected by the act of April 24, 1890, 87 O. L., 147; Secs. 3365-21, 3365-22, Rev. Stat., is a question not yet set at rest, we believe, by the decisions. Counsel for the company undertake to distinguish this case from that of *Railway Co. v. Erick*, 51 Ohio St., 146, [37 N. E. Rep., 128] in which it is said that there was a *chief* inspector, having other inspectors under him, upon which the learned judge delivering the opinion remarks (p. 162) that "the chief inspector would not, by the provisions of the latter part of the third section of this statute, be a fellow servant," and states this as an *additional* reason for holding that the trial court did not err with respect to its charge. Counsel here regard this language as implying that if the inspector had not been a *chief* inspector, the rule as to fellow servants would have applied and perhaps changed the result, and point out that in the case at bar the inspector who inspected this car was not a chief, but a subordinate inspector.

We understand that the learned judge, in the language quoted, was indicating a reason why the action of the trial judge was right in view of the provision of the latter part of the third section of the act; but we further understand the court as holding that the action of the trial judge was supported by the other provisions of the act, entirely independent of those found in section three. The court holds in that case that to overcome the presumption of negligence on the part of the company, arising out of the use of defective appliances, the burden is upon the company to "show by proof that it has used due diligence, and is not guilty of negligence;" also that to overcome the presumption of knowledge of the defect, it is not sufficient to show the employment of competent and careful inspectors and the imposition upon them of the duty of making the inspection, but that "it would take an actual and

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proper inspection, or its equivalent, to overcome the statutory presumption of knowledge of such defect." (p. 162.) This language applies to inspections of all classes and grades. It is apparent that if the employment of a competent *chief* inspector will not exonerate the company, the employment of a subordinate should not have that effect. The question of superior or fellow servant seems to be wholly aside from the question of presumptive knowledge and presumptive negligence on the part of the company. We believe that the doctrine of fellow servants cannot be applied to inspectors and other employees, and woven into this statute so as to defeat the plain provisions and purposes thereof respecting presumptive knowledge of and presumptive negligence in the use of defective appliances.

"Actual and proper inspection, or its equivalent," must be shown, whether the inspector is a chief or a subordinate, to overcome these presumptions. Whether there was "actual and proper inspection, or its equivalent" in this case, under such circumstances as would exonerate the company, is a disputed question of fact, a solution of which requires a weighing of the evidence, a thing not authorized under the present condition of this record.

Complaint is made of the magnitude of the verdict, it being for \$4,000.00. Plaintiff was forty-two years of age and in good health and sound in body at the time he received this injury. He was earning \$65.00 per month, and was capable of earning this or more, regularly. His hand is destroyed, and it appears that he is not now capable of earning more than about one-third as much as formerly. The amount of this verdict invested so that the principal and interest might be paid to him during the period of his expectancy of life would not afford him for that period an income greater than that of which he has been deprived by this disability; so that, leaving out of the account his suffering, physical and mental, we cannot see that the verdict is excessive.

It was objected also, that the wife of the plaintiff was allowed to testify to certain transactions between herself and her husband which transpired when no third person, competent to be a witness, was present. The only transaction of that kind that we find testified to by the wife, about which that objection might be made, was to the effect that her husband turned over his wages to her on certain occasions. She does not undertake to tell how much. The purpose of the evidence was to show about how much he was earning. The plaintiff himself testified as to the amount of his earnings, and there does not appear to be any dispute about that, and he also testified that he turned these wages over to his wife. We cannot see that her testimony to the same effect about this undisputed fact could have possibly prejudiced the railway company.

These are all the questions that are made upon this record, all the alleged errors. Finding no error in this record, the judgment of the court of common pleas will be affirmed.

CROSS-PETITIONERS—DECREE.

[Franklin Circuit Court, September Term, 1900.]

Summers, Wilson and Sullivan, JJ.

JACOB LAPP V. HILDRETH & MARTIN LUMBER CO. ET AL.**DECREE ON CROSS-PETITION WITHOUT SUMMONS IRREGULAR.**

Where a third party intervenes in a suit *inter alios*, to have a debt owing by the defendant to the plaintiff paid to him, a decree for such relief, without summons issued on such cross-bill to the defendant, and without his knowledge, is irregular, and upon motion will be set aside, the defendant stating a good defense to the cross-petition.

HEARD ON ERROR.*O. E. Hallerman and F. G. Carpenter, for Jacob Lapp.**J. J. Stoddard and Lyman Innis, for the H. & M. L. Co.***WILSON, J.**

It is sought by this proceeding to reverse the judgment of the court of common pleas in refusing, on motion, to vacate a decree in favor of the defendant in error in the case of Clinton Keiser v. Jacob Lapp et al., of date July 23, 1891.

The motion to vacate was for irregularity in obtaining the decree in this, to-wit: The defendant in error, on its own motion, came into the case of Keiser v. Lapp et al., and by way of answer and cross-petition filed a creditors bill, seeking to appropriate what Lapp owed Keiser, to the payment of a judgment which pending the action it had obtained against Keiser. No summons issued upon the cross-petition, against Lapp, and he had no actual notice of the same. He claims that before the filing of the cross-petition, he had paid his debt to Keiser, which fact he seeks to set up by way of answer as a defense to the cross-petition.

The court below found this defense to be true, but held that the plaintiff in error was not entitled, under the code, to be summoned on the cross-petition, he not being a new party, and the matter set out in the cross-petition being in the nature of a counterclaim concerning the subject matter of the action.

It seems to us that the position taken by the court below is not tenable. Under Sec. 5464, Rev. Stat., a judgment creditor may subject the choses in action of his debtor to the payment of his judgment "by action." An action is deemed commenced by filing a petition and issuing a summons thereon. It is not an action until the summons issues. While a party may file a cross-petition to an action already pending and obtain affirmative relief against parties to the suit already summoned, it must be for some interest he had in the subject matter of the suit before he filed his cross-petition. It is that which gives him his status in the case, with the right to become a party and obtain relief without a new summons to the parties in court. But where a party, as in this case, who has no interest in the subject matter, seeks to obtain one by coming into the case and filing a cross-petition, for the purpose of subjecting his debtor's property, in equity, to the payment of his judgment, by procuring an order of the court compelling the debtor of his debtor to pay the judgment, the party affected by such proceeding is entitled to be

served with summons. Such a cross-petitioner is not a necessary party to the original action. He had no interest in the action of which the parties were bound to take notice, or which the court was bound to protect. The parties had no reason to apprehend his intrusion into the case. If to avoid multiplicity of actions he might properly be admitted as a party for the purpose of asserting his claim against the plaintiff, and obtaining an order in equity against the defendant, in all good conscience it should be on notice, and summons should issue on his cross-petition as at the commencement of an action, by which only he can have the relief sought under the statute.

We find, therefore, that the decree against Lapp in the case of *Keiser v. Lapp*, in favor of the defendant in error, was irregularly obtained, and that the motion to vacate the same was filed in time. The judgment of the court below will be reversed, the motion to vacate sustained, and the cause remanded to the court of common pleas for further proceedings.

CONTEMPT—IMPRISONMENT.

[Lucas Circuit Court, October 15, 1900.]

Haynes, Parker and Hull, JJ.

JACOB MILLER AND JACOB DIEHL v. TOLEDO GRAIN AND MILLING Co.

1. INJUNCTION ENFORCED AGAINST PERSONS NOT PARTIES TO THE SUIT.

A person having actual notice of an injunction is amenable thereto, although not a party to the suit in which it was issued. Therefore, where an injunction was granted restraining a manufacturer of flour from dressing and labelling his goods by certain ornamental designs and labels in imitation or similar to certain others, it is a violation thereof for persons who were agents of such manufacturer and had knowledge of the injunction, to sell flour upon their own responsibility under a design made by themselves which violates such injunction; and they are liable in contempt without an original proceeding for an injunction.

2. SECTION 5581, REV. STAT., IS PENAL—CONSTRUED STRICTLY.

Section 5581, Rev. Stat., providing for the enforcement of injunctions, and imposing a fine for its violation payable to the county, and imprisonment until the fine is paid, is penal in its nature and should be construed strictly, against the party bringing the proceeding to enforce it.

3. IMPRISONMENT FOR FAILURE TO PAY COSTS ILLEGAL.

A court has power, under Sec. 5581, Rev. Stat., providing for the enforcement of injunctions, to impose imprisonment for failure to pay a fine, adjudged in a proceeding in contempt, but a judgment imposing imprisonment until both fine and costs are paid is illegal, inasmuch as the order to pay costs amounts simply to a judgment for money and the constitution provides that there shall be no imprisonment for debt in civil actions, except for fraud.

4. JUDGMENT MODIFIED AND REVERSED—COSTS.

A judgment in a proceeding in contempt imposing fine and costs and imprisonment until both are paid will, on error, be modified so as to provide for the imprisonment for the non-payment of the fine and reversed as to the costs, and requiring the costs on the error proceeding to be paid one-half by each party.

HEARD ON ERROR.

T. N. Bierly, for plaintiff in error.

G. Harmon and Almon Hall, for defendant in error.

HAYNES, J.

In this case a petition in error is filed to reverse the action of the court of common pleas in assessing against Miller and Diehl a fine and costs, and in ordering their imprisonment until the fine and costs were paid, in a proceeding in contempt, for the violation of an injunction which had been granted before that time in the case of the Toledo Milling and Grain Co., against Louis M. Friedman, restraining Friedman from using a certain device or design on certain flour bags, indicating that the grade or class of flour was what was called, commonly, "Pansy."

In the original case against Friedman, Miller and Diehl were not parties. They had been selling flour as agents of Friedman, were in court, and testified in the case, and knew of the decree that was rendered, but after the decree was rendered, they ceased to be the agents of Friedman, and then took up the business of selling flour under a design made by themselves, which is the design that is complained of as an infringement or imitation of that of plaintiff below, and in violation of its rights under the injunction.

The proceedings were heard upon evidence, and the opinion of the court, delivered by Judge Pratt, is here given in full, in which he sustains the proceeding. Judge Pratt closes his opinion by saying:

"I have had in my practice several cases of this kind—one before Justice Swayne, when he was sitting in the federal court here, and one at Cleveland, in which one of the most prominent attorneys in the city was engaged; and, after holding that the act done was in violation of the injunction, he continued the matter for two weeks, saying that there would probably be no further necessity for any action on his part; and there was not. The same order was once made in a case in the circuit court here, by Judge Scott, at Chambers.

"I would punish parties for contempt by imprisonment, however, if that were deemed necessary. But this is the first time this matter has been brought to the attention of the court, and the fact being, so far as this court is concerned, determined that the injunction has been violated, the violation of the injunction should cease at least until there has been an opportunity to rehear this case on petition in error, and it can be heard, of course, in circuit court. If there should be a continued violation of the order notwithstanding this finding, then some other judge would have to pass upon the question when it is made; but at present the order of the court is that the defendants be fined in the sum of \$25 each, and the costs of this proceeding."

This decision was made on February 8, 1900. An entry was made on the journal of the court upon that, and an order was issued, on February 16, eight days afterwards; but it appears that, notwithstanding the court said he was not going to commit the accused to imprisonment, the entry upon the journal was as follows:

"It is therefore ordered and adjudged, that said Jacob Miller and Jacob Diehl, and each of them, pay a fine of twenty-five dollars and the costs of this proceeding, and that each of them stand committed to im-

prisonment in the county jail of Lucas county, Ohio, until said fines and costs are paid, or until they be otherwise discharged, and that execution issue to enforce the foregoing order and judgment. To all of said finding, orders, and judgment both Miller and Diehl except."

This is a transcript of the journal entry, and is the same as a copy of the final judgment.

In relation to the facts of the case, we are clearly of the opinion that the court of common pleas was right in finding that the design that was used by these parties for the bags of flour which they sold was in violation of this injunction. It seemed to us very marked and very clear in that respect; so that upon the facts we find that the court of common pleas was correct in its finding.

Two questions have been made which are of some importance. They are these:

First, whether these parties are so far parties to the original suit of the Toledo Grain and Milling Company, against Friedman that an attachment for contempt can issue against them, without first instituting an original proceeding for an injunction, and after that an attachment for a violation of it, if they should violate it.

The second question is, whether the imprisonment clause is illegal.

It is claimed on behalf of the plaintiffs in error that it was an abuse of the discretion of the court. It will be observed that this original injunction is against Friedman and his agents, and it was admitted here and stated in the evidence, that Miller and Diehl were agents of Friedman, selling his flour, at the time that the mark upon it was enjoined, and continued to be used until after the judgment of the court in that case; that immediately thereafter they started out independently to sell flour, and undertook to make a design that should just avoid being a violation of the one in use by the defendants in error.

We think the court was correct in holding that these proceedings could be maintained against these parties, although they were not technically parties to the original suit. The law in regard to injunctions is pretty liberal in that respect. The statute itself (Sec. 5579) provides that "An injunction shall bind the party from the time he has notice thereof, and the undertaking required by the applicant therefor is executed." We have had a case in this court since I sat on the bench in which it was held that where a party had notice that an injunction was applied for and being issued, but was not served for some time, yet he was liable for a violation of that injunction at any time after he had notice that an injunction was being issued against him. The law as laid down by the Supreme Court of the United States, is found in *Ex parte Lennon*, 10 O. F. D., 456. The court, Mr. Justice Brown delivering the opinion, say:

"The facts that petitioner was not a party to such suit, nor served with process of subpoena, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice. *High on Injunctions*, Sec. 1444; *Mead v. Norris*, 21 Wis., 310; *Wellesley v. Mornington*, 11 Beav., 181."

We think, therefore, that the court of common pleas had authority to pass judgment on these parties, the facts warranting it.

Now in regard to the punishment. While this is a proceeding for contempt, it is governed by Sec. 5581 of the code:

"An injunction or restraining order granted by a judge may be enforced as the act of the court, and disobedience thereof may be punished by the court, or any judge who might have granted it in vacation, as a contempt; an attachment may be issued by the court or judge, upon being satisfied, by affidavit, of the breach of the injunction or restraining order, against the party guilty of the same; and such party may be required by the court or judge to pay a fine not exceeding \$200, for the use of the county, to make immediate restitution to the party injured, and to give further security to obey the injunction or restraining order, and, in default thereof, he may be committed to close custody until he complies with such requirement, or is otherwise legally discharged."

He may be required to pay a fine not exceeding \$200, and in default of such payment may be committed to close custody until he complies with such requirement. We have no question but that the court might impose the fine that it did impose, to-wit: a fine of \$25.00 against these parties. The only question is whether he had a right to impose a fine and costs both. We do not think there was any abuse of discretion in imposing a fine of \$25.00. We think the facts of the case fully warranted the court in making that order; but in regard to the costs of the case we do not agree with the court, that it had a right to impose imprisonment in default of payment of costs. I read from the first case cited by counsel for the plaintiffs in error, from the fifth circuit, Hamilton county, which was an alimony case—*Lubbering v. State*, 10 Circ. Dec., 508.

"A court has the power to imprison one who has been ordered to pay alimony in an amount which he could pay, but which he refuses to pay; but where there is added to the amount of alimony a fine and costs of the contempt proceeding, and the defendant is committed until the whole sum is paid, the order of imprisonment is invalid.

"A sum ordered to be paid as fine and costs in a contempt proceeding amounts simply to a judgment for money, and the court has no power to imprison as for contempt on failure to pay it.

"Alimony is something more than a debt, and imprisonment for failure to perform is not against the provisions of our constitution or our statutes."

In that case *Lubbering* was ordered to pay \$1.50 per week, and the arrears amounted to \$4.50 at the time they were proceeding in the case, and he had also refused to pay an attorney fee of \$15.00, to plaintiff's attorney. The court of common pleas took the matter in hand, and ordered that the amount be paid, and in addition to that sum of \$25.00 to be applied in payment of the expenses of the contempt proceedings, and also the costs of the contempt proceedings, amounting to \$16.41, and in default thereof ordered him committed to the county jail, to be confined until said sums of money were paid. The court say:

"We think the judgment of the court should be set aside. The court had no power to order the accused to be confined in the jail until the fine and costs were paid.

"Section 5645, Rev. Stat., provides: And if it be adjudged that he is guilty he may be fined not exceeding \$100, or imprisoned not more than ten days, or both."

"And Sec. 5646, Rev. Stat., provides: When the contempt consists in the omission to do an act which is yet in the power of the accused to perform, he may be imprisoned until he performs it.

"The only contempt charged against Lubbering, which the court found him guilty of, was in not paying the \$4.50 alimony to the wife, and if Lubbering had been ordered imprisoned until he paid this amount, we would hold the judgment valid, for we are of the opinion that the evidence shows he could have paid this amount; but what the court did was to order him committed until he paid \$25.00 in the nature of a fine and the costs of the proceedings in contempt. The fine and costs were simply a judgment for money, and there was no power in the court to imprison as for a contempt on the failure to pay it.

"The power to imprison as for a contempt on failure to pay alimony we think rests on different grounds. Alimony is something more than a debt, and the best interests of society require that decrees of this nature should have all the power that courts can give for their enforcement. It is a protection to the family and the marriage relation which is the foundation of our society. We adhere to the ruling made by this court in *Effinger v. State of Ohio*, 5 Circ. Dec., 408."

We had this question before us in *Pancost v. State*, 8 Circ. Dec., 546, three years ago this term. And in that case, which was an alimony case, there had been an order that a certain amount of alimony should be paid, including the sum of \$25.00 to the attorneys. He was ordered to be imprisoned until he paid the amount of alimony, attorney's fees, and costs.

The court held:

"Plaintiff in error was imprisoned for contempt in refusing to obey an order granted in a divorce case to pay certain sums to the divorced wife for the support of minor children.

"Held: Under the evidence, it was not within the power of the plaintiff in error to perform the order of the court within the meaning of Sec. 5646, Rev. Stat.

We say here:

"In regard to the attorneys' fees we are unable to find any authority for the court directing their payment. But whether the court was authorized to do that or not, we are clearly of the opinion that he had no authority to order this man to be imprisoned at that time for the payment of those attorneys fees, nor for the payment of the costs made in the contempt proceedings. In support of that we cite a case from 80 Mo., 447. I read from the syllabus:

"Petitioner was found guilty by the circuit court of Jackson county, of contempt in wilfully violating its restraining order, by removing and refusing to return certain fixtures in controversy in a pending civil suit, and was adjudged to pay the adversary party therein \$150, as costs and expenses incurred by the latter in the contempt proceedings; also to pay a fine of \$500, and that he restore the property mentioned in the order and be committed to jail until he paid said sums of money and returned the property. Held, that so much of the judgment of the court as related to the payment of the fine and the \$150 was illegal and void.

"The case is a lengthy one, and discusses many questions under their statutes; but where they hold that he might be imprisoned for not returning the property, they say:

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"Here the court had jurisdiction, and the imprisonment of the petitioner until he should comply with the order of the court, was warranted by law. After he shall have restored the goods the prisoner will be entitled to his discharge, the other requirements of the judgment being nullities. * * *

"For these reasons the judgment of the court will be reversed, and the defendant be discharged, and the case be remanded to the court of common pleas."

There is quite a long discussion in that case in Missouri of the law in regard to the matter, and the distinctions that are made between the cases that are in the nature of criminal and those that are really civil.

There is a cause, which I will not attempt to read from, *Second Nat'l Bank v. Becker*, 62 Ohio St., 289, in which the Supreme Court make a distinction in regard to matters that are civil, and hold that there should be a construction of the statute such as would not permit the imprisonment of a party in a matter purely civil, and only civil, for the reason that the constitution provides that there shall be no imprisonment for debt in civil actions, except in case of fraud. In criminal causes the rule, of course, is different, and parties are fined, and imprisoned until they pay the costs. This statute provides that a party may be fined a certain sum for the use of the county, not for the party. That certainly is a matter penal in its nature: but we think the statute should be construed strictly as against the rights of the party who is bringing the proceeding for the purpose of enforcing a fine and imprisonment; and while the statute provides that he may be imprisoned for the non-payment of the fine, there is no provision in regard to the non-payment of the costs.

The judgment of the court will therefore be modified so as to provide for the imprisonment for the non-payment of the fine, but not for the costs. As to the matter of costs, it will be reversed. The costs will be divided under the statute, payable one-half by each party.

LIENS.

[Lucas Circuit Court, February 23, 1901.]

Haynes, Parker and Hull, JJ.

THOMAS H. WALBRIDGE V. CHARLES W. BARRETT ET AL.

1. VENDORS' LIENS—MECHANICS' LIENS—MORTGAGES—PRIORITY.

A vendor's right to be paid the balance of the purchase money is superior to the lien of a material man; and if the former, for a valuable consideration, before a judicial sale of the property, conveys the legal title to another, the latter becomes vested with the rights and interests of the vendor, and the lien of such original vendor, where the property is mortgaged by his vendee, passes to the mortgagee. *Mutual Aid B. & L. Co. v. Gashe*, 56 Ohio St., 270, followed.

2. SAME—RULE OF PRIORITY APPLIED.

Under the rule that a vendor's lien, by virtue of subsequent conveyance to and mortgage by vendee, passes to the mortgagee, the latter, where property was sold for part cash down and the balance to be paid in installments, and vendor conveyed to vendee to enable him to mortgage and borrow money to build on the property, and who absconded after obtaining money by mortgage, in a suit to marshal liens, is entitled to priority to the amount of the vendor's lien as against the holders of mechanics' liens, though the latter attached prior to the execution of the mortgage.

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3. AGREEMENT TO POSTPONE VENDOR'S LIEN TO MORTGAGE.

An agreement by such vendor with the mortgagee of his vendee, that he would postpone his vendor's lien to the mortgage, does not extend to mechanics' liens or defeat the priority of the vendor's lien in favor of the mortgagee.

4. VENDOR RECEIVING MORTGAGE MONEY AND PAYING TO VENDEE.

The fact that the vendor of land for which the purchase price had not been paid, who had executed deeds to enable the vendee to raise money to build on the property, received the mortgage money and paid it over to the vendee, who absconded shortly after, without paying his creditors, does not make the vendor responsible therefor to holders of mechanics' liens.

5. MONEY PAID ON ANOTHER CONTRACT—NOT AVAILABLE.

Where such vendor, after conveyance to and mortgage by his absconding vendee, received from the latter certain sums of money, proceeds of the mortgage, to apply on another contract, the money so received cannot be deducted from the amount of the vendor's lien or reached in case at bar.

APPEAL.

H. C. Rorick, for mortgagee.

King & Tracy, for the plaintiffs.

Ray & Cordell; McDonald; Reno; Southard & Southard and others, for the defendants.

HAYNES, J.

This action, above entitled, and *N. G. Secor* against *Chas. W. Barrett*, were heard together. *Mrs. Secor* is a sister of *Mr. Walbridge*, and he transacted the whole business that was done in regard to the matters in controversy here, and the cases were submitted to us the same as if they were one case.

The actions were submitted to us on questions of the marshalling of liens. The facts, briefly, are: That *Walbridge* was the owner of some property in the city of Toledo which was subdivided into six lots. He sold the same to *Barrett*, at a certain price, no part of the purchase price being paid down, but it was agreed that the price should be paid as *Barrett* should build upon the property, he stating that he expected to build upon the property soon. The first payment was to be made when the houses should be completed up to a certain point; the second, when the roofs were on the houses, and the balance when the houses were completed. *Barrett* in fact went into possession of the property immediately and commenced to build, and to put six buildings upon the property, one on each lot. It was further agreed between *Walbridge* and *Barrett* that if *Barrett* should want to mortgage the property for the purpose of raising money, *Walbridge* would convey the property to *Barrett* by deed. Soon after *Barrett* went into possession of the property and commenced to build, he desired to mortgage the property, and thereupon *Walbridge* executed deeds and delivered them to *Mr. Rorick*,—through whom *Mr. Barrett* was negotiating loans; the loans were negotiated, the mortgages made and the deeds and mortgages were placed on record at the same time. At the time that the money was paid in on the mortgages, quite a sum of the money was paid over by *Rorick* to *Walbridge* and *Walbridge* paid over to *Barrett* the principal part, or perhaps all of the money, and *Barrett* paid off a few of the laboring men, put the balance of the money,

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in his pocket, left the country and has never been heard of since. The property, I believe, had been sold, or portion of it, and actions have been brought to enforce liens upon the property, and thus the questions arise which we have here.

Many of the questions have been argued to us, with a great deal of earnestness and ability, and we have endeavored to consider them all, but I do not undertake to go through and discuss all the questions which have arisen or may arise in the minds or judgment of counsel. We think the well established principles of law as laid down by the Supreme Court of Ohio, are sufficient to guide us to a determination of the rights of the parties in this case. The decree in this case will be substantially this:

1. The costs and taxes and assessments, if there are any mentioned in the petition which are a lien upon the property and which are payable according to the statute.

2. The amount of the vendor's lien will be ascertained and will be allowed to the mortgagee.

3. The liens of mechanics and material men and contractors will be paid.

4. The balance, if any remains, to the mortgagees.

In *Mutual Building & Loan Company v. Gashe*, 56 Ohio St., 273, 295 [46 N. E. Rep., 985], the principle is laid down by the Supreme Court which we follow here. That was a case which went from Lucas county. We had taken a certain course in the case and in respect to this particular matter, the court said we were in error, and they reversed us, and now we will follow the Supreme Court. The principle laid down there is, that a vendor's lien, unpaid, passes to the mortgagee and he is entitled to it, that is, he is entitled to the amount of the vendor's lien upon his mortgage to the exclusion of the lienholders under the mechanic's lien law. That is the matter, in brief. And, therefore, after paying the costs of the suit, we allow the amount of the vendor's lien in this case to pass to the mortgagee, and give them the benefit of it. But the mortgagees having taken their mortgages subsequent to the commencement of the mechanics' liens, the mechanics' liens would otherwise be prior to the mortgages; so that after the amount of the vendor's lien is awarded to the mortgagees the holders of the liens, under the mechanic's lien law, will come in for the balance that remains due upon their contracts, and when the amount of the liens is paid off, if there is anything left, the mortgagees may have it, and by that time, as near as I can understand, the money will be exhausted.

Campbell v. Sidwell, 61 Ohio St., 179 [55 N. E. Rep., 609], which has been cited, we think, has no application to this case whatever. We think the whole case is solved in substance by the position that I have mentioned. I will say, however, that there was one question raised and argued by counsel in which it was claimed that inasmuch as Walbridge had agreed with the mortgagees (and I should have stated that he did so agree), that he would postpone his vendor's lien to the mortgage, that that waiver should extend to the whole of the mechanics' liens. *Mahngren v. Phinney*, 50 Minnesota, 457, 52 N. W., 915, was cited to us; but counsel who have cited it have overlooked something in that case, because, in fact, that decision is the very reverse of what is claimed for it. Prior to that, there had been a decision holding the doctrine claimed by counsel, but that decision was overruled by *Mahngren v. Phinney*, 50 Minn., 457, 52 N. W.,

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915, and, at any rate, we hold that that rule has no application and we find no authority for so holding.

There was in this case a question raised which we should probably notice, and that is, that at the time the money was paid over by the mortgagees to Mr. Walbridge, under an arrangement between them, Mr. Walbridge received from Barrett some \$2,000 or \$3,000 of that money upon another contract that he had for the sale of property, not upon this contract, nor upon this land; and we had considerable discussion whether that could be reached in any way in this case; but we are unable to see how it can be reached here, because, to take that out to apply upon the vendor's lien would be simply to take it out of the mortgagees, which would be unjust and would not be right, because all these matters transpired after the mortgage had been executed and the mortgagees had their lawful lien upon the premises. Whatever questions there may be between the mortgagees and Walbridge in regard to that matter, they do not arise here, and we will not pass upon them.

It has been suggested that the amount of money placed in the hands of Walbridge ought to be held for the payment of these liens, but we know of no principle of law that would require us to hold that Walbridge should be liable to the mechanics' lienholders for the amount of that money received by him. He had not undertaken with them at any time or in any manner, to see that whatever money was paid on the mortgages, or paid by Barrett, or received by Barrett, or from any other source whatever, should be applied in payment of the amount of the mechanics' liens and we know of no legal obligation on his part to do so, unless he had volunteered to do it. He paid this money over to Barrett. It was a serious mistake, there is no doubt about it, but we think it is very clear that he honestly expected that Barrett would receive it and use it and would go forward in the business which he had undertaken and would carry out his contracts; we think that in all that he acted honestly, even if he erred in judgment. It seems that when Barrett got the money in his pocket the temptation was too strong and the money led him away and he forgot to return. But we are unable to see how, under any legal principles, that matter should be charged in any manner to Mr. Walbridge. Walbridge was in no wise bound to receive this money from the mortgagees or to hold it. It seems that Rorick did pay it over to Walbridge and it was passed through his hands, but that was a matter between him and Walbridge. So that after a very full and lengthy discussion of this matter, we came to the conclusion we have in the premises, and are very clear in our minds that it is in accordance with the principles of law already established by the Supreme Court, and which we are bound to follow, and the decree will be as I have stated.

In regard to Caspar Sacks and his claim, Mr. Sacks was sworn and gave testimony to sustain it. It was said by counsel that they would look into the matter and perhaps offer some further testimony, but we have never heard anything in regard to it, and so the claim of Mr. Sacks will be as stated in his answer.

PARENT AND CHILD.**[Lucas Circuit Court, October 15, 1900.]****Haynes, Parker and Hull, JJ.*****MICHAEL H. MURPHY V. EDWARD QUIGLEY.****1. IMPLIED CONTRACT FOR SUPPORT OF CHILDREN.**

Where the father, upon separation from the mother, placed his children with their grandparents, under contract to pay a stipulated price for their care and support, and subsequently took them away and placed them in a convent, and the mother afterwards, without the father's consent, returned the children to their grandparents, where they remained for four years, the father visiting them frequently and knowing that no compensation was being paid for their care and support, the father is liable, upon implied contract (if returning the children to the grandparents did not revive the original contract), for a reasonable sum for such care and support.

2. PLEADING TWO CAUSES OF ACTION IN SUCH CASE.

A petition in an action against a parent for board and support of his children, which sets up two causes of action, the first upon an express agreement as to the price and the other upon a *quantum meruit*, is not objectionable and plaintiff cannot be compelled to elect upon which ground he will proceed, especially where both grounds may be true and he is not certain which may be established by the evidence. It is proper in such case to submit the question to the jury upon the pleadings and evidence for their determination.

3. VERDICT ON IMPLIED CONTRACT SUSTAINED.

In the case above stated, the reviewing court declined to disturb a verdict, for board and care of the children, of six dollars a week and interest, because in a previous hearing another jury allowed five dollars a week for the same time, the latter being the amount specified in the express agreement above referred to.

HEARD ON ERROR.*Hiram VanCampen, Jr.*, for plaintiff in error.*Hurd, Brumback & Thatcher*, for defendant in error.**HAYNES, J.**

A petition in error is filed in this case to reverse the judgment of the court of common pleas, in which a verdict had been rendered for the plaintiff below, the defendant in error here, for the sum of \$1,787.57, for the care of the children of the defendant.

The case stands upon the facts and the application of the law to those facts. The case was once tried to a jury, and taken from this court to the Supreme Court, this court having reversed the judgment of the court below, and having set aside the verdict and remanded the case for a new trial. The Supreme Court affirmed the action of this court, and the case was retried in the court below, with the result that another verdict has been rendered in favor of the plaintiff Quigley.

There was no report of the case by the Supreme Court,—simply reversed without report. There was not a very extended discussion of the

*For a decision of the common pleas in this case, see 5 Dec., 680.

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questions in the petition in error in this court, at the time the case was reversed. We shall not go into any extended discussion of the questions this time. We do not think it is necessary. We doubt, indeed, that we could add anything to the law of the case which has been cited by counsel for both parties. They have been diligent and energetic in the citation of authorities, and perhaps have given them as fully as they can be obtained, certainly more fully than we could get them. The real thing for the court to do is to apply the law to the facts of the case.

The first point that has been urged before us is this: That the court below erred in its refusal to compel the plaintiff below to elect upon which cause of action he would proceed to the trial of the case. The first cause of action, it may be remarked, was upon an alleged agreement, the next was upon a *quantum meruit*. It was sought to bring the case under Secs. 3110 and 3116, Rev. Stat.

The code provides (Sec. 5060) for a statement of a cause of action in ordinary and concise language, and in the next section, that each cause shall be separately stated and numbered; if the petition contains more than one cause of action. I read from the notes and the cases therein cited: The irregularity is reached by motion and not by demurrer, otherwise it is waived; and the refusal of a motion to compel plaintiff to separately state his causes of action is not ground of error unless the opposite party is prejudiced. *Bear v. Knowles*, 36 Ohio St., 43.

It is a general rule, however, that facts constituting a single cause of action cannot be subdivided into two or more causes of action. *Ferguson v. Gilbert*, 16 Ohio St., 88; *Sturges v. Burton*, 8 Ohio St., 215; 24 Fed. Rep., 580.

Where there is one cause of action, and it is set forth in several counts, plaintiff may be compelled by motion to elect on which one he will rely. 10 How. Pr., 281; *Sturges v. Burton*, 8 Ohio St., 215; *Raab's Estate*, 16 Ohio St., 274, 281.

But where he is uncertain as to the grounds of his recovery, or there is a fair and reasonable doubt as to his ability safely to plead them in one form, he may set forth his causes of action in distinct statements, and he will not be compelled to elect as between them. 65 How. Pr., 1; 61 Cal., 209; 12 Abb. n. c., 309; 31 Hun., 432.

As where plaintiff seeks to recover upon two grounds, both of which may be true, and he does not know which one, he may state them as separate causes of action, and in the alternative in one petition. *Strong v. Strauss*, 40 Ohio St., 87; *First National Bank v. Railway Co.*, 9 Dec. (Re.), 702; see *Cin. N. O. & T. P. Ry. v. Bank*, 1 Circ. Dec., 109.

And since our statute does not require that the facts shall be stated without unnecessary repetition, this mode of pleading cannot be regarded objectionable. *Citizens Nat'l Bk. v. Railway Co.*, 9 Dec. (Re.), 147.

There may be actually two grounds, or, being only one, certain supposed grounds may be so connected that the plaintiff will not be able to tell in advance which will be established upon the trial. The code will have failed in its chief object if he is forbidden to develop every ground upon which he bases his right to recover. *Bliss Code Pl.*, Sec. 120; *Pomerooy Rem.*, Sec. 576; 27 Wis., 327; 1 Abb. Pr., 442.

We have examined substantially all these cases, and we think the law is well settled and is as stated in this note. We therefore think the court did not err in refusing to require the plaintiff to elect as to which cause of action he should proceed upon. It seems to us it is clearly within

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the principle laid down, where the plaintiff is not certain as to which ground he can recover upon. The testimony shows that it was a very proper case for the party to set out his cause of action in two or three different forms. It is possible that by reciting the testimony he might have stated it all in one cause of action; but had he done so, he would have still been liable on motion to have his petition trimmed down for redundancy. We think it was proper for him to state it as he did state it, and then offer his testimony, and have the question submitted to the jury upon the pleadings and the evidence as it was finally developed on the trial. We have had several of these cases precisely like the case at bar, involving allegations on express contract and general account.

The more difficult question comes up as to the liability of this plaintiff in error to the defendant in error for the care of these children. A very brief recital of the facts will show the situation of the parties.

This plaintiff was a married man. His wife and he could not agree. What the difficulty was between them does not appear, and it is immaterial here. Suffice it to say, they agreed to disagree, and to live separately; but it was agreed that these two children, one perhaps five and the other two and one-half years of age, should be left with the plaintiff below, Quigley, who was the foster father of Mrs. Murphy, or at least the person by whom she had been brought up. They were to be left with Quigley and his wife. It was not stated how long they should be left. It was agreed that they should not be taken away without the consent of the father, and it was agreed that he should pay \$5.00 a week for their board. It is said that nothing was said about clothing. A few weeks after that it is said that notice was served by Mr. Murphy upon Mr. Quigley, that he would not be responsible for their board any longer. It is denied on the part of Mr. Quigley, I believe, that he received that letter. At the expiration of that time, Mr. Murphy, without the consent of either of these parties, took these children and put them in the convent, where he made arrangements for their board and care for an indefinite period, and for which he was to pay a certain fixed sum of money. They remained there a short time, and then the mother went to the convent and took the children, without the consent of the sisters or those in charge, and perhaps without their knowledge, and took them back to her foster father's, the plaintiff below, and left them there. There they remained for a period of some four years, the plaintiff and his wife taking care of the children, and giving them all the care which grandparents could give, boarding and clothing them, at which time the parents had come to some agreement in regard to their differences, and concluded to live together again, and did so, and the children were taken by their father and mother to their own residence. Subsequently, although it is not material here, the mother left and went back to where she had been before, in Michigan, and worked for her support on a newspaper, and the children have remained from that time to this in the care of the father, and are now with him at his residence.

Although there is but a single question here, that this case finally turns upon, there has been an extensive discussion of the question and of the law governing this class of cases; but in the application of the law to the particular facts of this case, it seems to us that the problem is simple, or at least not very difficult.

It is claimed that when the children went back, they did not go back under the contract, and there has been some discussion of that.

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There might be, perhaps, some difference of opinion about that; but I am myself inclined to think that when they went back the contract ought to apply, or at least it ought to be used to give some light as to the amount that should be recovered by Mr. Quigley. But the children did go back. They went back with the full knowledge of the father that they were there, and with his knowledge they remained there, and it was with his knowledge that Mr. and Mrs. Quigley were caring for them, and that Mrs. Murphy was not paying for their board and clothing. He saw the children frequently. He took them out riding from time to time, and returned them to this place. He never notified Mr. Quigley that he would make any payment, neither was any payment demanded by Quigley during the four years they were there. The matter ran along, and stood in that shape. It was known, of course, at the time the children were originally placed there that Mr. Quigley expected payment, and Mr. Murphy expected to pay.

With these leading facts in the case, it was submitted to the jury by the court in a charge which we think was fair and full, and which properly submitted the issues to the jury. The real question, in our opinion, was whether this board and clothing had been furnished for these children, and furnished under such circumstances that there was fairly an implied understanding and agreement that the father should pay for the care and custody of the children, and whether the law would not imply, under all the circumstances, that he should pay for the care of the children.

Questions have been discussed which are collateral to this, and which we think have no real bearing on the present issue in the case. It is a case where the jury might very properly infer that the understanding was, when the children originally went there, that the Quigleys were to be paid. The fair understanding was, when they were allowed to remain there afterwards without being taken away, that the Quigleys should be paid for their care and maintenance. It was a fair and just debt, under the old idea of *quantum meruit*, which is said to be as broad as a bill in equity. It was equitable upon the facts of the case that the parent should pay for the support of these children. The case was decided against the defendant below, and we see no reason why the court should disturb the verdict. The verdict, it is said, is large. It is \$1,700. I do not know how the jury got at it. The claim below was for 225 weeks at \$5.00 a week, which would make it something over \$1,100. That was the amount of the verdict in 1896. The jury seems to have allowed about \$6 a week, which with interest from '96 down to the present time would make up substantially the amount of the verdict. So the only difference seems to be that in one case the jury allowed a little larger amount than in the other per week, and the interest makes up quite a large amount of difference between the two verdicts. We do not think we ought to disturb the verdict on this account.

The judgment of the court of common pleas will be affirmed, but without penalty.

NEGLIGENCE—TRIAL.

[Lucas Circuit Court, February 2, 1901.]

Haynes, Parker and Hull, JJ.

WILLIAM BEUCKER v. HERBERT BAKER ET AL.

1. RULE AS TO DIRECTING VERDICTS.

Where there is no dispute in regard to the facts in a case and can be no dispute upon the testimony, it is proper for the court in its discretion to direct the jury to return a verdict for the defendant, the only question being one of law as to whether there was any actionable negligence or liability on the part of defendant.

2. EMPLOYER AND EMPLOYEE—NEGLIGENCE.

Where an employee in an iron foundry, whose duties required him to go to and from a cupola, was familiar with conditions and accustomed to go back and forth in daylight and after dark, he cannot recover for injuries received from falling while descending from the ladder to a platform, on the ground that the lights were turned out just as he was in the act of swinging upon the ladder. An employer owes his employee nothing more than ordinary care, and under circumstances stated cannot be held to have been guilty of negligence. The court, in this case, was justified in directing a verdict for defendant.

HEARD ON ERROR.

Hurd, Brumback and Thatcher, for plaintiff in error, cited:

Assumption of risk: *Van Dusen Gas and Gasoline Engine Co. v. Schelies*, 61 Ohio St., 298; *Columbus, H. V. & T. R. R. Co. v. Shannon*, 2 Circ. Dec., 644; 1 *Shearman & R. on Neg.*, Secs. 203, 211, 214; *Wood's Master and Servant*, Sec. 349; *Motey v. Pickle Co.*, 74 Fed., 155; *Baxter v. Roberts*, 44 Cal., 187; *Wheeler v. Mfg. Co.*, 135 Mass., 294; *B. & O. R. R. Co. v. Baugh*, 7 O. F. D., 606; *Ill. Steel Co. v. Schymanowski*, 162 Ill., 447, 44 N. E., 876; *Cook v. Railway Co.*, 34 Minn., 45, 24 N. W., 311; *Coal Co. v. Haenni*, 146 Ill., 614, 625; 35 N. E., 162; *Perren v. Railroad Co.*, 143 Mass., 197, 9 N. E., 608; *Blumenthal v. Craig*, 81 Fed., 320.

Contributory Negligence: *Penna. Co. v. Snyder*, 55 Ohio St., 342; 363; *Stevenson v. Railway Co.*, 18 Fed., 493; *Railroad Co. v. Mowery*, 36 Ohio St., 418; *Goodrich v. Railroad Co.*, 116 N. Y., 398, 404, 22 N. E., 397; *Ladd v. Foster*, 31 Fed., 827; *Smith v. County Court (W. Va.)*, 8 L. R. A., 82; *Harris v. Clinton Twp.*, 64 Mich., 447, 31 N. W., 425; *Mitchell v. Railway Co.*, 11 L. R. A., 130; *Hawkins v. Johnson*, 105 Ind., 29, 4 N. E., 172.

Defendant's Liability: *Bronson v. Oakes*, 76 Fed., 734; *Akeley Lbr. Co. v. Rauen*, 58 Fed., 668; *Penna. Co. v. Snyder*, 55 Ohio St., 342, 361; *Railway Co. v. Murphy*, 50 Ohio St., 135, 143, 33 N. E., 403; *Gould v. Woolen Co.*, 17 N. E., 531.

Directing Verdicts: *Stewart v. Bridge Co.*, 8 Circ. Dec., 454; *Colter v. Street Ry. Co.*, 9 Circ. Dec., 865; *Cleveland Axle Co. v. Zilch*, 6 Circ. Dec., 699; *Marietta & Cin. R. R. Co. v. Picksley*, 24 Ohio St., 654, 668; *Richardson v. Swift*, 96 Fed., 692.

Smith & Baker, for defendants in error.

HAYNES, J.

In this case a petition in error is filed for the purpose of reversing the judgment of the court of common pleas in a case in which the plaintiff in error was the plaintiff and the defendants in error were defendants. The action was brought against defendant below by plaintiff for injuries which were received by him in the course of his employment by defendants at their foundry in the city of Toledo. The petition, which was amended once or twice, does not set forth very distinctly the particular grounds upon which plaintiff claims that defendants were guilty of negligence. It states, generally, however, that at the foundry defendants have a cupola in which iron is melted; that in order to reach the upper portion of this cupola it is necessary to go up to what is called a platform, really to the second floor of the foundry, where there is a door in the cupola and where the cupola is fed. It states that at the close of the work in the daytime or at night, it becomes necessary to empty that cupola and that in doing so there is often found what they call a "freeze," that is to say a shell forms over the hot iron and it remains there, firm, and in order to dislodge it so that it will not become hardened, they some times throw water upon the hot iron that has been drawn out at the bottom of the cupola and sometimes they send up a man to throw a piece of iron into the cupola for the purpose of breaking the shell and running it down. It is claimed that in order to get up to this floor they ascended by a ladder which was about eighteen inches or two feet wide and which had side pieces extending up above that floor about two feet; that there were no railings around the area where the ladder reached the second floor. It is said that the plaintiff's particular duty was to look out and care for this cupola; he saw that it was cleared out at night and he lit it in the morning, fed it and was generally in attendance upon it. On the night on which the accident happened, it is said in the petition that plaintiff was ordered to go up and throw some iron into the cupola for the purpose of breaking this crust which had formed; that he did go up, and that while he was up there the servants of the defendant firm turned out the electric lights. It is said that there was at that time a considerable amount of steam and gas in the room, arising from the main room where they had been filling the molds, and that by reason of these facts he fell and was injured.

The testimony of the plaintiff himself and the clear and undisputed evidence is that this same man had been at work there for quite a length of time; that his duty, as has been stated, was in regard to the emptying of the cupola and attending to it and that on the night in question, this pack not breaking, he had thrown some water upon the hot ashes under the cupola and then the foreman had said to him, "You go up stairs and throw in some iron," and that he did so. After having performed that duty he started to come down, and having reached the ladder, he took hold of it with his left hand and swung himself around upon the step of the ladder to descend as is the usual custom, backwards, that is, faced to the ladder; and that just as he was swinging his feet around the electric lights were turned out and he fell and was injured. The testimony shows that he was in the habit of going up there as often in the dark and performing this duty as he was when the lights were burning. He was up there very frequently in the performance of his duties in the

daylight and also when it was dark in the evening, and performed his work without the aid of light as frequently as he did with the aid of light.

The case has been twice tried. In the first trial of the case, under the testimony there adduced, the trial judge submitted the question to the jury, the jury disagreed, no verdict was returned and the jury was discharged. Upon the second trial of the case the evidence was offered as stated in the record, and at the conclusion of the testimony on the part of plaintiff, upon motion of the defendants, the court directed the jury to return a verdict for the defendants, and it is averred, among other things, that "The court erred in directing the jury to return a verdict for the defendants, to which the plaintiff duly excepted at the time." And, "That the court erred in overruling the motion of plaintiff for a new trial," and "That the court erred in denying to plaintiff his right to a jury trial under the constitution of the state of Ohio and of the United States." Other errors are assigned in regard to the admission and rejection of evidence, but the question that is submitted to us here is his main question, whether the court erred in directing the jury to return a verdict for the defendant?

From an inspection of the record, there seems to have been no dispute in regard to the leading points in the evidence, there is no denial of them. It seems to us that after this man had gone up to perform his duty, the engineer in whose room the machinery was that made the electric light, stepped into the room and called to the foreman and wanted to know if he was going to keep him there all night. He said no, that the electric lights might be turned out now, and thereupon the electric lights were either turned off or the machinery was stopped and the light ceased. It happened that the light ceased at the same time, or about the time that this plaintiff in error had taken hold of this ladder for the purpose of descending. It is contended here very strenuously on the part of plaintiff's attorneys that the right of a trial by jury has been violated in this action. It is known to us all that during the old system of practice, prior to the adoption of the constitution of 1851, it was customary to move the court to nonsuit the plaintiff, the general rule being that if a verdict should be returned upon the evidence, which the court would set aside a nonsuit should be allowed, but now, instead of a motion to nonsuit, we have the motion to take the case from the jury. Under Sec. 5314, of the code, it is provided that an action may be dismissed without prejudice to a future action in certain cases, and at the conclusion it says: "In all other cases the decision must be upon the merits, upon the trial of the action."

For some time after the adoption of the code there was no provision for an exception to the setting aside of a verdict because the verdict was against the evidence or contrary to the evidence. But subsequently, on April 12, 1858, there was an amendment to the code which provided, in substance that either party may except to the decision of the court on a motion to direct a nonsuit and arrest the testimony from the jury. This has been carried into the code in its present form in Sec. 5301:

"When the decision is not entered on the record, or the grounds of the objection do not sufficiently appear in the entry, or the exception is to the decision of the court on a motion to direct a nonsuit, or to arrest the testimony from the jury, or for a new trial for misdirection by the court to the jury, or because the verdict, or if a jury is waived, the find-

ing of the court is against the law and the evidence, or on the omission or rejection of evidence, the party excepting must reduce his exceptions to writing," etc.

The first decision that I know of in regard to this statute and its construction is to be found in *Stockstill v. Railway Co.*, 24 Ohio St., 83. In that case, among other things, the court say:

"Under the act of April 12, 1858, the court is authorized, in a proper case, to arrest the testimony from the jury, and render judgment for the defendant. The judgment in such case, however, has not the effect of a nonsuit at common law, but is, under the provisions of the code above referred to, a decision of the action upon the merits.

"It was substantially the same as a judgment for the defendant on a demurrer to the plaintiff's evidence at common law or the submission of the case to the jury under instructions to return a verdict for the defendant; the same result being reached in either case.

"If the evidence tends * * * to prove all the facts which it is incumbent on the plaintiff to establish in order to maintain his action, he has a right to have the weight and sufficiency of the evidence passed upon by the jury, and it is error for the court to grant the motion, and render judgment against him."

And the court then proceeds to state their conclusion in regard to that particular case. There have been other decisions from time to time, and the last one that we know of is *Railway Co. v. Murphy*, etc., 50 Ohio St., 135, which went up from Erie county. I will read from page 143, where the court say:

"Negligence is always an inference from facts put in evidence, as contrasted with a fact which is the subject of direct proof. The proof disclosed facts calling for logical, as distinct from legal, deduction. Where that is the case the question is for the jury, and not for the court."

That seems to reduce the matter to quite a close point, so far as the statement is concerned. But the rule as we understand it from all these cases, and from all the cases which have been cited from the Supreme Court, where there is no dispute in regard to the facts in the case and can be no dispute upon the testimony, then it is proper for the court, and it may in its discretion, interfere and arrest the case from the jury, or, what amounts to the same thing, direct the jury to return a verdict for the defendant, the only question being a question of law as to whether there was any actionable liability or negligence on the part of defendant in the case.

This case has been submitted to us on the claim that the court erred in taking this case from the jury. As I have already stated, it seems to us from the evidence, and I think it clear that upon the main points of the case there was no dispute in regard to the facts of the case. This party plaintiff had been accustomed to perform this kind of work, had been accustomed to go up there in the dark quite as often as by daylight. It is admitted by counsel for plaintiff that if the claim had been set up in his petition that he fell because there was no railing around that area, that there could be no recovery, because he was perfectly familiar with the position and was in the habit of going there, and that he assumed those liabilities; but it was claimed that because the light was extinguished, which went out just as he was about stepping upon the rounds of the ladder, that that made a new and different case. The employer of the plaintiff, through his employment, was only liable for ordinary

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negligence, such negligence as an ordinarily prudent man would be liable for; they were only required to exercise such care as persons of ordinary prudence were accustomed to exercise under like circumstances. We are clear in our opinion that the defendant company had no reason to anticipate that the turning out of this light at this time would have any effect whatever upon the plaintiff, who was then upon the second floor, for the reason that he was accustomed to be there under those circumstances, often, and they naturally would suppose that the turning off of the light or the not turning it off would make no special difference to him, and therefore they were justified in turning the lights off as they did at that time; that there was no causal connection between the turning off of the lights and the injury that occurred, and this was shown by the evidence. It is true that the plaintiff says that just at the time these lights went out he was kind of frightened, was startled. It was not shown by his own testimony that that frightening necessarily precipitated him to the floor below. The evidence shows that it occurred about the same time that he was in the act of stepping upon the ladder, a thing that he had done hundreds of times before and that he had done in the dark as often as in the light and there is nothing to show that he either misplaced his foot or misstepped with his foot or took any different steps than he would if the light had been burning; it simply happened at that time, and for some reason perhaps unknown to himself, he fell and received the injury. There was some evidence attempted to be offered to the effect that when the light was out there was some steam about the room and that that had the effect of startling him; but we do not think that evidence had any bearing on this question, nor do we think from the evidence itself that there was any real showing of that kind made.

We are brought to the conclusion, after examining this question, that the action of the court in taking this case from the jury was within the principle that is recognized by the Supreme Court of Ohio and has been so recognized for a great many years. We are aware also that this class of cases are what are denominated close cases and it is difficult to judge exactly what ought to be done under certain circumstances, but it seems very clear to us that there was no cause of action proven here on the part of the plaintiff against these defendants. There were some questions submitted to us on the admission and the rejection of evidence, but, under the view we take of this case, these questions are immaterial, because if upon the showing of the plaintiff there was no cause of action against the defendants, the rulings upon those questions would have no material effect upon the final decision of the case. The judgment of the court of common pleas will therefore be affirmed.

FEES—COUNTY OFFICERS.

[Hamilton Circuit Court, 1901.]

Swing, Giffen and Jelke, JJ.

EUGENE L. LEWIS, AUDITOR V. STATE EX REL. HARRISON.**ADDITIONAL COMPENSATION TO COUNTY OFFICERS.**

The services performed on the decennial county board of equalization, under the Hendley-Royer law, by the auditor, county surveyor and county commissioners are without the scope of their official duties as such, and are not so "incident" or "germane" to the regular duties of the offices to which they have been respectively elected, as to make the provision for compensation contained in the Hendley law, in contravention of the act of the legislature, 94 O. L., 396, or of the constitution, Art. 2, Sec. 20.

Frank F. Dinsmore, for plaintiff.

Wilson, Cosgrave & Jones, county solicitors, for defendants, cited:

94 O. L., 396; Sec. 20, Art. 2, Const.; Sec. 2813a, Rev. Stat; 94 O. L., 622; Sec. 1078, Rev. Stat. *Henderson v. Commissioners*, 4 Col. App., 301 [35 Pac. Rep. 880]; *State ex rel. v. Raine*, 49 Ohio St., 580 [31 N. E. Rep. 741]; *Mechem on Pub. Off.*, Sec. 826; 1 *Dillon on Mun. Cor.*, 315; *Evans v. Trenton*, 24 N. J. L., 764; *Strawn v. Commissioners*, 47 Ohio St. [26 N. E. Rep. 635]; *Anderson v. Jefferson Co.*, 25 Ohio St., 13; *McClave v. Miller*, 25 Ohio St., 14; *In re Lease's Claim*, 2 Circ. Dec. 386, (4 R.3); *Halpin v. Cincinnati*, 3 Dec. (Re.), 58; *Debolt v. Cincinnati Tp.*, 7 Ohio St., 237; *Hatch v. Cincinnati*, 17 Ohio St., 48; *Callaway v. Henderson*, 119 Mo., 32 [24 S. W. Rep., 437]; *Bartch v. Cutler*, 6 Utah, 409 [24 Pac. Rep., 526]; *People v. Calhoun Co.*, 36 Mich., 10; *Donaldson v. Wabash Co.*, 92 Ind., 80; *Hope v. Hamilton Co.*, 101 Tenn. [47 S. W. Rep., 487]; *Jones v. Commissioners*, 57 Ohio St., 189 [48 N. E. Rep., 882; 63 Am. St. Rep., 710]; *United States v. Saunders*, 120 U. S., 126 [7 Sup Ct. Rep., 467].

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The question in these cases is whether or not an allowance of five dollars per day can be made to the auditor, each of the county commissioners and the county surveyor, as members of the decennial county board of equalization, under what is known as the Hendley-Royer law, viz., Sec. 2813, Rev. Stat., as amended by the Hendley law, 94 O. L., 246; and by the Royer law, 94 O. L., 336; and construed by the Supreme Court in *State ex rel. Guilbert, Auditor, v. Halliday, Auditor*, 63 Ohio St., 165.

It is contended by counsel for the auditor that the defendants in error are all county officials, and therefore Sec. 20, Art. 2, of the constitution forbids any change affecting their salaries or compensation during their respective terms of office; and further, that an act of the same general assembly which passed the Hendley-Royer law, viz., 94 O. L., 396, providing "that no act heretofore passed at this session of the general assembly, regulating the salaries and compensation of county officers, in any county of the state, shall be construed to affect or change in any man-

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ner the salary or compensation of any county officer elected prior to the passage of such act," makes nugatory the clause of the Hendley law providing for compensation. 94 O. L., 248.

From an examination of the authorities, we are of opinion that this case turns upon the question whether the service of a member of the decennial county board of equalization is without the scope of the official duty of each of these county officers respectively, is as to the offices to which they have been elected extra-official, or is germane and incident to such official duty.

In the following cases, under more or less similar constitutional or legislative provisions, compensation has been allowed: *Evans v. Trenton*, 24 N. J. L. R., 764; *United States v. Saunders*, 120 U. S., 126, 127; *Ex rel. Anderson v. Durick*, 20 Calif., 94; *Love v. Baehr*, 47 Calif., 364; *Melone v. State*, 51 Calif. 549; *Green v. State*, 51 Calif., 577; *Crosman v. Nightingill*, 1 Nev., 274; *State ex rel. Davenport v. Laughton*, 19 Nev., 202, 8 Pac., 344; *State ex rel. Howell v. La Grave*, 23 Nev., 373, 48 Pac., 674; *Burroughs v. Commissioner*, 29 Kan., 196; *Kansas v. Corning*, 44 Kan., 442, 443, 24 Pac., 966; *State ex rel. McGrath v. Walker*, 97 Mo., 162, 10 S. W., 473; *McBride v. Grand Rapids*, 47 Mich., 236, 10 N. W., 353; *Roulo v. Auditor*, 74 Mich., 129, 41 N. W., 879; *Detroit v. Redfield*, 19 Mich., 376.

In the following cases compensation was denied: *Ex rel. Stetsen v. Supervisors*, 36 Mich., 10; *Jones v. Commissioners*, 57 Ohio St., 189; *Henderson v. Pueblo Commissioners*, 9 Col. App., 301; *State ex rel. v. Raine, Auditor*, 49 Ohio St., 580; *Strawn v. Commissioners*, 47 Ohio St., 404; *Callaway Co. v. Henderson*, 119 Mo., 32, 24 S. W., 437; *Bartch v. Cutter*, 6 Utah, 409, 24 Pac., 526; *People v. Calhoun Co.*, 36 Mich., 10; *Donaldson v. Wabash Co.*, 92 Ind., 80; *Commissioners v. Bromley*, 108 Ind., 158, 8 N. E., 923; *Hope v. Hamilton Co.*, 47 S. W., 487.

And generally on this subject see *Mechem on Public Officers*, Secs. 859-864; *Dillon on Municipal Corporations*, Vol. 1, Par. 233 and 234 and notes.

The reason of such constitutional and legislative provisions sounds in contract, and is that one entering upon an office to which a salary or compensation has been affixed undertakes not only to perform such duties as are prescribed to such office, but has in contemplation the performance of all duties which may arise which are naturally incident to such office or are germane to it, and that when the legislature specifies an additional duty germane in its nature and naturally incident to the office it has added nothing but what the officer is deemed to have had in contemplation when he entered upon the office at a fixed salary.

The administration of the county's business is divided among its various officers and boards, and, theoretically speaking, such division is supposed to embrace all the necessary powers and duties of the county.

The service performed by each and every member of the decennial county board of equalization is the same, be he in other capacity auditor, surveyor or county commissioner. If, then, this service is incident and germane to the duties of any county officer, it is important to discover which. If the county's business is properly divided, it is logically impossible that it should be incident to more than one, or to three. It is absurd to assume that three officers entered upon their different offices under an implied obligation to perform one and the same service. If we say this service is incident to one of the three—the auditor or the commissioner

or the surveyor—we do not say that it is incident to either. We are therefore driven to choose one and say that this service is incident to his office, or to say that it is incident to neither of them. If it is incident to neither the conclusion is plain, it is as to them a new office and they may receive compensation. If we choose one and say this service is incident to his office, the result is manifestly unfair because we deny him compensation and give it to the others.

The service performed by the members of the decennial county board of equalization is more akin or germane to the duties of the county auditor than to the others. Let us therefore take this horn of the argument and see whether or not this service is as to him so incident to his office as to come within the constitutional and legislative prohibition against additional compensation.

The language of the Hendley law, itself, furnishes us a clue as to what the legislature thought in this regard. On page 248 (94 O. L.), at the twentieth line, the law provides: "Including the county auditor *in his own proper person*." Recognizing that all moneys received by the auditor, as auditor, must go directly into the fee fund, and that the duties on the decennial board are not auditorial duties or performed in the capacity of auditor, but are a distinct and independent service performed in another capacity, and anticipating and providing against the very question raised in this case, and intending that the compensation provided for should go to the person performing the service on the board irrespective of other official capacity, the legislature inserted these significant words. And inasmuch as the county auditor is the only one of three officers who receives fees for service performed in his official capacity, which pass into the fee fund, but is himself paid a fixed salary, it becomes apparent that the legislature deemed it necessary to say this only as to him, thinking that the question never could arise as to the others, hence the insertion of these words becomes pregnant with meaning as to all.

This argument disposes of the objection under the prohibition of the act of the legislature, 94 O. L., 396, but does not meet the constitutional objection. It will not do to say that this provision is constitutional because the legislature thought this service not *incident*. The legislature intends all its acts to be within the constitution, and presumptively they are. This brings us back to the main question, which must be determined from the nature of the service itself.

In the first place this service is so large and important that it properly is not confided to an individual, but to a board of five members, which acts with a quorum and by a majority of three. The individual members can do nothing by and of themselves.

How can it be said that service on this board is of such a nature that it was in contemplation of the legislature in prescribing the duties of the auditor, or in contemplation of the auditor, when he assumed the duties and responsibilities of his office at a fixed salary? He does nothing on the board as auditor. The legislature has had recourse to his office merely for the purpose of providing an *ex officio* method of appointment. An examination of the cases cited above will show that the *ex officio* appointment does not render the service any less distinct and independent, if it is in its very nature distinct and independent.

An *incident* or *germane* duty can not be larger and more important than the essential or prescribed duties of an office. It seems to us that this duty is so large and important that the legislature did wisely in not

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imposing it upon any county officer as such, and in confiding it to a separate board; and although the auditor acts as a member of the board, the board's action is so superior to the auditor, and controlling upon him in his official capacity as auditor, that his position on the board can not be considered as an *incident* or *germane* duty.

It was said in *White v. East Saginaw*, 43 Mich., 567, 6 N. W., 86, in a somewhat different inquiry: "The imposition of new duties not 'incident' or 'germane' to the regular duties of his office upon an officer, does not change his office, but invests him with a new office."

We therefore are of opinion that the compensation of five dollars per day, provided for the auditor in the Hendley law is not in contravention of any other legislative provision or of the constitution.

This conclusion follows with even greater certainty as to the surveyor and county commissioners.

Judgment affirmed.

ATTACHMENT.

[Lucas Circuit Court, October 15, 1900.]

Haynes, Parker and Hull, JJ.

JOHN H. BOTFUHR v. WARD A. LEFFINGWELL.

BOND IN ATTACHMENT NOT SIGNED BY PLAINTIFF—RIGHT OF ACTION.

A defendant in attachment has a right of action against a plaintiff in attachment, who has been required to give bond, that he will pay all damages, if it turns out that the attachment was wrongfully or improperly granted, although the plaintiff in attachment did not sign the bond and although the suing out of the writ was not malicious.

HEARD ON ERROR.

B. F. Reno, for plaintiff in error:

1. The action not being upon the attachment bond was necessarily an action for malicious prosecution.
2. Being an action for malicious prosecution the original court (the J. P.) had no jurisdiction.
3. The original court having had no jurisdiction an appellate court would have none on appeal.

Citing: *Drake on Attachment*, 1st Ed., Pars. 150, 151, 754; *Veitch v. Cebell*, 105 Wis., 260; 81 N. W. Rep., 411; *Bartholomew v. Insurance Co.*, 1 Dec., 267; Sec. 591, Rev. Stat.

Geo. B. Boone, for defendant in error, cited:

Does the petition state facts sufficient to state a cause of action. Sec. 5523, Rev. Stat.: *Kirsey v. Jones*, 7 Ala., 622; *Seay v. Greenwood*, 21 Ala., 491; *Sanders v. Hughes*, 2 Brev. (S. C.), 153, (495); *Davis v. McLaughlin*, 14 Kan., 168; *Fry v. Estes*, 52 Mo. App., 1; *Half v. Curtis*, 68 Tex., 640, 5 S. W., 451; 3 Am. & Eng. Ency., 245.

HULL, J.

This action comes into this court on petition in error to reverse the judgment of the court of common pleas. It involves the question, whether an action can be maintained against a party for wrongfully suing out and procuring a writ of attachment, although the plaintiff did not sign the bond in attachment, but it was signed by the surety only and although the petition does not allege that the attachment was procured maliciously or without probable cause, but simply alleges that it was procured, or that it was granted, wrongfully and improperly.

The plaintiff in error, John H. Botfuhr, began an action against the defendant in error, Leffingwell, and procured an attachment upon one of the grounds named in the statute, it not being upon the ground of non-residence, but being upon one of the grounds where a bond was required. A bond was given as required by the statute, but was signed by the surety only and not by the principal. Upon a motion being made before the justice of the peace, where the action was commenced, to discharge the attachment, that motion was overruled, but upon appeal to the court of common pleas the attachment was discharged. Leffingwell then brought his action before a justice of the peace against Botfuhr for damages on account of procuring a wrongful and improper writ of attachment. The defendant claimed before the justice that the justice had no jurisdiction, for the reason that the action, to all intents and purposes, was an action for malicious prosecution, not being an action upon the bond, and that therefore, under Sec. 591, Rev. Stat., the justice was without jurisdiction. The justice held against the defendant, and rendered judgment in favor of the plaintiff. The case was appealed to the court of common pleas. There a demurrer was interposed to the petition upon the ground that the court had no jurisdiction, for the reason, as it was claimed, that the justice had no original jurisdiction in the action; it being still insisted that the action was and should be held to be, an action for malicious prosecution. It is further argued in behalf of the demurrer, which was a general demurrer, that the petition did not state facts sufficient to constitute a cause of action, for the reason that it did not allege that the defendant was a party to the bond in the attachment proceeding, and did not allege that the attachment was procured maliciously and without probable cause. The demurrer was overruled and the case afterwards heard and judgment rendered in favor of the plaintiff for \$50.00 damages on account of the attachment. It is that judgment that it is sought to reverse in this court.

It is claimed, as I have said, by plaintiff in error, that the action, to all intents and purposes, is an action for malicious prosecution, and therefore the petition must allege that the writ of attachment was procured maliciously and without probable cause; that to maintain his action, the plaintiff must establish all the elements of a malicious prosecution. And it is urged that unless the principal, the plaintiff, signs the bond in attachment, there can be no recovery upon the ground that the attachment was wrongfully and improperly sued out; that without this element of malice, there can be no recovery, unless the party signs the bond, and thereby becomes a party to it, and is bound by it.

The question has never been passed upon by the Supreme Court of this state. It was argued quite fully by counsel. The older decisions, and the older text-books, seem rather to recognize and approve the position

taken by plaintiff in error in this case: that to make a case, unless the party signs the attachment bond, he must show malice and want of probable cause.

The statute provides (Sec. 6490) that:

"When the ground of attachment is, that the defendant is a foreign corporation, or a non-resident of the county, the order of attachment may be issued without an undertaking, but in all other cases, the order of attachment shall not be issued by the justice until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the justice, an undertaking, not less than double the amount of the plaintiff's claim, to the effect, that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained."

So that it appears from the statute, that before the writ of attachment can issue, the plaintiff must file an undertaking in not less than double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order prove to have been wrongfully obtained.

The writ of attachment is an extraordinary writ, and it affords an extraordinary remedy, to which the party is entitled if certain facts exist, but he is not entitled to such a remedy unless those statutory grounds do exist. He must bring himself within and upon one of the grounds set forth in the statute, and state that ground in an affidavit, before the writ of attachment may issue. By filing an affidavit and a bond he is entitled to levy upon the defendant's property in advance of a judgment, to levy upon and take it before there has been an adjudication of his claim; an act which may and often does, result in damage, and great damage, to a defendant whose property is thus taken, if it turns out that the attachment has been wrongfully or improperly obtained. The statute (Sec. 6490) recognizes this element of possible or probable damage which the plaintiff may do to the defendant, and requires that the plaintiff give an undertaking that he will pay all damages which the defendant may sustain by reason of the attachment, etc.

The nearest case in point in Ohio is a common pleas decision rendered by Judge Johnson, who was afterwards a judge of the Supreme Court of this state. It was rendered while he was upon the common pleas bench in Lawrence county, in 1857. The case is that of Zigler v. Russell, 2 Dec. (Re.), 518. In the case before Judge Johnson the defendant was a non-resident, and no bond was required under the statute, and he there held that there was no liability against the plaintiff for merely wrongfully or improperly procuring the attachment. The syllabus of the case is:

"In an action for wrongfully suing out an attachment before a justice, against a non-resident defendant, where no bond is required it is not enough for the plaintiff to allege in his petition, as to this point, that the attachment was wrongfully sued out; but he must go further, and show that it was sued out maliciously, without probable cause; as in an action for malicious prosecution."

The learned judge, in discussing the question on page 428, refers to cases in other states. He says:

"The next two cases cited are *Wilson v. Outlaw*, Miner, 367, and *Kirkry v. Jones*, 7 Ala. 622, and are, it is true, *actions on the case*; but are different from that at bar, in this, that they were cases in which bonds

were, by the attachment law of Alabama, required to be given, and rest, in the opinion of the court, solely on the ground that such bond was required to be given.

"Besides this, the condition of the Alabama bond is against 'the wrongful or vexatious suing out' of the writ. From this phraseology their courts have also drawn an argument to support their decision.

"Our attachment law is different in this respect. In cases of non-residents, no bond is required; and hence, if we admit the proposition, that the giving of the bond under Section 193 of the Code, creates a statutory liability beyond what would be the case without such a law, yet it does not follow that a similar action would lie for the wrongful suing out of the attachment where no such bond is required.

"Those cases rest upon the ground that the condition of the bond, 'to pay all damages by reason of the attachment if the order be wrongfully obtained,' has been broken, when the grounds upon which the writ has been sued out are held to be insufficient, even though the plaintiff may have acted in the utmost good faith, and from facts and circumstances amounting, at common law, to probable cause. * * * *

"Had this been a case where a bond was required before obtaining the writ, the present plaintiff, on this construction, could have recovered damages actually sustained to his property; but the fact that the legislature has required no bond where non-residents or foreign corporations are parties, furnishes conclusive evidence that no such remedy as this, in that class of cases, was intended; but such parties were simply left to their common law remedy by action on the case.

"It is true, it gives a decided advantage to the resident defendant in attachment; but such is evidently the intent of the attachment law."

So that the inference from the judge's argument would seem to be, that in his opinion where a bond was required to be given, there the plaintiff who causes the attachment to be issued, might be and would be liable, although not on the bond; but in a case against a non-resident, where no bond is required, there, he says, the legislature evidently intended to discriminate in favor of the resident and against the non-resident defendant. And no bond being required, there could be no action, except the common law action.

The question has been decided by the courts of some of the other states. In *Kirkry v. Jones*, 7 Ala., 622, the Supreme Court of Alabama say in the syllabus:

"Under the attachment law an action on the case may be sustained either for wrongfully or vexatiously suing out an attachment; and the existence of malice is important only in connection with the amount of damages.

"Where an attachment is wrongfully sued out, the defendant, whose goods are attached, may recover the damages actually sustained by reason of the levy; and if the process is vexatious as well as wrongful, he may recover as in an action for a malicious prosecution."

The Supreme Court of Texas, in *Half, Weiss & Co. v. Curtis*, 68 Tex., 640, 5 S. W., 451, passed upon this question, and say in the second paragraph of the syllabus:

"The rule that an action to recover actual damages for the wrongful suing out and levy of an attachment must be based on the attachment bond, has not been recognized in Texas; the bond is the foundation of the liability of the sureties, but not of the principal. As against the

principal a suit may be maintained against him for wrongfully suing out the attachment, either on his bond or on his liability, which, independent of the bond, resulted from his wrongful act in resorting without just cause to the process of attachment."

The court say:

"The province of the attachment bond is to give security to the defendant on which he may rely if the attachment may be wrongfully sued out, and as to the sureties is the foundation of their liability. Not so, however, as to the plaintiff who wrongfully avails himself of process which is too often used for purposes and in cases never contemplated by law. As against a plaintiff using such process, the basis of his liability is its abuse or wrongful use whereby a defendant is deprived of the use and possession of his property, or it may be of the property itself. Against such a person the action may be upon the bond, or upon the liability which arises from his wrongful act."

The question is discussed in the *Am. & Eng. Ency. of Law*, and the authorities cited. Page 245, Vol. 3, 2d Ed.

"In a few jurisdictions it is maintained that to give an attachment defendant a right of action for the wrongful suing out of an attachment, independently of statute and not under the attachment bond, proof of malice is necessary. But the more prevalent rule is that the attachment defendant has a right of action not based upon the bond, but sounding in tort for an attachment merely wrongful."

It seems to us that the reasoning of these cases and authorities is sound, and that the better doctrine is, and the doctrine that is sustained by the weight of authority, that the attachment defendant has a right of action against the plaintiff who has been required to give bond that he will pay all damages, although the plaintiff does not sign the bond, and although the suing out of the writ was not malicious. It would be, an anomalous legal proposition that the man who signs a bond as surety should be held, while the principal for whose security it was given would not be liable, for a wrongful attachment. It is clear that the bondsman is liable upon the bond that he has given, if it turn out that the attachment was wrongfully and improperly granted; but the construction that is sought by the plaintiff in error would relieve the principal of liability while the surety would be held. This, seems to us, contrary to the well established doctrine of principal and surety; that is to say, that the surety may be liable and the principal not; the rule is, where the principal is not liable, the surety cannot be held.

The surety might compel the person injured to proceed against the principal, under the doctrine of principal and surety and under the statutes governing such actions, and if judgment was obtained against the surety who had signed an attachment bond, the plaintiff in the case not being a party to the bond, it seems clear that the surety who had thus had a judgment recovered against him, might proceed against his principal to compel him to pay it, or recover from him an amount that he either had paid or had become liable to pay. What can be done indirectly can be done directly.

The judgment of the court of common pleas, therefore, is affirmed.

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DEBTORS AND CREDITORS.

[Lucas Circuit Court, October 15, 1900.]

Haynes, Parker and Hull, JJ.

ELLEN MULLENKOPS V. L. S. BAUMGARDNER & Co.

DEBTORS AND CREDITORS—BILL OF SALE—PAROL EVIDENCE VARYING.

A bill of sale absolute upon its face may be shown by parol evidence in an action at law for damages to have been intended as a mortgage and given as security for a debt, without showing fraud on the part of the creditor obtaining it.

HEARD ON ERROR.

M. F. Griffin and Delphy & Corbitt, for plaintiff in error.*Doyle & Lewis and Mr. Seiders*, for defendant in error.

HULL, J.

This is a proceeding in error brought to reverse the judgment of the court of common pleas. The plaintiff in error was also plaintiff below, and the verdict was directed by the court against the plaintiff, and judgment rendered in favor of the defendant upon such verdict. This proceeding is brought to reverse that judgment.

The plaintiff was a woman engaged in mercantile business in the village of Maumee, this county. She says in her petition that for some time prior to October 22, 1897, she had been dealing with the defendants, L. S. Baumgardner & Co., and on that day she was indebted to them in the sum of \$1,396.97; and she claims that she entered into an arrangement on that day with the defendants, whereby she secured to them by such arrangement then made this indebtedness, by turning over to them: her stock of goods, upon a contract that they were to set aside a certain amount of goods, sufficient to pay this debt, and that she was to have the balance, and also to have the privilege of selling the goods which, at the invoice price, amounted to sufficient to pay this debt; that is to say, she was to have the profit on those goods as well as the others. And she claims in her petition that with intent and purpose to defraud her, she was induced at that time by the agent of the defendants to sign a paper which turned out to be a bill of sale, turning over to Baumgardner & Co., and transferring to them, her entire stock of goods, which she claims at that time was of the value of about \$3,000. And she alleges that after taking possession of the goods, instead of carrying out what she claims the agreement was, they retained and disposed of the entire stock of goods, to her damage, in the sum of \$1,500.

The defendants in their answer admit that on the day mentioned the plaintiff was indebted to them in the sum of \$1,396.97, and admit that the plaintiff had a conversation with defendants about securing the payment of said indebtedness, and that afterwards, under and by virtue of a written agreement with the plaintiff, defendant took possession of said stock of goods and disposed of it. All the allegations in the petition that are not so admitted by the answer are denied. Defendants say further in their answer:—

"That on October 22, 1897, the plaintiff was indebted to this defendant in the sum of \$1,398.77; that on said date plaintiff voluntarily and at her own instance came to defendant, and executed and delivered to defendant a certain bill of sale in writing, whereby she sold, assigned, and conveyed to this defendant all and singular her stock of goods, wares and merchandise, consisting of dry goods and notions, and all other merchandise of every name and description, together with show cases, stools, and all fixtures belonging to her and being in the two story brick building owned by one Mrs. G. B. Mouen, in Maumee, Waynesfield township, Lucas county, Ohio.

It is alleged in the answer that they then became the absolute owner of said property, which they say was so assigned and conveyed to them for the sole and only purpose of paying and discharging the indebtedness aforesaid, then due from plaintiff to defendant, and that in consideration of that, they executed to the plaintiff a full and complete release of the indebtedness.

To give the exact language of the plaintiff it is perhaps better to quote from the petition.

She alleges that:

"She called on the said defendants and had a conversation with them about securing them for the money she owed them, and she had a conversation with one Mr. Hall, who was an agent of the said defendants and acted for them; and it was agreed between the said plaintiff and the said defendants, through the said Hall, who acted for the said defendants, that the said defendants would invoice the goods of the said plaintiff and select therefrom a sufficient amount, at the invoice price, to pay the said defendants the amount of money she owed them, and the balance of the goods the said plaintiff could have to pay her other creditors. But the goods so selected by the defendant should remain in the store occupied by the said plaintiff, and she might sell them in the usual course of trade, but the money received therefor should be paid to the said defendants, and when she had paid the said defendants the amount of money due them they should release their claim on the remainder of said goods. The said Hall then prepared a paper writing which he, with intent to defraud her, said, embodied the agreement made with the said plaintiff, and the said plaintiff, relying on the said statements of the said Hall, signed the said paper without reading it, or knowing what it contained more than what said Hall told her, relying on the statements made by said Hall."

She alleges that the goods invoices \$2,188, but that they were of the value at this time of \$3,000; and after this transaction she alleges as I have already stated, that the defendants locked the store, took possession of the goods, and disposed of them, and gave her no part thereof, and have never accounted to her.

The plaintiff testified in her own behalf, and called one witness. The case rests largely upon the testimony of the plaintiff. At the conclusion of the testimony offered in her behalf, the court upon motion directed a verdict in favor of the defendant.

The plaintiff in error claims that she was entitled to have the case submitted to the jury upon her claim as to what the real contract was between the parties. She claims that the bill of sale, was not the whole contract between the parties, and that oral testimony as to what was

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agreed was to be done with the goods, and to show whether the transaction was an absolute sale or a security merely was admissible, and that therefore, under the testimony as it stood at the conclusion of the plaintiff's case, she had a right to have the case go to the jury.

As to the claim of the defendants, I will read from their brief as follows:

"The common pleas court directed a verdict because a bill of sale was in actual existence, and there was no evidence whatever tending to show that she had been influenced in signing it. This action is not based on the alleged fraud of the defendant. It is based on an alleged breach of an alleged verbal agreement. But her own testimony discloses a subsequent written agreement quite different from the alleged verbal agreement. Until this written agreement is out of the way, her evidence as to verbal agreement is unavailing. Her attempt to rid herself of the written contract by claiming that it was procured by the fraudulent representations of Hall fails, because of the fact that she does not remember that he made any statements as to what the paper contained; because she could read and write, and had every opportunity to know what the paper contained. Besides this failure of evidence, her own actions at the time contradicts her present claim.

"Under these circumstances it was for the court to say whether sufficient evidence had been introduced to avoid the written contract, so that a recovery might be had on an alleged breach of an alleged verbal contract. The evidence not being sufficient to avoid the written contract, there was nothing for the jury to consider.

"Thus it will be noted, that not only was there no evidence for the jury to pass upon, but the action of the court in taking the case from the jury was practically an exclusion of the evidence on the alleged verbal contract, because of the insufficiency of the evidence to avoid the written contract. Of this action of the court there is no complaint, either in the motion for a new trial or the petition in error."

It is true that the record does not show, as stated in this brief, that Mr. Hall, who represented the defendants, made any fraudulent representations to Mrs. Mollenkopf as to the contents of this paper. She testifies to having a talk with him as the representative of the firm (I will refer to her testimony on that a little later). She says she cannot remember what he did say, nor whether she read the paper or not; but agreeing, as she claims, upon the terms of the transaction, he immediately wrote this paper and handed it to her, and in substance told her that she should sign that; that she signed it, and that is about all she remembers about the paper. The paper itself shows that it was witnessed by two witnesses, and acknowledged before a notary public, with the same formality and solemnity as a deed.

In order to determine the question whether or not the court erred in directing a verdict for the defendants, it will be necessary to look briefly at the testimony, especially at some portions of the plaintiff's testimony. She testifies that she was indebted to Baumgardner & Co. to the amount of about \$1,400. (In fact it was \$1,396.97.) She had had some talk with them about this indebtedness, and she came to Toledo to see them about it, and she found Mr. Hall in charge of the credit department of the firm. She says she said to Mr. Hall, "I am indebted to you for such an amount, and I would like to settle it in some way. If they would come up to Maumee, we would take an inventory, and we would get at the

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amount of goods, they could take enough to satisfy the claim, and what was left would be mine. I was owing \$250 besides that, and I had other creditors. I wanted them to take their amount out of the stock, and whatever it invoiced over that would be mine. Mr. Hall agreed to that. He said 'certainly.' They brought me a paper to sign. I was very much worried, and I had been worried for some time."

And further along these questions were asked, and answers made:

Q. "You signed it there in the store that day?" A. "Yes, sir."

Q. "Did you read it?" A. "I don't think I did; no, sir."

Q. "You don't think you did?" A. "No, sir: I didn't read it."

Q. "Was it read to you?" A. "I don't remember whether it was. I was walking up and down outside the railing. I don't remember whether it was read to me or not."

Then she is asked what she said when the paper was brought to her. She says:

"I said 'before I sign any paper, they must agree that they were only to take out the amount of their bill from the invoice; I was to retain the rest of it.'"

Q. "What did Mr. Hall say then?" A. "He said, 'certainly.'"

She says:

"I was to retain the goods. They were only to have the amount of their bill. I was to retain the goods myself; the rest of it was to be mine."

She says further along that the goods were to be left in the store until she had sold them. She is asked, "Was there anything said between you and Mr. Hall about the contents of that paper?" and answered, "I don't remember."

Q. "Was that all that took place that day?" A. "Yes, sir."

See then testifies to Mr. Hall going out and taking possession of the store, locking it up, putting a sign or card on the store that the goods were the property of Baumgardner & Co., or something to that effect. Baumgardner & Co. then proceeded to take an invoice of the goods, and they told her afterwards that they invoiced \$2,188. She says on the following Friday, which was after they had taken possession of the store, she had another conversation with Mr. Hall, and he told her that the store could not be opened until after the invoice. She then testified as follows:

Q. "You are not asked to state just exactly what he said; nobody can state it after this lapse of time; state your remembrance of the substance of what he said." A. "I don't think that I can state that—that I couldn't open the store any more. That is the only thing he impressed on my mind, that the goods were not mine. I said, 'Mr. Hall, I don't understand that is the way I made the agreement with you.' 'I am very sorry if you don't understand it, but if it was otherwise it wouldn't be legal.' That is, he gave me to understand they were not mine. That is the first understanding I had of it."

Q. "Did he say to you at that time it was a bill of sale?" A. "He may have mentioned it that way, but I didn't know what a bill of sale was, and I don't know anything about it if it was."

Q. "If he had a title to the goods?" A. "If he did, he told me on that day, on Friday—or Saturday."

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Q. "Where were you at that time?" A. "In the store at Maumee."

Q. "What did he say then? Try to give his words as near as you can—about that being a bill of sale." A. "I can't remember the words that he said. I only know that he gave me to understand. I can't remember what he said. He frightened me so that I didn't understand."

She is asked on cross-examination as to that paper.

Q. "This paper is marked 'Bill of Sale' right at the head of it; look at it and see if it isn't. That is the paper you signed?" A. "That is my signature."

Q. "You wrote it?" A. "Yes, sir; it looks very much like mine."

Q. "You see the words 'Bill of Sale' at the top?" A. "Yes, sir."

Q. "You knew what 'bill of sale' was?" A. "No, sir; I did not."

She is asked this question:

Q. "You knew you were signing a contract by which you were turning these goods over to them, did you not?" A. "No, sir; only what I thought I signed was an agreement they were to take out what was coming to them."

She also assigned at the same time to Baumgardner & Co. the insurance policies upon this stock of goods. They gave her at some time during the transaction a receipt, which she says she did not read. She is asked these questions on cross-examination:

Q. "And at that time he turned over a receipt for your account, didn't he?" A. "He gave me some kind of a paper one of the days he came up there."

Q. "Didn't he give you a receipt for your account?" A. "It was a receipt for something; I don't know what it was."

The Court:

Q. "Didn't you read it?" A. "He laid it on the counter. When I got through talking I went up stairs. He called me back and said, 'Mrs. Mollenkopf, this is a receipt.' I said, 'What is it?' He said it was a receipt."

She said she didn't read it, whatever it was. It turned out, according to the record, to have been a paper in this language, dated October 22, 1897:

"Received from Mrs. E. Mollenkopf thirteen hundred and ninety-eight and 77-100 dollars in full of account. The above amount received in stock of dry goods, notions, etc., situated in Maumee, Ohio, as evidenced by a certain bill of sale of even date herewith. L. S. Baumgardner & Co."

She says that after this talk with Mr. Hall, when he told her that this was a bill of sale, and that she had lost her title to the goods, that they took possession of them and disposed of them, and never accounted to her; that they did not set off the \$1,400 worth of goods, according to the contract as she understood it, which were to be used in paying their account; her claim being, as I have stated, that Mr. Hall agreed with her that they would take an invoice of the goods, and that goods to the amount of \$1,400, at the invoice price, were to be set aside to secure the claim of Baumgardner & Co., and the balance she was to sell to pay her other creditors; that she was also to sell the

goods that invoiced \$1,400, and was to have the profit, whatever there was, over and above the amount of their debt.

The case seems to have gone off in the court of common pleas upon the proposition that a written bill of sale having been introduced in evidence, which the plaintiff admitted she signed, and there being no sufficient evidence to show fraud on the part of Mr. Hall, that this written contract could not be varied by oral testimony and that it must be regarded as the contract and the whole contract between the parties. And this is the argument made here by counsel for defendant in error.

It is of course a well settled principle of law that fraud is not to be inferred or guessed at; it must be proven, and clearly proven: and that a written contract cannot be varied or set aside without proof of fraud, mistake or some other legal ground to vary it, or set it aside; and where no proper ground exists, the terms of the written contract must prevail, and prior talk between the parties is merged in the written contract. If this bill of sale then was the contract, and the only contract, as is claimed, then the court was justified in directing a verdict in favor of the defendant, for she would be bound by the written contract. If, however, the bill of sale was not in fact the whole contract between the parties, but was in fact only the execution of a portion of the real contract, then the plaintiff, in our judgment, would be entitled to recover upon the real contract that was made between them, if there was a breach of it, and she had suffered any damage. The question as to whether a bill of sale or a deed absolute upon its face may be shown in fact to be only a mortgage, either of realty or chattels, is one that has been before the courts a great many times, and our understanding of the law is that a bill of sale or even a conveyance of real estate, absolute upon its face, may be shown by parol testimony to have been in fact executed to secure a debt, and therefore should be held and is to be held, under those circumstances, between the parties as a mortgage, instead of an absolute transfer or conveyance. One of the earliest cases upon this question found in Ohio is *Miami Exporting Co. v. Bank, Wright, 249*. In this decision by Judge Wright, this is stated in the syllabus:

"Whether a deed is a mortgage or not, is determined by its object; if given as a security, it is a mortgage, whatever its forms; the *fact* of its being so given determines its character, not the evidence of the fact.

And Judge Wright says in the opinion on page 253:

"It is now the acknowledged doctrine, that parol evidence is admissible against the face of a deed to show that a mortgage only was intended. * * * And whether a conveyance be a mortgage or not is determined by its object. * * * This is so whether the condition of defeasance form a part of the deed is evidenced by other writing, or exists only in parol. The fact of its being given as security determines its character, not the evidence by which the fact is established."

In *Randall v. Turner, 17 Ohio St., 262*, the Supreme Court say in the syllabus:

"A written assignment of a chose in action, unconditional on its face, in part execution of a contract not intended by the parties to be expressed in the assignment, is not conclusive evidence that the transfer was absolute, but the contract under which it was executed may be shown by other proof."

The court say in the opinion, on page 269:

"It is claimed that the written assignment on the certificate of stock is conclusive that the sale was absolute and not conditional, as stated in the petition; and that, therefore, the court should have found for the defendants in the action.

"No objection to any of the evidence was interposed, but it is claimed that the written assignment, in law, excluded the consideration of any evidence of a contract but that contained in the written transfer of the stock. It is true that the assignment was, on its face, absolute and without condition. The assignment was not intended to express the contract between the parties, but was a part execution of a contract that required this, with other things, to be done for a specific purpose. No effort was made to vary the written assignment. That was as the parties intended it should be. The use, however, to be made of the assignment, was to be determined by future events. Whether it was received in absolute payment of a debt or not, was the issue between the parties; and proof upon this question, showing the terms upon which it was held, did not modify the written paper."

And in *Wilson v. Giddings*, 28 Ohio St., 554, this question is discussed at some length. This is a case where there was a written contract outside of a deed, which provided that the deed should be held and regarded as a mortgage. But the general question is discussed on page 565 of the opinion. The court say:

"There is no principle in equity more firmly settled on authority than that every contract for the security of debt, by the conveyance of real estate, is a mortgage, and that all agreements of parties tending to alter, in any subsequent agreement, the original nature of the mortgage, is of no effect."

And on page 567 the court say; referring to the parties in the case before them:

"I have found no better rule by which to determine the character of the transaction between *Wilson* and *Giddings* than the one so clearly stated in *Robinson v. Cropsy et al.*, Edw. Ch. (2d Ed.), 138. It is as follows: In order to determine whether a transaction amounts to a mortgage or a conditional sale, 'if the deed or conveyance be accompanied by a condition or matter of defeasance, expressed in the deed, or contained in a separate instrument, or exists in parol (whether the consideration is a pre-existing debt or present advance of money to the grantor), the only inquiry necessary to be made is, whether the relation of debtor and creditor exists and a debt still subsists between the parties; for if it does, then the conveyance must be * * * treated in all respects as a mortgage.'"

In *Jones on Chattel Mortgages*, Secs. 22 and 23, the question is discussed. I will read a few words from those two sections:

"Section 22. A bill of sale absolute on its face, but accompanied by a verbal defeasance, is a mortgage not only between the parties to it but also as to third persons who have actual notice or such knowledge of the facts as will charge them with notice; and a sale of the chattels by the mortgagor to a third person, in payment of a debt due from him to them, conveys no title."

In Sec. 23 the author says:

"But the better doctrine, and that more generally accepted in this country is, that the admission of parol evidence is not confined to cases of distinct fraud, accident, or mistake; but that such evidence is admissible upon the broad ground that the deed of sale, though absolute in form, was intended merely as a security in the nature of a mortgage; and that upon this ground alone courts of equity may take jurisdiction and afford relief. The fault of the instrument in such case is inherent in the transaction itself, and does not arise out of the subsequent conduct of the vendee in attempting to retain the property."

A decision of the Supreme Court of Michigan holds squarely that this may be done in a court at law the same as in a court of equity, and that the rule is the same, and that you may show in a court of law what the real contract was between the parties. I refer to *Wood v. Parrish*, 3 Mich., 211. The syllabus of the case is:

"Parol evidence is admissible in a court of law to show that a bill of sale absolute on its face was intended as a mortgage."

In the opinion, delivered by Judge Green, presiding judge, is a very full discussion of this question. He says on pages 214 and 215:

"It would appear very strange, then, if not absolutely absurd, for this court to say that a circuit court can afford no relief in a case of this character when sitting as a court of law, while at the same time it is conceded that it might do so when sitting as a court of chancery, and while it is perfectly obvious that the relief would be as ample, and justice as fully administered between the parties, on the law side as on the chancery side of the same court. It would not certainly be in accordance with the progressive spirit of our jurisprudence, which seeks to administer justice between parties by the most direct and simple methods of procedure that are consistent with that order and regularity which ought to prevail in all judicial proceedings for the safety of all. If then, it is admitted, parol evidence is admissible in a court of chancery to prove that a deed absolute on its face, was intended as a mortgage, such evidence is equally admissible in a court of law.

"Whether the admission of parol evidence of a defeasance in this class of cases be regarded as an exception to the general rule, or whether it be upon the ground of fraud, as has been suggested, need not be determined. The parol proof seems to vary the effect of the written instrument, yet it is not given for the purpose of showing that its language is not precisely what the parties intended. The verbal agreement was that just such an instrument should be made, but that the property conveyed by it should be subject to redemption as in the case of a mortgage. The defeasance, however, is left to rest upon the verbal understanding and agreement between the parties. Mortgages, and conveyances intended to operate as mortgages, are generally given by the necessitous to the more opulent, the debtor to the creditor, the borrower to the lender, the suppliant for favor to him who has power to make the terms upon which it shall be granted. The man whose property is about to be sacrificed by a creditor, will not hesitate in regard to the amount of security to be given, nor the manner of giving it, if he can loan the money to satisfy the debt, or otherwise gain time for its payment. He will not hesitate to execute a deed or bill of sale, absolute upon the face of it, but intended to operate as a mortgage, to four times the value of the loan, without insisting upon a written deed of defeasance. To hold that parol evidence

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is inadmissible to show the intent that the instrument should operate as a mortgage, would enable the selfish and unfeeling creditor or money lender to gratify his avarice, by violating the plainest principles of common honesty with entire impunity. On the other hand, its admission does no injustice to the creditor, but secures to him the full amount which is his due. He loses nothing, but is only prevented from taking that to which in right and justice he has no claim. Admitting that this constitutes an exception to a general rule, based upon the soundest principles of jurisprudence, what great danger is to be apprehended from it? It has long been familiar to courts of equity at least, and is of safe and easy application in courts of law, organized as our courts now are."

There is more of this discussion in the opinion, but I will not take the time to read more of it.

Applying this doctrine and these principles, which seem to be established by the authorities, can we say that the court was justified in directing the jury to return a verdict in favor of the defendant? The plaintiff had testified what the real contract was. She testified that she agreed with Baumgardner & Co., through Mr. Hall, that they would invoice these goods, set aside the amount of her debt at the invoice price, and that she was to be free to sell the balance of the goods as she wished, and to sell the \$1,400 worth so set aside and have whatever profit she could make on them; that she signed this paper without knowing its contents, and perhaps without anything being said to her about it; that they at once took possession of the store and of the goods, which they invoiced at about \$2,200, about \$800 more than her debt to Baumgardner & Co.; that they retained the entire stock of goods and accounted to her for no part thereof. According to her testimony, the debt at the time of her talk with Mr. Hall in the store and when the paper was signed was not cancelled, but after the invoice was taken, Mr. Hall laid some paper down on the counter in her store, and said "Here is your receipt."

It is claimed that this was an absolute sale, and that it should be so held. But it is a significant fact that, according to the testimony in this record, there was no talk between Mrs. Mollenkopf and Mr. Hall about a sale of these goods. The record is barren of any evidence of negotiation between the parties. There is no testimony here as to any bargaining in regard to the value of these goods, no price fixed upon them by Mrs. Mollenkopf, no claim by either one that the price was too high or too low. The relation of creditor and debtor existed at the time. She testifies that she went there for the purpose of securing this debt; testifies that when she got to the store she told them that she had come there for that purpose; and so far as her testimony discloses outside of this paper writing itself, her conduct was all along the line of securing this debt to Baumgardner & Co., and leaving to her the balance of the goods, if any there should be, after this debt was paid.

It seems to us that the principle laid down in *Randall v. Turner*, 17 Ohio St., 262, covers this case, and that alone would perhaps be sufficient authority. The court say on page 269, "The assignment was not intended to express the contract between the parties, but was a part execution of a contract that required this, with other things to be done for a specific purpose. No effort was made to vary the written assignment. That was as the parties intended it should be."

The fact that she alleged in her petition that Baumgardner & Co. induced her by fraud to sign this bill of sale, and the fact that she failed to establish fraud, would not prevent her from recovering, for it was not necessary for her to establish fraud, under the authorities. It was not required that she should show that by fraudulent representations she was induced to sign this paper. She brought herself within the law when she testified to a contract that this stock of goods was to be held as security, and security only, and that in furtherance of that the bill of sale was signed. If she had signed this bill of sale knowing exactly what was in it, if she had read it before she signed it, and had understood every sentence and every word in it, still if the real contract between the parties was that this property was to be held by virtue of this bill of sale, not as an absolute conveyance, not as the absolute property of Baumgardner & Co., but for the purpose of securing her debt to them, she would then, be entitled to recover any damages that she might have sustained by reason of the breach of this contract which she claimed existed between them. As the Supreme Court of Michigan say, this rule is based upon the plainest principles of justice, that if the creditor recover the amount of his debt, he is getting all that he is entitled to.

The court erred in directing a verdict for the defendant in this case, and for that reason the judgment of the court of common pleas will be reversed.

HAMLETS—ROADS AND STREETS—STREET RAILROADS.

VERERA ET AL. (COMRS.) v. A. B. & C. R. R. Co.

[Cuyahoga Circuit Court, February, 1896.]

Hale, Caldwell and Marvin, JJ.

POWER OF COUNTY COMMISSIONERS TO GRANT FRANCHISE IN HAMLET.

The county commissioners have no power to grant a franchise to a street railway company over the streets and roads in a hamlet, and cannot maintain an action to enjoin the construction of the road in violation of the terms thereof. The exclusive jurisdiction over such streets is vested in the trustees of the hamlet, under Sec. 1651, Rev. Stat.

APPEAL.

P. H. Kaiser, for plaintiffs, cited:

Board of Ed. v. Board of Ed., 46 O. S., 595, 599 [22 N. E. Rep., 641]; Commissioners v. Railway Co., 45 O. S., 401 [15 N. E. Rep., 468]; Lewis v. Laylin, 46 O. S., 663 [23 N. E. Rep., 288]; Lawrence Rd. Co. v. Commissioners, 35 O. S., 1; Calhoun v. Price, 17 O. S., 96, 99, 101; Wills v. Railway Co., 8 O. F. D., 385; Sections 4615, 4829, 4831, 4850; 89 O. L., 199; 90 O. L., 315, Sec. 1651; 66 O. L., 150, 151, 152; 71 O. L., 65; Franklin v. Croll, 31 O. S., 647, 648; State ex rel. v. Commissioners, 11 O. S., 183, 190; 1599 (Sec.); Secs. 1606 to 1613; Elliott on Roads and Streets, 332, 312; Cooley on Const. Lim. 4th Ed., 311, 312, citing 20 Ill., 200; 24 Ill., 22; 50 Ill., 39; 16 Mo., 88; and 33 Mich., 28.

Chas. H. Howland, for the Railroad Company.

E. J. Blandin, *H. T. Cowin*, and *Alex Hadden*, for the hamlet of Newburgh.

In November, 1894, the commissioners of Cuyahoga county, granted to the Akron, Bedford and Cleveland Railroad Company, a franchise to construct and operate a street railroad upon one of the public roads of the hamlet of Newburgh, within said county. One of the terms of the franchise was, that the track should be laid along the southern side of the highway, in May, 1895. The railroad company obtained a franchise over the same road, from the trustees of the hamlet of Newburgh, by the terms of this franchise the track was to be laid along the *northerly* line of the highway. The railroad company began to lay its track in accordance with the terms of the hamlet franchise, and the commissioners of the county brought suit to enjoin the company from laying the track on the *northerly* side of the highway. Judgment was given for the defendants in the lower court, and the plaintiff appealed.

MARVIN, J.

No. 1656, is the case of the Board of Commissioners of Cuyahoga county against the Akron, Bedford and Cleveland Railroad Company, to enjoin the construction of the track of the railroad company along the northeasterly side of the state road passing through the hamlet of Newburgh.

The commissioners make the claim that this road shall not be laid along the northeasterly side, because they, the commissioners, recently, before the railroad company undertook to construct this road had expended considerable money under the statute found in 92 O. L., 190, which statute authorized the levying by the commissioners of a tax on the entire property of this county to construct and improve public roads outside of cities and incorporated villages. The commissioners say that a franchise was granted by them to the railroad company to construct and lay this track on the southwesterly side of that road.

Now, without going into discussion of all that is before us, we find that Sec. 1651, Rev. Stat. of Ohio gives the trustees of hamlets the exclusive jurisdiction of public roads and streets, alleys, sewers, and drains within the limits of the incorporations; trustees of the hamlet have exclusive jurisdiction.

Now, that being true—and let me say that language is a little stronger than Sec. 2640, Rev. Stat., which gives the control of streets to the council of other incorporations than hamlets—that being true it seems to us the commissioners cannot maintain this action. Whether the trustees have given a franchise to this company or not, it seems to us that the commissioners cannot maintain an action to enjoin the use of a street, the exclusive control of which is given to the trustees of the hamlets, and the petition for the injunctions is dismissed.

EXEMPTION—JUDGMENT.

[Lucas Circuit Court, October 15, 1900.]

Haynes, Parker and Hull, JJ.

MARY E. KERRUISH ET AL. V. WILLIAM T. MEYERS ET AL.**1. WAIVER OF RIGHT TO CLAIM EXEMPTION.**

Where an order in aid of execution, under Sec. 6680, Rev. Stat., upon a judgment was in force at the time of the rendition of a judgment for damages in favor of the judgment debtor, directing payment of a certain sum to the creditor on the first judgment, if the judgment debtor is entitled to the amount recovered in the last judgment as exempt in lieu of homestead, he should proceed according to law to secure it, that is by modification of the original or by a new order which will prevent payment under the original order in aid of execution; and if he neglects to do so until after the money has been paid upon such judgment he cannot subsequently claim it.

2. JUDGMENT CREDITOR STANDS IN RELATION OF GARNISHEE.

A judgment debtor, who, at the time a judgment was rendered, was directed by an order in aid of execution to pay a certain sum to the judgment creditor in another action, stands in the relation of a garnishee and the mere fact, without legal assertion of the right, that the money on the second judgment might be claimed as exempt in lieu of homestead by the judgment debtor, would afford no defense to a failure to comply with the original order in aid of execution.

3. ASSIGNING JUDGMENT—DEFEATS CLAIM TO EXEMPTION.

A judgment debtor, under circumstances above stated, who, instead of claiming the money due under the judgment as exempt by proper legal steps, immediately assigns his judgment for damages, does not thereby defeat the operation of the order in aid of execution, and cannot subsequently claim the money paid under it as exempt or direct its disposition in favor of another creditor.

4. AGREEMENT TO REFUND—NOT A TRUST, WHEN.

An agreement by attorneys for the judgment creditor in the original action that if the judgment debtor should recover against the judgment debtor in the second action, on account of payment to the judgment creditor under the order in aid of execution on the first judgment, that they would indemnify him or restore the money so paid, does not establish a trust in favor of the judgment debtor against which he can assert his claim to exemptions.

HEARD ON ERROR.

I. N. Huntsberger, for plaintiffs in error, cited:

Error lies to overruling motion to dissolve injunction. *Burke v. Railway Co.*, 45 Ohio St., 631.

Exemption, who may assert claim to: *Conley v. Chilcote*, 25 O. S., 320; *Green v. Fischer*, 6 Dec. Re., 1138; *Deveaux v. Leslie*, 9 Circ. Dec., 480; *Tombow v. Haskins*, 8 Circ. Dec., 281.

Fund not specifically exempt, proceedings necessary. *Conley v. Chilcote*, *supra*; *Carpenter v. Warner*, 38 O. S., 416, 420; *Frost v. Shaw*, 3 O. S., 270; *Fry v. Smith*, 61 O. S., 276; *Carter v. Ross*, 54 O. S., 664, affirming (4 Circ. Dec., 333; *Neihaus v. Faul*, 43 O. S., 63, 64; *Wilder-muth v. Koenig*, 41 O. S., 180; *Close v. Sinclair*, 38 O. S., 530; *Chilcote v. Conley*, 36 O. S., 545, 549; *Cooper v. Cooper*, 24 O. S., 488; *Hoover v. Haslage*, 7 Dec., 98.

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Failure to claim exemption within reasonable time. *Green v. Fisher, supra*; *Frost v. Shaw*, 3 O. S., 270; *Butt v. Green*, 29 O. S., 667; *Hoover v. Haslage, supra*.

Money in hands of attorney in hands of client: *Longworth v. Handy*, 2 Disn., 75, 79, 81; 3 Am. & Eng. Ency. Law, 412, 413; *Cotton v. Ashley*, 5 Circ. Dec., 6; 7 *Ib.*, 242.

Beard and Beard, for defendants in error, cited:

Stockholders liability: *Rouse v. Bank*, 46 O. S., 493, 500.

Parties: *Miesse v. Loren*, 8 Dec., 448, 449; *Penn. Fire Ins. Co. v. Carnahan*, 10 Circ. Dec., 225.

Exemptions—Demand—Selection:— *McConville v. Lee*, 31 O. S., 447, 450; *Close v. Sinclair*, 38 O. S., 530; *Ryan v. Miller*, 40 O. S., 232, 233; *Niehaus v. Faul*, 43 O. S., 63, 64; *Fry v. Smith*, 61 O. S., 276; *Frost v. Shaw*, 3 O. S., 270; *Carter v. Ross*, 4 Circ. Dec., 333; *Tombow v. Haskins*, 8 Circ. Dec., 281; *Comer v. Dodson*, 22 O. S., 615; Secs. 5441 and 5433, Rev. Stat.

PARKER, J.

This is a proceeding brought to reverse a decision of the court of common pleas overruling a motion to dissolve an injunction. The action below was brought by Meyers and the law firm of Beard & Beard against the National Union Building Company, and the stockholders of that company and the plaintiffs in error here, the action being to enforce the liability of the stockholders of the company, and thereby to obtain satisfaction of a claim which Meyers and Beard & Beard assert against the company. The plaintiffs in error, it is not controverted, were not stockholders of the company, and as to them the action was one to reach a fund which is said to have arisen by a contribution of the stockholders, paid into the hands of Charles S. Ashley, as attorney for the company, to be applied upon the discharge of this claim asserted here by Meyers and Beard & Beard; and with respect to the plaintiffs in error it is said that the fund has been paid over wrongfully by Ashley to Huntsberger, as attorney for Mrs. Kerruish, and that Huntsberger was about to pay it over to his client, Mrs. Kerruish. Therefore, amongst other things sought was an injunction against Huntsberger to restrain him from paying the fund over to his client, and against Mrs. Kerruish to restrain her from receiving and applying the same upon her judgment against Meyers.

In order that the real question involved may be understood, it will be necessary to give a brief history of a variety of transactions pertaining to the matter.

It appears that on April 8, 1895, Mary E. Kerruish, one of the plaintiffs in error, recovered a judgment against Meyers before Seagrave, a justice of the peace, for \$100 and costs; that afterwards, Mr. Meyers, having received an injury which he charged to the negligence of this National Union Building Company, and having made up his mind to sue to recover on account of that injury, employed Beard & Beard as his attorneys, and entered into an agreement with them to pay to them one-third of whatever amount they might recover, if they should bring and prosecute such action on his behalf. After this action was instituted, to-wit, on November 20, 1897, Mrs. Kerruish, anticipating or hoping per-

haps that Meyers might recover something of which she might avail herself for the satisfaction of her claim against Meyers, instituted a proceeding in aid of execution before Seagrave, justice of the peace, against the National Union Building Company, and Meyers, under Sec. 6680 of the code and the following sections, providing for such proceedings before justices. On December 18, 1897, an order was made in that proceeding to the effect that the National Union Building Company should hold and pay over to Mrs. Kerruish upon her judgment so much of any amount that Mr. Meyers might recover against that company in the pending suit, as might not exceed the claim of Mrs. Kerruish against Meyers. That order appears to have remained in force from that time to this. On January 16, 1899, Meyers recovered a judgment against the National Union Building Company for \$500, and on the same day, in pursuance of this agreement with Beard & Beard, he assigned the judgment to them. He assigned to Beard & Beard the whole judgment, not only the one-third thereof which he owed them in consequence of their prosecution of that action, but the remainder of it, to cover their general account for services theretofore performed by them for him as his attorneys. On April 14, 1899, the National Union Building Company paid to Beard & Beard, as attorneys, for Meyers upon this judgment, \$300. On November 17, 1899, nearly two years after the order of the justice of the peace in the proceeding of Kerruish v. Meyers and the National Union Building Company, and ten months after the judgment recovered by Meyers against the National Union Building Company, that company paid about \$140, or the full amount of the judgment of Kerruish v. Meyers, to Huntsberger, as attorney for Mrs. Kerruish. It is to reach that money in the hands of Huntsberger that this action is prosecuted. So far as Huntsberger and Mrs. Kerruish are concerned, they have no other or further interest in this proceeding. The plaintiffs in the action below, *i. e.*, Meyers and Beard & Beard, claim that they should have this money; that such judgment should be entered or order be made as will require the payment of the money over to them, because, they say, it was exempt to Meyers under the homestead laws of Ohio; that he had a right to claim it, and still has a right to claim it, and have it set off to him in lieu of a homestead, and hold it as exempt; that Mrs. Kerruish has no right to reach it or recover it; that Mr. Ashley had no right to pay it over to Mr. Huntsberger in order that it might be applied upon the Kerruish judgment.

Upon the application of the plaintiffs below an injunction was allowed. When the matter came on to be heard upon a motion to dissolve the injunction, which motion was made upon the ground that the petition did not state a cause of action or any ground for relief as against Huntsberger and Mrs. Kerruish, and also that the facts did not justify any order of injunction against them, a great many affidavits of the parties were used, and what I shall say as to the facts is derived partly from the averments in the petition and partly from those affidavits. I cannot expect to analyze them, but only to give our conclusions from a consideration of all the evidence.

It fairly appears from the evidence thus presented and the undisputed averments of the petition, that Mr. Meyers, ever since he recovered this judgment against the National Union Building Company, has been a resident of Ohio and not the owner of a homestead, and that he has and had a right to select and hold in lieu of a homestead this balance of the

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\$500 which had been paid over to Mr. Huntsberger. But it is contended on behalf of plaintiffs in error that Myers has waived that right, or that he has slept upon it until such time as that, by the payment and actual application of the money upon the claim of Mrs. Kerruish, his right has been lost and defeated by his own laches. It is contended, however, by Meyers and Beard & Beard, that this money has not been actually paid and applied upon the claim of Mrs. Kerruish, but that under the arrangement between Mr. Ashley, as attorney for the company, and Mr. Huntsberger, as attorney for Mrs. Kerruish, Mr. Huntsberger in fact holds this money in trust, and under such circumstances and conditions as that it may be reached by a court of equity, and he may be compelled to restore it, and allow it to be applied as prayed for by the plaintiffs in the case below.

It appears that after this judgment was recovered, there was some discussion from time to time between the various attorneys and parties interested as to who should have it, it being claimed on the one hand by Mrs. Kerruish and her counsel, and on the other hand as against them by Meyers and his counsel, Beard & Beard. And it is said that Mr. Ashley, as attorney for the National Union Building Company, agreed that he would hold onto the fund, and allow it to be paid into the court of common pleas in the case of Meyers v. Building Company, and that there should be an interpleader between Meyers and Mrs. Kerruish, so that their respective rights might be determined there.

Even if we were to find that this is true to the extent claimed by defendants in error, we cannot see that Mr. Huntsberger, as attorney for Mrs. Kerruish, or that Mrs. Kerruish, were in any way bound or affected by this arrangement. It is said by certain of the affidavits that the affiants believed that there was an arrangement between Mr. Ashley and Mr. Huntsberger that Huntsberger was to hold this money until the rights of the respective claimants thereto might be determined, but this is stated upon belief only; there is no further evidence of the fact; and it is denied positively by Mr. Ashley and Mr. Huntsberger in their affidavits. They admit, however, that if Mr. Meyers should recover against the building company on account of this payment to Huntsberger, that Mr. Huntsberger would indemnify that company or restore the money to them. But that would be no more than his legal duty, or the duty of his client. We do not think that it gives rise to a trust, much less to a trust in favor of Meyers which he may assert and enforce. Conceding as fully as it is claimed by defendants in error in their arguments and in their affidavits, that from time to time a demand for this money was made of Mr. Ashley and other counsel of the building company, in favor of Meyers, does that alter the situation? We do not see how that could affect the rights of Mr. Huntsberger as attorney of Mrs. Kerruish, or the rights of Mrs. Kerruish. Whether because of that demand Meyers would have any cause of action against Mr. Ashley, or against the company, on account of the disregard thereof, or on account of the disregard or violation of any arrangement that may have been entered into between him and Beard & Beard, or Meyers, we are not called upon to say; we are called upon to determine now, only the rights involved as between Mrs. Kerruish and Huntsberger on the one hand and Myers and Beard & Beard upon the other.

We are of the opinion, however, that if Meyers were entitled to a homestead, he did not proceed in a proper way or as required by law to

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enforce his right or demand. The order upon the company was in full force and effect at the time this money was paid by Mr. Ashley to Mr. Huntsberger. It had remained in full force and effect continuously from the time it was entered up until the time of that payment. The company was not at liberty to disregard it. It would have been liable to an action for it and to other proceedings, perhaps, if it had disregarded it. The duty of Mr. Meyers, under the circumstances, in our opinion, was, if he desired to insist upon his right to hold that money as exempt, either to institute a further proceeding in court before the payment of the money over to Huntsberger or Huntsberger's client, or, (as seems to us to be the more proper method,) to file a motion before the justice where this order had been entered, asking for such modification of it, or the entry of such new order in the premises, as would protect him in his right under the homestead law. We think that after a garnishee has been ordered to pay money into court or to pay it to the creditor (and we believe the company stood here in the situation of a garnishee) if the garnishee should, under such circumstances, disregard the order of the court to retain the same and should pay it over to the debtor, the fact that it might be claimed and held by the debtor as exempt, would afford the garnishee no defense in an action by the person in whose favor the order had been made, *Conley v. Chilcote*, 25 O. S., 320. It would be the duty of the person upon whom the order was made to pay the money into court or to pay it over to the person to whom he was ordered to pay it, and it would be the right and the duty of the person entitled to the property as exempt to apply to that court to have the proper order made to prevent this application of the property or fund. The plaintiff below, Meyers, having failed to proceed in this way until after the money had actually been paid to Mr. Huntsberger as attorney for Mrs. Kerruish upon her judgment, we are of the opinion that his demand now to reach this property comes too late, and that the court is without power to grant him the relief he prays for. The court below should have dissolved the injunction and dismissed the petition as to Mrs. Kerruish and Huntsberger, for the reason that there is no cause of action stated against them, and for the further reason that the facts as stated in the petition and the evidence, when fairly considered, do not make a case that would authorize the relief prayed for.

The judgment of the court below will be reversed, and this court, proceeding to enter the judgment that the court below should have entered, will order that the injunction be dissolved and the petition dismissed as to Mrs. Kerruish and Huntsberger.

SCHOOLS—CONTRACTS.

[Lucas Circuit Court, October 15, 1900.]

Haynes, Parker and Hull, JJ.

JOHN I. WARD V. BOARD OF EDUCATION.**1. SUPERINTENDENT OF SCHOOLS NOT A PUBLIC OFFICER.**

A superintendent of public schools as designated in Sec. 3982, Rev. Stat., relating to election of superintendents, etc., is an employee of the board of education and not an officer within the purview of the constitution prohibiting any change in the salary of an officer during his existing term.

2. EMPLOYEES GOVERNED BY GENERAL CONTRACT LAWS.

Although a teacher may have a vested right in a contract that cannot be impaired by legislation though the legislation take the form of abolishing the position, as for instance, providing for the selection of a superintendent of instruction and repealing a law providing for a superintendent of schools, yet a contract between a teacher and board of education is subject to the general rules governing contracts.

3. PROMISE OR PERFORMANCE CONSTITUTING NO CONSIDERATION.

Neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the promisor is already bound to do, either by the general law or by a subsisting contract with the other party.

4. SUPERINTENDENT OF SCHOOLS—VOLUNTARY INCREASE OF SALARY.

A promise not supported by a consideration creates no legal obligation and hence its non-performance creates no legal liability. Therefore, a superintendent of schools having accepted the position at a stated salary for a time certain, being under a legal contractual obligation to serve that time, has no claim against a board of education on a voluntary promise of an increase of salary, for meritorious services, during his term, there being no rescission of the original contract, no new or additional service to be rendered or other consideration moving in support of the new promise.

5. VOLUNTARY INCREASE OF SALARY—NUDUM PACTUM.

While the payment of an increase of salary to a superintendent of schools during his existing term, under Sec. 4017, Rev. Stat., may be legal if made, yet it does not follow, that because the board of education promised it that he thereby acquires a legal claim thereto, enforceable in the courts; such promise of extra compensation is a mere *nudum pactum*.

6. SUCH REWARDS AGAINST PUBLIC POLICY.

A voluntary increase of the salary of superintendents or teachers in public schools, given as a reward, is not only without consideration but against public policy, for the board is dealing with public funds and acting with respect thereto as trustees for the public.

7. WAIVER OF RIGHTS UNDER ORIGINAL CONTRACT.

Where, after the passage of the "Niles law," 93 O. L., 485, relating to boards of education in cities of the grade and class of Toledo, and abolishing the position of superintendent of schools and creating that of superintendent of instruction, the superintendent under the former law by accepting another position tendered him by the superintendent of instruction inconsistent with the one he was holding, voluntarily relinquished his former position and salary, and is not entitled to recover under his original contract.

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T. N. Bierly and C. W. Everett, for plaintiff in error, cited:

Jury: 90 Ill., 363.

The rule of damages in such a case: *James v. Allen Co.*, 44 Ohio St., 226, 6 N. E., 246.

To constitute a substitution: *Wood on Master and Servant*, page, 106; 16 Penn. St., 196; *Mechem on Agency*, Sec. 625; *Clark on Cont.*, pp. 187, 192 and 612; *Thurston v. Ludwig*, 6 Ohio St., 1; *Greenleaf on Ev.*, 394 (14th Ed.).

Not sufficient evidence of a new contract: See *Wood on Master and Servant*, pp. 306, 307, 268, 269, 205; 1 *Beach on the Modern Law of Cont.*, 86-94; and especially on page 778 and cases cited; *Amer. Ency. of Law*, Vol. 14, pages 772-797 (1st Ed.), *Pension*, Sec. 3897b.

No right to diminish teachers' pay: Sec. 4017, Rev. Stat.

M. R. Brailey, C. K. Friedman and C. S. Northrup, for defendant in error.

PARKER, J.

This proceeding is brought to reverse a judgment of the court of common pleas of this county. Mr. Ward brought an action in the court below against the board of education of the city of Toledo to recover on a claim for a part of his salary, which he said had not been paid to him, and after he had rested, the case was taken from the jury by the trial judge, and the jury directed to return a verdict for the defendant, which was done. On account of this action of the court Ward prosecutes error. He sets forth in his petition:

"That the defendant, the Board of Education of the city of Toledo, Ohio, on or about May 1, 1897, duly employed and appointed one A. A. McDonald as superintendent of the public schools of the city of Toledo, Ohio, for a period of two years, beginning on July 1, 1897, and ending on June 30, 1899. That on or about January 15, 1898, the said defendant, the Board of Education of the city of Toledo, Ohio, suspended the said A. A. McDonald from his said position as superintendent of the said schools. That on January 31, 1898, at a regular session of the board of education of the city of Toledo, Ohio, said defendant duly elected, employed and appointed the said plaintiff John I. Ward to superintend the public ward schools of the city of Toledo, Ohio, to serve out the unexpired term of the said A. A. McDonald, which term would have ended as hereinbefore stated on June 30, 1899. The said board of education of the city of Toledo, Ohio, thus employing the said plaintiff to serve in the said capacity until June 30, 1899, at the stipulated price of \$1,800 a year. And plaintiff says he accepted the said employment and said position at the said price, and immediately entered upon the performance of the duties pertaining to the said position. That he served in the said capacity at the said price until on or about April 4, 1898, when the defendant, the Board of Education of the city of Toledo, Ohio, by reason of the meritorious work on the part of the plaintiff as such superintendent of the said public ward schools of the said city, increased the pay or compensation of the plaintiff from \$1,800 a year to \$2,500 a year for the remainder of plaintiff's term, ending June 30, 1899, said increase to begin on April 1, 1898. That from April 1, 1898, the plaintiff should receive \$2,500 a

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year for his said services until his term closed on June 30, 1899. Plaintiff says that he accepted this increase in his pay or compensation for his services, and that he continued at his said work as superintendent of the said ward schools until on or about July 22, 1898, at which time he received notice from the defendant the said Board of Education of the city of Toledo, Ohio, that he had been appointed a teacher in the Toledo public schools, and that he should go to teaching in the Jefferson school in said city."

Then he avers that in pursuance of that appointment he served out the remainder of this time as principal of the Jefferson school, also as teacher of the training school, but that the board of education allowed and paid him for the time that he thus served at the rate of \$1,800 a year only. The averment is that he received \$1,782 a year. There is a matter of \$18.00 a year subtracted from his salary on account of the teachers' pension fund, but counsel for plaintiff in error makes no contention on account of the \$18.00, and therefore, I will make no further reference to it, but treat the case as though the \$18.00 had been paid. At the end of the year, which was about June 30, 1899, Mr. Ward, who had theretofore been receiving his salary from month to month, at the rate of \$1,800 a year, declined to accept the payment then tendered him as the balance at the same rate, but then set up for the first time his claim for the addition or increase of \$700.

In answer to this petition the defendant admits a large part of that which is averred therein, and then avers a single defense in various forms, namely: that Ward voluntarily gave up his position of superintendent of ward schools and relinquished whatever right or claim he might have had to this extra compensation or increase of \$700 a year, and that he did this in consideration of his appointment to the position of principal of the Jefferson street school at \$1,800 a year; that there was a mutual rescission of the contract under which he was to serve as superintendent of ward schools for \$2,500 a year.

The statute governing boards of education in the matter of fixing the compensation of teachers and superintendents permits such boards to increase the salaries or compensation of teachers during the terms for which they have been employed. I read Sec. 4017, Rev. Stat.:

"Each board of education shall have the management and control of the public schools of the district with full power to appoint a superintendent and assistant superintendents of the schools, a superintendent of buildings, janitors, and other employes, and fix their salaries, and shall fix the salaries of the teachers, which salaries may be increased but shall not be diminished during the term for which the appointment is made."

The part of the statute read is the same as that in force at the time the contract and transaction involved transpired and were made.

It is contended on behalf of plaintiff in error that since the board of education voluntarily increased the salary of Mr. Ward from \$1,800 to \$2,500, that vested in him a legal right to demand and recover that amount for the term.

If a superintendent of schools were a public officer, it is clear that this provision would not be constitutional. In some aspects his position is like that of a public officer. He seems to be a quasi-public officer; and yet we are not prepared to say that the constitutional provision on the subject of salaries of public officers applies to a superintendent of public schools. I will refer to those provisions only because they indicate the

policy of the state upon the subject of salaries of public servants. Sec. 31, Art. 2, provides that the salaries of members of the legislature shall not be increased during their term; Sec. 19, Art. 3, makes the same provision as to executive officers; Sec. 14, Art. 4, makes the same provision as to judicial officers; Sec. 20, Art. 2, places this limitation upon the powers of the legislature:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Section 3982, Rev. Stat., provides:

"A majority of the board of education shall constitute a quorum for the transaction of business; upon a motion to adopt a resolution * * * to employ a superintendent, teacher, janitor, or other employe, or to elect or appoint an officer, or to pay any debt or claim."

The vote shall be taken in a certain way, etc. The petition avers, and the answer does not contradict the statement, that this superintendent was an employe; that is to say, that he was employed at a certain salary for a certain term. Taking the statute and the averments together, we believe that Ward as superintendent was not an officer, but was an employe.

Assuming, therefore, that he was not an officer within the purview of the provisions of the constitution that I have read, but that he was an employe, and that this payment of \$700 per year extra to him, this increase, would have been a legal payment if made, it does not follow that because the board of education promised it to him, he thereby acquired a legal claim thereto, enforceable in the courts. Since this point is not raised expressly by the pleadings, and does not seem to have been considered in the court below, and has not been presented by counsel here, we have taken more than usual pains in examining into the question, and our conclusion is that this promise of extra compensation was a mere *nudum pactum*. Although a teacher may have a vested right in a contract that cannot be impaired by legislation, though such legislation, like that involved here, may take the form of abolishing the position, providing, as it does, for the selection of a superintendent of instruction, and repealing the law providing for a superintendent of schools, still, such contract entered into between the teacher and the board of education is subject to the general rules governing the validity of contracts. It has been said by our Supreme Court in *Turnbull v. Brock*, 31 Ohio St., 649, *per curiam*: "A promise not supported by a consideration creates no legal obligation; and hence its non-performance creates no legal liability."

This extract from Pollock on Contracts, Sec. 162, gives the general rule upon the subject in a very concise form: "Neither the promise to do a thing, nor the actual doing of it, will be a good consideration, if it is a thing which the party is already bound to do, either by the general law or by a subsisting contract with the other party."

It will be observed that Mr. Ward has averred in his petition (and his testimony is consistent with the averment, and is not controverted) that a proposition was made to him by the board of education to employ him at the rate of \$1,800 a year, and that he accepted it; that he entered into such a contract with the board of education, and entered upon the performance of his duty as such teacher or superintendent of ward schools

for the term ending on June 30, 1899. He was therefore under a legal contractual obligation to serve in that capacity for that period at that salary. I read from the notes to the section of Pollock on Contracts from which I have quoted the following illustrations of the application of the rule:

"A promise to pay sailors in consideration of their agreeing to finish a voyage is without consideration. *Bartlett v. Wyman*, 14 Johns, 260.

"A promise to pay a witness for attendance at court more than the fees allowed by law stands upon the same footing. *Dodge v. Styler*, 26 Conn., 463; *Sweaney v. Hunter*, 1 Murphy, 181.

"Or any promise made in consideration of the payment, in whole or in part, of a debt already due."

Among the cases cited in support of this is *Jenkins v. Clarkson*, 7 Ohio, 72, and *Turnbull v. Brock*, *supra*.

"A promise of reward to an officer for arresting a criminal whom the duties of his office required him to apprehend, is both without consideration and against public policy." *Gilmore v. Lewis*, 12 Ohio, 281, and many other cases.

Since the board of education is dealing with public funds, acting with respect thereto as trustees for the public, it seems to us that the law laid down in *Gilmore v. Lewis*, *supra*, is not inapplicable, and that such voluntary rewards given by a board of education should be deemed to be not only without consideration, but against public policy. So far as we know, it is the only statute of the state which authorizes public officers, who have a valid legal contract with others, to pay them extra compensation without any new or additional consideration. I call attention also to the discussion of this principle in *Withers v. Ewing*, 40 Ohio St., 400; *Hooker v. DePalos*, 28 Ohio St., 251; *Johnson v. Otterbein University*, 41 Ohio St., 527; *Sherwin v. Brigham*, 39 Ohio St., 137; also Beach on the Modern Law of Contracts, Secs. 157 and 158, and there many authorities will be found cited.

Here, according to the petition and according to the testimony of Mr. Ward, there was no rescission of the original contract; there was no new agreement and no new or additional service to be rendered or consideration moving in support of the new promise of additional compensation. It does not appear that he met with the board of education and that they came to an agreement that his compensation should be increased by \$700 a year; but the averment of his petition is that they did this on account of his meritorious services; and the part of the record which is introduced indicates the same thing. It reads as follows:

"Mr. McKee offered the following and moved its adoption:

"Whereas, that on January 31, 1898, Prof. J. I. Ward was elected superintendent of our public ward schools for the period of Mr. A. A. McDonald's unexpired term at the salary of \$1,800 per year.

"Whereas, said salary is not commensurate for the services of superintendent of our public ward schools; and

"Whereas, said superintendent J. I. Ward has shown most remarkable ability in efficiency as superintendent of our public ward schools, and is entitled to more pay for his services.

"Therefore be it resolved, that the salary of our superintendent J. I. Ward be increased to \$2,500 per year for the remainder of Superintendent J. I. Ward's term, ending June 30, 1899, said increase to begin on the 1st day of April, 1898:

"Adopted. Yeas—Messrs. Canfield, Klein, Gifford, McKee, McFylan, Roulet, Rutherford, Tucker, and Wheeler. No—Seagrave."

He appears to have continued right along in the same employment, performing the same services during the remainder of that school year, but after the adoption of this resolution he drew his salary at the rate of \$2,500 a year, until this other action was taken by Mr. Chalmers, the superintendent of instruction, assigning him to a different position and different duties. There were no new or additional or different duties or responsibilities assumed by or imposed upon Mr. Ward; no new promise was made to Ward directly, and Ward on his part promised nothing new. It is, as it appears to be, simply a gratuitous reward promised for meritorious services. In so far as it has been paid, the legality of the payment is not drawn in question here; and I may say, that in so far as he has been paid, the payment is authorized by the statute that I have read; but in so far as it has not been paid, it stands upon the footing of a promised but unexecuted gift, a gratuitous promise and therefore it is not enforceable. Beach on the Modern Law of Contracts, Secs. 5 and 203. So we are of the opinion that the plaintiff Ward should have failed, because his petition fails to state a cause of action, and because the evidence, which does not go beyond his petition, fails to show a valid claim.

The fact that the promissor is a public board acting in pursuance of express power given by the statute we do not regard as materially affecting the case.

The statute conferring the *power* upon the board of education to *promise* and *pay* may be so far valid as to justify the board in paying in pursuance of such promise. But the statute conferring the power does not necessarily impose a correlative duty. We think that promises made by such boards are still subject to the ordinary rules as to consideration being necessary to make them obligatory. An individual has the *power* to make such naked promises, and may legally perform them, but he cannot be compelled to do so. The statute puts the board on the same footing as the individual or natural person in this respect. If the rule of the board or the original contract should provide for a raise in the salary after a certain term of service, or upon the accomplishment of certain things, or proof of certain merit or imposition of additional or different duties, or the like, the case would be quite different from that at bar, for in such case the promise would be based on a new consideration, or would be supported by the original consideration.

If, however, we should find ourselves able to get beyond this point in the case, looking then into the evidence, we are of the opinion that the conduct of Mr. Ward indicates very clearly and conclusively a willingness upon his part, and a purpose, to accept of this new position at the rate of \$1,800 a year, and relinquish his old position, which under this resolution of April 4, gave him \$2,500. It appears that after Mr. Ward had been employed the so-called "Niles Law," 93 O. L., 485, relative to the board of education of Toledo, had been passed by the legislature, that having been passed on March 23, 1898; that after the passage of this Niles law, and after the board of education provided for in the Niles law had been elected, that is to say, on the evening of election day, this resolution increasing the salary of Mr. Ward was adopted. This act provides, in Sec. 5 as follows:

"The board shall organize on the third Monday of April, 1898, and annually thereafter. The member of the board whose term shall expire

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at the end of the current year shall be president of the board for such current year, and shall have sole power to appoint all standing and other committees of said board. The board shall at its first meeting, or as soon thereafter as may be, employ a superintendent of instruction, and also a business manager for a term not to exceed two years. The business manager shall also be clerk of the board, and discharge all the duties imposed by law upon such officer.

"Sec. 6. The superintendent of instruction shall have the power to appoint and discharge, subject to the approval and confirmation of the board, all teachers and assistants, authorized by the board to be employed. He shall report in writing to the board monthly and oftener, if required, as to all matters under his supervision, and may be required by the board to attend any or all of its meetings."

It appears that Mr. Chalmers was appointed to the position of superintendent of instruction, and that upon July 22, 1898, he sent to Mr. Ward the following notice:

"Mr. J. I. Ward: Dear Sir:—You are hereby advised that you have been appointed a teacher in the Toledo Public Schools, subject to the provisions of law and the rules or orders which are or may be in force relative to the employment and compensation of teachers and government of the schools.

"In case of your acceptance of the appointment, you will please fill out the blank hereto attached, and file the same in the office of the superintendent, within thirty days. A failure to do so will be held to be a declination of the appointment. Very respectfully yours, W. W. Chalmers, Superintendent of Instruction."

Instead of at that time making known to Mr. Chalmers or to the board of education that he claimed the right to serve under his previous employment at the rate of \$2,500 per year, or of questioning the right of Mr. Chalmers as superintendent of instruction to assign him to duties inconsistent with those which devolved upon him as superintendent of ward schools, Mr. Ward, without a word of objection, signed and returned to Mr. Chalmers an acceptance of this appointment which reads as follows: "Toledo public schools. Teacher's acceptance. To be torn off and returned to the office. To W. W. Chalmers, Supt. of Instruction. I have received your notice of appointment, dated June 10, 1899, and hereby declare my acceptance of the position, under the conditions named. Respectfully, J. I. Ward."

Now, Mr. Chalmers having notified Mr. Ward that if he did accept this position, he must do it subject to the provisions of the law then in force, which provisions of law gave to the superintendent of instruction the power to appoint, as I have read, it is quite apparent that Mr. Ward did not regard this as simply an assignment by his superior to other and different duties under the original appointment, but that he could not have understood it as being anything else than a refusal to recognize him as superintendent of ward schools. As I have stated, he entered upon the performance of these duties without a word of objection and without a word of suggestion that he would insist upon this extra compensation of \$700 a year, and he did not make known that he entertained any purpose of making a claim of that character until the expiration of the full term, to-wit: about the 30th of June, 1899.

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We think, therefore, that not only because of the resolution to pay him the extra compensation of \$700 a year was not enforceable, it being a mere naked promise, but because even if it had been a valid promise, he had voluntarily relinquished that position, and with it necessarily the salary going with it, and accepted another position requiring of him different duties, making it impossible for him to perform the duties of superintendent of ward schools, the direction of the trial judge to the jury was correct.

There being no other question in the record, the judgment of the court of common pleas will be affirmed.

LANDLORD AND TENANT—NEGLIGENCE.

[Lucas Circuit Court, October 15, 1900.]

Haynes, Parker and Hull, JJ.

PHOEBE E. HOHLY ET AL. V. RACHEL E. SHEELY.

1. RULE AS TO LIABILITY FOR NEGLIGENCE.

In an action for personal injuries brought by the tenant of a building against the owner thereof and her agent, for negligence in failing to keep a cellar door closed, the liability of the owner rests upon her ownership, and the liability of the agent upon actual participation in the wrong.

2. PHOTOGRAPH TO DESCRIBE PREMISES IN EVIDENCE.

A photograph of premises where an accident occurred which appears to be substantially correct and which is used by witnesses on both sides in describing such premises in the presence of the jury, and introduced in evidence and submitted to the jury as an exhibit, must be regarded as evidence, and not merely upon the footing of a view of premises by a jury.

3. OMISSION OF PHOTOGRAPH FATAL TO BILL OF EXCEPTIONS.

A reviewing court is not, therefore, at liberty to consider a case on error upon the question of the weight of evidence where it appears that a photograph of certain premises, used for the purpose of describing such premises, and introduced in evidence as an exhibit, is not attached to the bill of exceptions, although the bill contains the usual certificate that it contains all the evidence submitted to the jury.

4. EXCEPTION TO RULE REQUIRING ALL THE EVIDENCE.

In some cases, where it has been made fairly to appear from the bill of exceptions that certain evidence has been lost and such fact is certified by the trial court before whom the bill of exceptions was made up, it has been held that the reviewing court may consider the record in determining the weight of evidence notwithstanding the omission of such evidence.

5. PRESUMPTION THAT EVIDENCE WAS MATERIAL.

In the absence of evidence to the contrary, it must be presumed that evidence admitted was competent and material and it is necessary that the immateriality of the evidence omitted must be disclosed or the omission thereof will be fatal.

Hamilton & Kirby, for plaintiff in error.

U. G. Denman and *Chas. R. Clapp*, for defendant in error, cited:

Review on the weight of the evidence. *Armleder v. Lieberman*, 33 Ohio St., 77 [31 Am. Rep., 530]; *Toledo v. Libbie*, 8 Circ. Dec., 589 [19 R. 704]. City ordinance not attached: *Foster Coal Co. v. Moherman*, 6

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Circ. Dec., 437, 440, (9 R., 544). Of map not attached: Butchers' Savings Co. v. Woodward, 6 Circ. Dec., 658; The N. Y. Life Ins. Co. v. Block, 6 Circ. Dec., 166 (12 R. 224). Depositions not attached: P. & St. L. Ry. v. Millikin, 10 Circ. Dec., 255 (18 R. 594).

Plaintiff in error retained control of the cellar way where defendant was injured, and, therefore, owed defendant the duty of ordinary care to keep the way closed.

Toledo R. & Inv. Co. v. Putney, 10 Circ. Dec., 698 (20 R. 476), and cases cited; Dorse v. Fisher, 10 Dec. (Re.), 163 (19 B., 106); Penn. Ry. v. Snyder, 55 Ohio St., 342, 361 [45 N. E. Rep., 559; 60 A. S. Rep. 700]; Beck v. Coster, 68 N. Y., 283. Cellar way off alley: Corby v. Hill, 4 C. B. (N. S.), 556; 10 Allen, 368; Binney v. Carney, 46 N. Y. Sup., 307. Trap-door in closet: Toomey v. Sanborn, 14 N. E. Rep., 921 [146 Mass., 28]; 88 N. C., 129; Camp v. Wood, 76 N. Y., 92 [32 Am. Rep., 282]; Farris v. Hoberg, 33 N. E. Rep., 1020 [134 Ind., 269]; Kelley v. Columbus, 41 Ohio St., 263.

Question of invitation was for jury: Pelton v. Schmidt, 62 N. W. Rep., 552 [104 Mich., 345-8; 53 A. S. Rep., 462].

Opening of door by stranger: If the door had been opened by stranger, and plaintiffs might have discovered it in the exercise of ordinary care but failed, they would be liable. Colo. Mtg. & Inv. Co. v. Rees, 42 Pac. Rep., 42 [21 Colo., 435]; Baumeister v. Markham, 39 S. W. Rep., 844, 41 S. W. Rep., 816 [101 Ky., 122; 72 A. S. Rep., 397].

Plaintiffs were bound to be active and exercise affirmative care to keep the door closed: Dinniham v. Beach Imp. Co., 40 N. Y. Sup., 764; 68 N. Y., 283.

Greater diligence required of plaintiffs than of defendant in error: Quigley v. Mfg. Co., 26 App. Div. (N. Y.), 434.

Two ways of opening blinds—Not negligence as a matter of law in choosing one or the other, though one be safe and the other may not be: O'Callaghan v. Bode, 24 Pac. Rep., 269 [84 Cal., 489]; Wabash R. R. v. Heeter, 7 Circ. Dec., 485 (14 R. 257); Pennsylvania Ry. v. Snyder, 55 Ohio St., 342-361 [45 N. E. Rep., 559; 60 A. S. Rep., 700].

Contributory negligence: Defendant in error was not guilty of contributory negligence: Camp v. Wood, 76 N. Y., 92 [32 Am. Rep., 282]; Watson v. Land Co., 8 So. Rep., 770 [92 Ala., 320].

PARKER, J.

This is a proceeding brought to reverse a judgment of the court of common pleas. In the court below Rachel E. Sheely brought an action against Phoebe E. Hohly, Reed Hohly, and Paul Hohly, a minor over fourteen years old, to recover damages on account of alleged injuries received upon certain premises which it appears were owned by Phoebe E. Hohly, who is the mother of the other defendants. These premises were occupied by Mrs. Sheely as tenant of Mrs. Hohly. The ground of the action was negligence on the part of the defendants in failing to keep a certain outside cellar door closed, whereby Mrs. Sheely, who had a right to the use of that part of the premises, inadvertently fell into the cellar way and was injured. The liability of Mrs. Hohly rests upon her ownership; the liability of the other defendants rests, according to the rulings of the trial court, upon the actual participation in the alleged wrong doing. On the trial it appeared that there was no evidence tending to fix liability upon

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Paul Hohly, and the court directed a verdict in his favor; but a verdict was returned against Phoebe E. Hohly and Reed Hohly, her son, for \$400, and judgment was entered upon it. A motion for a new trial was made and overruled. It is claimed here that there was error in that action on the part of the court, since the verdict was against the weight of the evidence, and was not sustained by the evidence. It is also contended by the plaintiff in error that the court erred in its charge to the jury.

It is urged by counsel for defendant in error that this court is not at liberty to consider this cause upon the question of the weight of the evidence, since (it is said) it does not appear from the bill of exceptions that all the evidence is brought up. The bill of exceptions contains the usual certificate that it contains all of the evidence submitted to the jury; but it appears that a certain photograph which was used for the purpose of describing the premises, and to aid the witnesses in describing the premises, and which was introduced in evidence as an exhibit, is not attached to the bill of exceptions.

It is well settled in this state, as stated in *Tilton v. Morgaridge*, 12 Ohio St., 98, that the bill of exceptions should contain all the evidence. In that case, on page 102, the court say: "The bill of exceptions sets forth the evidence given on the trial both on the part of the plaintiff and defendants, and the judge therein certifies it to contain 'all the evidence introduced by plaintiff for the purpose of proving or tending to prove the arrest of the plaintiff upon said warrant, issued by Joseph Clark, justice, and all the proof of defendant tending to disprove the matters charged.'" But it is not certified, nor does it appear by necessary implication, that the bill of exceptions contains *all the evidence* given upon the trial, which is indispensably necessary to enable this court to determine whether the court below did or did not err in overruling the motion for a new trial for the alleged cause that the verdict is against the evidence." In *Hicks v. Person*, 19 Ohio, 426, it is said that "the reviewing court must have precisely the same evidence." That is said in the head note, but that is not the precise language of the court in delivering the opinion, although perhaps what is there said amounts to that: The reviewing court must have the same evidence. *P. Ft. W. & C. Railway Co. v. Probst*, 30 Ohio St., 104, is authority to the effect that it is not sufficient to bring up the substance of the evidence. If the bill of exceptions sets forth that it contains the substance of the evidence, that will not answer. And although the bill of exceptions states that it contains all the evidence, if on examination it appears that material evidence or documents referred to are omitted, the reviewing court cannot consider it on the weight of the evidence. *Armleder v. Lieberman*, 33 Ohio St., 77. The language of the court as to the material evidence in that case being "all the evidence * * * which was deemed material, and admitted in the trial court."

These authorities have been followed by the circuit court in a great many reported cases, and by this court in *Toledo v. Libbie*, 8 Circ. Dec., 589, which was affirmed by the Supreme Court without report in 51 Ohio St., 562; also in *C. H. & D. Railway Co. v. Curtis*, 9 Circ. Dec., 112, where the matter is very fully discussed by Judge Bentley. The decision in that case declares the rigidity of the rule very forcibly. The bill of exceptions set forth that it contained all the evidence excepting that pertaining to the plaintiff's injuries, it being an action to recover on account of negligence. And it is held:

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"The rule in Ohio that a bill of exceptions must contain all the evidence in the case in order to enable the circuit court to reverse a judgment as against the weight of the evidence, is so absolute that the judgment will not be disturbed if evidence is omitted, although the bill may certify that such evidence, or 'all other testimony offered in behalf of plaintiff related solely to the character and extent of plaintiff's injuries.'"

These rules have been applied by the circuit courts in the case of *Alliance Review Pub. Co. v. Valentine*, 6 Circ. Dec., 323, where a copy of a newspaper in a libel case was not attached; in *Foster Coal Co. v. Moherman*, 6 Circ. Dec., 437, a personal injury case occurring in a coal mine, where a map or chart of the coal mine which was used upon the trial was not attached; in *Mulligan v. Receiver*, 8 Circ. Dec., 722, also a negligence case, where articles of clothing which had been upon the person injured at the time he was injured were exhibited to the jury, and introduced in evidence, but not attached to the bill of exceptions. Of course there are certain things that may be included without corporal or physical attachment to a bill of exceptions: it may be done by reference or by identification. It would not be proper, of course, to attach a suit of clothes manually to a bill of exceptions. It can be done by reference and identification. Large and cumbersome objects are often attached in that way, but they must be referred to so as to be identified with certainty. In this case the photograph is not brought forward at all. In *Toledo v. Libbie*, 8 Circ. Dec., 689, certain city ordinances were not attached to the bill of exceptions, though upon the reading of the case it is not apparent what bearing those ordinances had upon the issues involved. That is not disclosed by the bill of exceptions.

I may remark that it was stated by counsel for plaintiff in error in argument that this photograph had been lost, so that he was unable to attach it to the bill of exceptions. What a court of review would do if that fact were made to appear in the bill of exceptions, and the best possible effort had been made to substitute the lost evidence, we are not called upon to say here, because the matter is not presented in that way. There are cases, however, where such situation is made to fairly appear from the bill of exceptions, and the facts are certified by the trial court before whom the bill of exceptions was made up, in which it is held that the reviewing court may consider the record, notwithstanding the omission of some of the evidence.

And it appears that it is unnecessary that the materiality of the evidence omitted should be disclosed to make such omission fatal. If it is wholly and utterly immaterial, and that fact is disclosed, it may be and probably is true that the omission of such immaterial evidence would not be held to be fatal. But in the absence of evidence to the contrary, if matter is admitted in evidence, it must be presumed to have been competent and material.

It seems to us, therefore, that the only question remaining for us to consider upon this branch of the case, is whether a photograph is evidence. It is contended in argument by counsel for plaintiff in error that it stands upon the footing of a view of the premises which may be had by a jury; that the photograph may be looked at by the jury for the purpose of assisting in trying the case and yet need not be regarded as evidence. What this photograph may have disclosed by way of corroboration or in contradiction of the other evidence—that is to say, the testimony of the witnesses—is not apparent. The whole case might

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be made, so far as a description of the place where the accident occurred is concerned, by a photograph. It appears that this photograph was used by a number of witnesses, both for the plaintiff below and the defendant below, in describing the premises. They point to it, and speak of "this window," and "this part of the building," and "this part of the premises," etc., indicating what they refer to by pointing to the photograph. And this was done in the presence of the jury, and the photograph with their testimony went to the jury. On page 72 of the bill of exceptions this appears: Bertha L. Sheely is testifying on behalf of the plaintiff, her mother: She is asked;

Q. "Do you know how wide the sink was?" A. "About a foot and a half."

Q. "On which side of the kitchen was it in regard to the stove, the same side or opposite?" A. "On the opposite side."

Q. "Now there is a little porch there, and underneath the step was there, and a little porch you stepped out onto."

And the court says: "You have got a photograph of it, and we will assume that is understood." So that no answer was made. It is only one instance among a number where the photograph was alluded to.

Now, that the photograph was introduced in evidence appears on page 6. Mr. Denman inquires of Mrs. Sheely.

Q. "Are you acquainted with the defendants Reed, Paul, and Mrs. Hohly?" A. "Yes, sir."

Q. "I show you a photograph, Mrs. Sheely, which the stenographer may mark plaintiff's exhibit A, and ask you if that is a fair representation of the east side of that house in which you lived at that time, the 10th of October, 1898?" A. "That is all right, except these banisters were not there. The banisters in the picture along the porch were not there at the time I refer to."

(The photograph, plaintiff's exhibit A, was here introduced in evidence.)

Mr. Hamilton:

"I object to the photograph going in evidence at all."

The Court: (To the witness)

Q. "Were you present when the photograph was taken?" A. "No, sir."

Q. "It was taken after the injury?"

Mr. Denman:

"Of course. This is a matter within the discretion of the court."

The Court:

"It would really be a benefit to both parties. She says it is a correct photograph except the banisters. The question will be taken care of when I come to charge the jury. It is admitted in evidence."

That the photograph then used is to be regarded as evidence, and not as a view of the premises by the jury, we think is apparent from the nature of the matter, and also from the authorities. I read from Sec. 869, Thompson on Trials:

"Next to an inspection of the object itself a photograph becomes its most accurate and convenient representation; and where an inspection

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of the object is proper but impracticable, a photograph of it may be exhibited to the witnesses as an aid in identification, and may be admitted in evidence, and in the discretion of the court examined by the jury through a stereoscope or other magnifying glass, and taken by them to their room. So in an action for damages for an injury to real estate, a photograph of the premises taken at the time, is admissible for the purpose of showing the nature and extent of the injury."

And in a note is indicated a variety of cases in which photographs have been admitted in evidence, and among the cases is that of *Ruloff v. The People*, 45 N. Y. App., 213. I read from 224:

"Objection was also taken to the admission of the photographic likenesses of the two persons found drowned. Evidence was given of the manner in, and disadvantageous circumstances under which they were taken; and the evidence was that they were not artistic pictures, nor in all respects the most perfect likenesses that could be taken. This was fully explained by the artist, and the reasons why they were not more perfect, stated. They were submitted to the witnesses, not as themselves, and alone, sufficient to enable them to identify the persons with entire certainty, but as aids, and with other evidence, to enable the jury to pass upon the question of identity. They were the best portraits that could be had, and all that could be taken. The persons were identified by other circumstances, the clothes they wore and the articles found upon their persons, and their general description; and the photographs were competent, although slight, evidence in addition to the other and more reliable testimony. We are of the opinion that it was not error, under the circumstances, to admit them as evidence for what they were worth."

The photograph in question in the case at bar was conceded to be substantially correct. In this note cases are given where photographs of a railway wreck were used in evidence.

At the last term of this court in Wood county we had a case in which the nature and extent of the plaintiff's injuries were made apparent to the jury partly through the aid of photographs of the injured limb.

The correctness of the photograph must be verified by the testimony of witnesses or it is inadmissible, but whether the evidence of its correctness is sufficient must be decided by the trial judge, whose decision thereon is not subject to exception. If a photograph exhibits only a partial view of premises it is admissible.

The photograph in this case, being according to the testimony of the witnesses, substantially correct, it seems to us would be more distinctly evidenced, and more reliable evidence than the map or chart of a coal mine, the place where the injury happened, held to be evidence in the case of *Foster Coal Co. v. Moherman*, *supra*. So we are of the opinion that we are not at liberty to consider this case upon the weight of the evidence; that is to say, if upon a consideration of such evidence as we have brought before us here—we should be of the opinion that the verdict is opposed to the weight thereof we would not be at liberty to reverse on that account.

We have, however, looked into this evidence with a great deal of care, and we have read every word of it, some of it many times over; and without stopping to take time to discuss it, other matters pressing upon the court, we are of the opinion that the verdict is not opposed to the weight of the evidence as exhibited in this bill of exceptions.

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Plaintiff in error insists that the court erred in its charge. A request to charge was made by counsel for defendant below in these words:

"The jury are instructed that unless they find from the evidence that either Reed Hohly or Mrs. Hohly left or caused to be left the door in the cellar way open, and that the cellar way thus left open was continuously open from that time until the plaintiff fell into the cellar way, they must find for the defendants.

"Request refused, because substantially given in the charge."

We think it is substantially given in the charge, in this language on pages 133 and 134:

"The law of liability as applicable to Phoebe and Reed Hohly is different. It appears undisputed that Phoebe Hohly was the owner of the premises. There is evidence that she was the manager of the business and was the executive head of the business. Now Phoebe Hohly became liable by virtue of sustaining the relation not only for her own acts in the care and management of that property, but also for the acts of her agents and her servants in the opening and shutting of the door and the management of the door."

Thus far the charge states that her liability is limited to such actions of agents and servants as are done in the performance of her business. But the court proceeds:

"As to the liability of Reed Hohly, he is liable for his own acts only, as he had no servants or agents there for which he was responsible. He cannot be held liable in this case unless you find from the evidence and by a preponderance of the evidence, that he was the one that left the door open which caused the injury. If it appears from a preponderance of the evidence that Reed was the one who left the door open, and it was continuously open from the time he left it open until the injury occurred, and that he so negligently left it open and failed to close it while he was in the performance of his mother's business, then both will be jointly liable. There is no evidence tending to show that Mrs. Hohly herself left the door open or was negligent in the failure to close the door. If she is to be held liable under the testimony in this case, it must be because you find from the preponderance of the evidence that her servants or agents negligently exposed this cellar way to the plaintiff, and while in the performance of his mother's business."

So it is twice repeated. It is urged that the evidence fails to disclose that he was about the performance of his mother's business at the time the cellar was left open. We assume that he left the cellar door open—a fact which we hold the jury was justified in finding. Mrs. Hohly had reserved the cellar under this house, and had the right to use this cellar way in order to reach the cellar. Upon the day that Mrs. Sheely received this injury a Mr. Ray came to the premises, and went to another building on the same lot, the second floor of which was occupied by Mrs. Hohly and her family as a residence. He saw Mrs. Hohly, and investigated the water pressure upon those premises to ascertain whether it would be sufficient to run a certain washing machine that he was intending to put in for Mrs. Hohly, if the pressure proved to be sufficient. He made an investigation up stairs in her part of the premises, her son Reed being present, and finding the pressure insufficient there for the purpose, he and Reed went down stairs and went over to this house, opened the door and went down into the cellar, made an investigation there, and afterwards came out and went back to the other house

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where Mrs. Hohly lived. Mrs. Hohly testifies that she did not know they were about to go over to the cellar; that she did not direct Reed to go over there. Reed, upon being inquired of, testified as follows:

Q. "Whose suggestion was it to go down there?" A. "Well, Ray came over there."

The Court:

Q. "You were going, either your mother or yourself?" A. "Yes, sir."

Q. "About whose business were you when you did go down there?" A. "My mother's."

And at another place in the record he repeats that in the performance of that work of going down to the cellar to assist in testing the water pressure he was about his mother's business. It also appears from the testimony of Mrs. Hohly, as well as from the testimony of Mrs. Sheely as to what Mrs. Hohly said to her, that Mrs. Hohly did know soon after this injury occurred that Mr. Ray and her son Reed had been down in the cellar upon that very business, because she spoke of it to Mrs. Sheely. How or when she ascertained it, unless it was upon the very day that they went down there upon that business, does not appear; that any one had subsequently informed her of it does not appear. From all the circumstances—Mr. Ray being there upon that business, making the investigation up stairs, going with Reed to the other house to pursue the same investigation, and the fact that Mrs. Hohly was aware of their visit to the cellar upon that business—we think the jury were justified in concluding, notwithstanding her testimony on that subject, that she was aware on that very day that Mr. Ray and her son Reed had gone together to the cellar for the purpose of investigating the water pressure.

The other facts in the case I shall not take time to discuss. It is our conclusion that the verdict is fairly supported by the evidence. This disposes, I believe, of all the alleged errors.

Finding no error in the record, the judgment of the court of common pleas will be affirmed.

APPROPRIATION.

[Cuyahoga Circuit Court, February 11, 1901.]

Caldwell, Marvin and Hale, JJ.

C. P. FOOTE V. LORAIN AND CLEVELAND RAILWAY CO., ET AL.

1. GENERAL RULE AS TO VALUE OF LAND—APPROPRIATION.

The general rule in appropriation cases is to confine the testimony to the market value of the land in issue, it being, in most cases, the best criterion of its value to the owner, but in getting at the value of the land it is always proper to ascertain the value of the land itself separate and apart from improvements made thereon, and the value that the improvements add to the land, and if there is no market value for the latter, a well for instance, it is proper, as one element of value, to show the cost of the article.

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2. VALUE OF LAND WITH A WELL.

In determining the value of land on which a well is situated, it is proper to show the nature of the well, its depth, the manner in which it was walled, the supply of water that it affords, and its utility and necessity, not only to the strip taken for a right of way, but to the land as a whole; also, its cost, not as a basis upon which to determine the value of it to the land alone, but as tending to show the value of the land.

3. RULE OF DETERMINING VALUE OF LAND APPROPRIATED.

In proceedings to compel appropriation, the owner of land is entitled to the full value of all the land for any purpose for which it might be used, including prospective value, which is certain to be realized. Therefore, evidence that land, by reason of having a lake frontage, and having many trees upon it, and by reason of its location, had large value for allotment and sale in suburban building lots, and was greatly depreciated in value by being cut in two by a railroad, is competent to show the market value of the land taken and damages to the part remaining.

4. EVIDENCE OF VALUE ADDED BY TREES.

Evidence of added value to land by reason of fruit trees growing thereon at time possession was taken by a railroad company is competent in ascertaining damages therefor. And while the better form might be to ask witnesses as to such added value, yet the difference between such questions and questions as to the value of the trees, is more in form than real meaning, and exclusion of evidence offered in that way constitutes prejudicial error.

5. RULE WHERE PROPERTY IS OWNED BY TENANTS IN COMMON.

Where a railroad company became owner of one-half of land owned by tenants in common, and has put its half and the half belonging to its co-tenant to a permanent use, where the latter cannot sell, or where the railroad company can force him to sell or go into court and compel appropriation, the land of such co-tenant no longer has a market value. Under the circumstances, in a proceeding to compel the railroad company to appropriate, such co-tenant is entitled to one-half the market value of the whole property, to be estimated, under rules stated, as of the time when the railroad company took possession, and including improvements, well, fruit trees, fences, and damages to the balance of the property.

6. REFUSAL OF EXPERT TESTIMONY NOT CURED.

A refusal to allow an expert witness to testify to the value of land, both real and prospective, as to the purposes for which it might be used, is prejudicial to the party calling him without her fault, and notwithstanding the cross-examination of the witness was such that the objection to his testimony was no longer available, and other witnesses were allowed to testify to such facts.

7. TESTIMONY OF EXPERT AS TO LAND VALUES.

Where a witness is expert not only as to the value of land, but as to the purposes for which it may be used, he may testify as to both and give the intrinsic characteristics of the property that make it of special value.

HEARD ON ERROR.

Frank Higley, for plaintiff in error.

Carr, Tolles & Goff, for defendant in error.

CALDWELL, J.

The plaintiff in error brought this action to compel the defendant in error to appropriate certain property belonging to her, situated in Cuyahoga county and lying along its right of way between Cleveland and Lorain.

The defendant in error undertook to make a contract of purchase of this property from the brother of the plaintiff in error; and the property being owned by the plaintiff in error and her brother in common, each owning a half interest, she, not being a party to the contract, is not bound by the same.

The defendant in error supposed that it had purchased the entire right to this strip of land on which to lay its railroad track, and went forward and built its track upon the land, and thereafter this action was brought to compel it to appropriate the interest of the plaintiff in error in the property.

On this strip of land there was a well used in connection with the farm of which this strip formed a part. On this strip of land were certain forest trees and fruit trees.

She now complains that there was error in excluding certain testimony which she offered upon the trial of the case. She offered to show by Henry P. Foote, her brother, the cost of the well, he having placed the well on the property; and this question was asked him: "Can you state what that well cost?" To which the defendant objected and the court sustained the objection, and she took an exception, and the statement was made that the witness would swear that the cost of the well was fifty dollars; and the bill of exceptions said that the plaintiff was not at any time during said trial permitted to show the value of said well or the cost of the same.

This raises the question, whether, in a case of this kind, the cost of the well may be introduced as evidence tending to show its value.

The general rule in such cases, is to confine the testimony to the market value of the property. But there is no market value of a well aside from the land; nor is there any market value of a well when sold in connection with land. And it is one of those exceptional cases in which the value of the property to its owner must be taken into consideration. In most cases, the market value of the property is the best criterion of its value to the owner, but in some, its value to the owner may greatly exceed the sum that any purchaser would be willing to pay.

We would not intimate that it would be proper to estimate the value of this well entirely separate and apart from the value of the land; but, in getting at the value of the land, it is proper at all times to ascertain the value of the land itself separate and apart from improvements that are made upon it, and the value that the improvements add to the land, and, if there is no market value for such improvements, or no value well established under any rule, then we think it is proper, as one element of the value, to show the cost of the article.

In connection with that, it is proper to show the nature of the well, its depth, the manner in which it was walled, the supply of water that it affords, and its utility and necessity to the land as a whole.

This well may have been essential to this farm, and it being destroyed by the railway company, and being no longer of use to the rest of the land, it may have been necessary to have produced another well to take its place to supply the remaining part of the land, not appropriated, with water for stock and other purposes.

All these elements would enter in in this case to show the value of that well, not only to the strip of land taken by the railway company, but of its value to the parts of the land not taken. And in cases of this kind, the cost may be taken into consideration, with the other facts above stated, to determine its value, although it might be improper for the court to treat such evidence, in its charge to the jury, as of any other value than as tending to show the value of the land; and it would not be proper for the court to treat it as the basis upon which to determine the value of it to the land alone.

It being evidence proper under the circumstances of this case, to show its value, it was error for the court to exclude it, and which error we find was prejudicial.

A witness was called to show the market value of the land taken and the damage to the part of the land remaining, and he had testified to such values. Then he was asked to give his reasons for the difference in the value that he found in this property with the railroad crossing it, and without it. That was objected to, the objection was sustained, and the plaintiff excepted and stated that she expected to prove in answer to this question that the land by reason of the fact that it had a lake frontage and by having many trees upon it, by reason of its location, had a large value for the purpose of allotment and sale in suburban building lots; that by reason of the land being cut in two by the railroad, that part of the land south of the railroad lost nearly all its value for the purpose of allotment and was now only suitable for pasturing purposes.

And this question was asked, to which an objection was made and sustained and an exception taken: "I will ask you, Mr. Hicks, whether this land having trees upon it, located as it is, is more valuable than if it were near farm land?" And a statement was made of what they expected the witness to answer to the question. This witness was called as an expert on the value of the land in question; and it appears from his evidence that he not only knew the values of land, but knew the location of this land and all its surroundings, and all of the uses to which it might be put.

The plaintiff was entitled to the full value of her land for any purpose for which it might be used, even if that was a prospective value, but certain to be realized. But it is claimed that when the witness answered as to the values, the witness that the plaintiff produced, the witness could go no farther, and, in attempting to ask the questions that were rejected, the plaintiff was seeking to cross-examine her own witness and the court might at its discretion refuse the testimony.

Where a witness is an expert not only as to the value of land, but as to the purposes for which it may be used, he may be questioned as to both and he may give any intrinsic characteristics of the property that make it of special value, in chief; and the witness should have been allowed to answer the questions, and it was error to refuse, and was prejudicial.

It is claimed that this was afterward cured, from the fact that other witnesses were allowed to testify as to the purposes for which said land could be used. Nevertheless, it is true that the plaintiff was deprived of the opinion of Hicks upon that question, for whatever it might be worth; and although the cross-examination of Hicks was such that the objection to his testimony would no longer be available, yet we think, under all the circumstances, it was prejudicial to the plaintiff; it prejudiced without her fault.

It is claimed the court erred in refusing testimony as to the value of trees that stood upon the land at the time the railway company took possession of the same. Stone was the witness, and he was asked if he knew the value of the land as it was at the time of the assessing of the damages, and he said he knew its value to be \$500 an acre; and he testified that he knew of the trees that were upon this land at the time it was taken by the railroad company; and he was asked the value of the fruit trees upon the land taken by the railroad company at the time the land

was taken. That was objected to and exception taken and then it was it was stated what was expected to be proven, that the witness's testimony would show that the fruit trees were worth \$800.

It is difficult to say that there is any market value for trees standing upon land, separate and apart from the land itself. And the intent and purpose of this question was not to ask the witness what the value of the trees were, separate and apart from the land; but the real meaning of the question is, "What would they add to the value of the land for the purposes for which the land was used before its occupation by the railroad company?"

Perhaps the better way to get at that is to ask what the land was worth at the time of the trial, supposing the trees to be upon it as they were at the time that occupation was taken, taking into consideration the natural decay and destruction of such trees. But the difference between the question asked and the one suggested is more in form than in real meaning, for the trees severed from the land are worth nothing as trees, only worth what they would bring for such purposes as they may be used for, such as wood or timber or any other purpose to which they were adapted when severed from the land. And we think that either form of question fairly proposes to the jury, "How much did they add to the value of the land as they stood at the time possession was taken;" and we think the question should have been answered and that it was prejudicial to exclude.

This question was under consideration during the production of testimony, and also by the court in presenting the case to the jury: "Whether the plaintiff was entitled to one-half of the market value of the entire land, supposing it to have been owned by one person; or whether she was entitled to only what her half was worth, taking into consideration that whoever bought it would have to be to some trouble by way of partition or some other process by which the land could be severed and divided."

Unquestionably, land owned in common where one tenant in common wishes to sell, will not bring as much in the market as where the entire property is being sold. Any one in purchasing an interest in land, takes into consideration what must be done in the courts or otherwise to, partition the land and get the ownerships of it severed, instead of in common.

But this case, we think, is peculiar in its facts. While she owned this land in common with her brother, the value of her half was one-half the value of the whole less what any purchaser would have considered proper to get the land divided between the owners.

But in this case, the railroad company becomes the owner of one-half, the half belonging to her brother; and it has put its half, and hers to a *permanent* use, where she cannot sell and where the railway company can force her to either sell out her half to it, or go into the courts and compel it to appropriate her half. Under such circumstances, her half no longer has a market value, for she cannot sell it. She can make only one disposition of it and that is, to transfer it to the railway company. And the railway company having placed her in this situation, we think the amount that she is entitled to, is one-half of the market value of the whole strip, that market value to be estimated at the time of the assessment of damages, taking into consideration the improvements that were upon it at the time the railway company took possession, which would be the well, the fruit trees, the forest trees, the fences, etc.

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Had the railway company appropriated this entire land, that would be the value that she would be entitled to, and her brother would have been entitled to the other half at the same time; and if this rule is not still to prevail, then the railway company can purchase one small fraction of a strip of land over which it desires to put its railroad, and then it can compel the other owners of the land to sell at a sacrifice simply because the railway company will not sell, nor can the others sell if the railway company has taken possession, to any other than the company.

Under these peculiar facts, we believe the more equitable rule is that she should be entitled to recover one-half of the actual value of the entire strip, including damages to any other portion of her land; and in estimating such values, the well and the trees that were upon it when possession were taken, should be taken into consideration.

For the errors herein named, we reverse the judgment in this case; the grounds of reversal being error on the part of the court in the rejection of testimony offered by the plaintiff, and in instructions to the jury.

GAS AND OIL LEASES.

[Lucas Circuit Court, March 2, 1901.]

Haynes, Parker and Hull, JJ.

***ANTHONY A. SIMMONS ET AL. V. BUCKEYE SUPPLY CO.**

* For decision of the common pleas, see 5 Dec., 287.

1. GRANTEE CHARGED WITH NOTICE BY POSSESSION IN OPERATING FOR OIL.

Where the owner of land permitted her husband and his partner to enter upon the premises and operate the same for oil, without a written lease, and without reservation of interest, rent or royalty, the firm being permitted to receive the entire production, and to hold themselves out to the world as owners thereof, and being in absolute possession of the premises at the time of a sale thereof by the wife, her grantee is charged with notice, not only of rights which a mortgagee of the oil business may have acquired, but of rights which were acquired against grantor by estoppel; and grantee takes the premises subject to such rights.

2. NOT TENANTS AT WILL—MORTGAGE SUCCEEDS TO RIGHTS ACQUIRED.

Where the owner of lands permitted her husband and his partner to enter into possession of the premises, without written lease, reservation of rent or royalty, and operate the same for oil, being permitted to receive the entire product, such firm was not merely a tenant at will, but acquired a right in equity to compel the owner of such property to execute a lease or grant, conveying the usual rights and interest which are conveyed by such instruments and a mortgagee of such firm succeeds to the rights thus acquired.

3. EVIDENCE OF RESERVATION THOUGH NOT CONTAINED IN DEED.

In an action by the grantee of the land in question for rent and royalty, evidence that there was a reservation in fact of the oil, is competent notwithstanding the deed contained no such reservation, particularly where it appears that the grantor and her husband at the time of the conveyance expected that the mortgage of the oil interests would be paid off and that the rights would revert to them.

4. CLAIM AS BETWEEN ORIGINAL PARTIES—DOES NOT AFFECT SUCCESSORS.

The fact that as between the owner on the one part and her husband and his partner on the other part, there was an understanding that she was to receive a rental, affords foundation for a claim against them, but does not in any way affect the rights of mortgagees of the partners without notice or their successors in interest, or the title acquired by estoppel.

APPEAL.

Hurd, Brumback and Thatcher, for plaintiff :

Tenants at will : 1 Wood on Landl. and T., pp. 43, 44, 48, 67; 12 Am. & Eng. Ency. Law, 670, 671 (1st Ed.); Sarsfield v. Healey, 50 Barb. (N. Y.), 245; Le Tourneau v. Smith, 53 Mich., 473 [19 N. W., 151]; Lea v. Hernandez, 10 Tex., 187; Goodenow v. Allen, 63 Me., 308; Rich v. Bolton, 46 Vt., 84; Murray v. Cherrington, 99 Mass., 229; Sanford v. Johnson, 24 Minn., 172; Williams v. Deriar, 81 Mo., 13; Knight v. Indiana, etc., 47 Ind., 105; Webb v. Seekins, 62 Wis. [21 N. W. Rep., 814]; Merrell v. Sizeland, 81 Ill., 457; Say v. Stoddard, 27 Ohio St., 478.

Decrees; Privity : 2 Black on Jdgt., Sec. 549.

Parol License : Mather v. Wright, 11 Circ. Dec., 578 [21 R., 103].

Ira C. Tabor, for defendant, cited :

Res adjudicata : Grant v. Ramsey, 7 Ohio St., 157; Petersine v. Thomas, 28 Ohio St., 596; Covington & C. Br. Co. v. Sargent, 27 Ohio St., 233; Roby v. Rainsberger, 27 Ohio St., 674; Porter v. Wagner, 36 Ohio St., 471; Foster v. Busteed, 100 Mass., 409; Hughes v. U. S., 71 U. S. [4 Wall.], 232 [18 L. ed., 303]; Andrews v. Stelle, 22 N. H. Eq., 479; Ehle v. Bingham, 7 Barb., 494; Young v. Rummell, 2 Hill., 478; Kingsland v. Spalding, 3 Barb. Ch., 341; Lyon v. Manufacturing Co., 125 U. S., 698 [31 L. ed., 839]; Gelston v. Hoyt, 1 Johns. Ch., 542; Cook v. Canal & D. Co., 23 N. E. Rep., 629; Kelauder v. Hoover, 111 Ind., 10; McBurnie v. Seaton, 111 Ind., 56 [12 N. E. Rep., 101]; Chicago v. Cameron, 120 Ill., 447 [11 N. E. Rep., 899]; Snow v. Mitchell, 87 Kan., 636, 639 [15 Pac. Rep., 224; 16 Pac. Rep., 737]; Hanson v. Manley, 72 Iowa, 48 [33 N. W. Rep., 357]; Harmon v. Auditor, 123 Ill., 111, 122 [13 N. E. Rep., 161]; Stockton v. Ford, 59 U. S. (18 How.) 413 [15 L. ed., 395]; Laird v. De Soto, 32 Fed. Rep., 652; Hughes v. Pipe Lines, 29 N. Y., 564; Thompson v. Roberts, 65 U. S. (24 How.), 233 [16 L. ed., 648]; Garrett v. Greenwell, 92 Mo., 120 [4 S. W. Rep., 441]; Chicago & N. W. R. R. Co. v. People, 120 Ill., 104 [11 N. E. Rep., 418]; Washington, etc., Packet Co. v. Sickles, 65 U. S. (24 How.), 333 [16 L. ed., 650]; Brooklyn City, etc., Ry. Co. v. Bank, 102 U. S., 14 [26 L. ed., 6]; Commercial Union Assurance Co. v. Scammon, 126 Ill., 355, 364 [18 N. E. Rep., 562; 9 Am. St. Rep., 607]; Orthwein v. Thomas, 127 Ill., 554 [21 N. E. Rep., 430; 4 L. R. A., 434; 11 Am. St. Rep., 159]; Kromer v. Friday, 10 Wash., 621 [39 Pac. Rep., 229; 32 L. R. A., 671]; Wolf v. Youbert, 45 La. Ann., 1100 [13 So. Rep., 806; 21 L. R. A., 772]; Vanfleet, Collateral Attack, Sec. 17; Fischti v. Fischti, 1 Blackf., 360.

Estoppel : Eldridge v. Walker, 80 Ill., 207; Ford v. Loomis, 33 Mich., 121; Winton v. Hart, 39 Conn., 16; Miles v. Lefi, 60 Iowa, 168 [14 N. W. Rep., 233]; Stewart v. Munford, 91 Ill., 58; Robbitt v. Shryer, 70 Ind., 513; Sebright v. Moore, 33 Mich., 92; Horn v. Coe, 51 N. H., 287; Howland v. Woodruff, 60 N. Y., 73; Barton's Appeal, 93 Pa. St., 214; Kirk v. Hamilton, 102 U. S., 68; O'Connor v. Clark, 170 Pa., 818 [32 Atl. Rep., 1029; 29 L. R. A., 607]; Quinlan v. Myers, 29 Ohio St., 500, 511; Miller v. Brown, 33 Ohio St., 547, 554; Stainchfield v. Emerson, 52 Me., 465; McCravey v. Renison, 19 Ala., 480 [54 Am. Dec., 194].

PARKER, J.

This case comes into this court on appeal. The plaintiffs seek to recover a share of the oil produced from wells drilled on certain prem-

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ises of which they are the owners. It appears that they became the owners of the premises, consisting of about sixteen acres of land in Wood county, Ohio, by conveyance from Elizabeth Fuher, on October 14, 1892, and they seek to require the defendant, the person in possession of and operating these premises for oil, to account to them for a share of the oil, their contention being that under the custom of the country they should receive as landlords, the one-sixth part, at least, of the oil produced.

The defendant insists that it acquired the right to the oil under such circumstances that it is not bound to pay any rental or render any share of the oil. The history of the matter, in the main, is set forth in certain stipulations filed in the case and which read as follows:

"It is hereby stipulated by and between the parties to this cause as follows, to-wit:

"That one Elizabeth Fuher was the owner in fee and held a good title to the property described in the petition, being between sixteen and seventeen acres of land located in the village of Prairie Depot, Ohio, prior to October 10, 1891, and continued as such owner until October 14, 1892. That there are no buildings upon said lands, but said lands are fenced; and upon the discovery of oil in the vicinity, four wells were drilled upon said property, which produced oil in paying quantities.

"That during the time said Elizabeth Fuher was the owner of said property, her husband, John Fuher, and Charles Villwock, were partners under the firm name of Fuher & Villwock, engaged in prospecting and operating for oil in Wood county, and as such partners, with the consent of said Elizabeth Fuher, entered into said premises, and drilled, completed and equipped four wells upon said land prior to February 10, 1891, and that no other wells were drilled thereon. That there was no written lease between the said Fuher & Villwock and the said Elizabeth Fuher; that the said Fuher & Villwock received the entire production of oil on said lease, deducting no royalty, of which the said Elizabeth Fuher had full knowledge.

"That prior to February 10, 1891, the firm of Fuher & Villwock became indebted to the Buckeye Supply Company for material entering into the construction of said wells on said premises, and to secure the same said Fuher & Villwock did execute a chattel mortgage on certain oil well property, including sold wells aforesaid.

"As an additional security, Fuher & Villwock also executed what is known as a transfer order, transferring all the oil to be produced from said wells in the future to be applied toward the payment of said indebtedness until said indebtedness should be fully paid.

"On October 14, 1892, said Elizabeth Fuher and her husband, John Fuher, duly conveyed said premises by warranty deed to the plaintiffs in this action, and the said plaintiffs thereupon entered into possession of said premises except in so far as the same were being occupied and used by the operation of said oil wells thereon, said John Fuher agreeing to pay to plaintiff a rental of \$30.00 per year, rental for ground occupied by said oil wells, as per written agreement in that behalf a copy of which is hereto attached and marked "Exhibit A," and made a part hereof:

"EXHIBIT A.

"Articles of agreement made and entered into this 14th day of October, 1892, by and between John Fuher and Anthony A. Simmons in which the said John Fuher agrees to pay to the said Anthony Sim-

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mons \$30.00 per year commencing on the first day of April, 1893, as a rental for grounds now occupied by oil wells on lands this day purchased and now owned by said Simmons and Cora A. West, said lands purchased from Elizabeth M. and John Fuher lying south of Freeport, Ohio, containing sixteen and one-half acres, said term of lease to continue until the removal of all of said oil wells. (Signed) John Fuher, A. A. Simmons.

"That on February 10, 1894, John Fuher began an action in the court of common pleas of Lucas county, Ohio, against the Buckeye Supply Company, Charles Villwock, William Hardee and Elizabeth Fuher, for an accounting; and the Buckeye Supply Company filed its answer and cross-petition therein to foreclose its chattel mortgage given by said Fuher & Villwock and covering the said oil wells and appliances owned by said Fuher & Villwock upon said premises, and setting up the transfer order above described. Said Elizabeth Fuher also filed in said action her answer and cross-petition, in which she made claim to a royalty interest in the oil produced from the said wells and prayed an accounting therefor against the Buckeye Supply Company and the said Fuher & Villwock, a copy of her answer is attached to the answer of defendant in this action. The plaintiffs, Anthony A. Simmons and Cora M. West, were not made parties in said cause."

Upon the final hearing of said cause a decree was entered, etc.

The decree mentioned in the stipulation, a copy whereof is attached thereto, determines that Elizabeth Fuher was estopped as against the defendant herein from claiming any oil produced up to October 14, 1892. This decree is set up in the answer of defendant and it is contended that because thereof the claim of the plaintiff herein is *res judicata*; but we find that that is not so, because the plaintiffs herein were not parties to that suit and it was instituted after they had acquired whatever interest they have in the premises. But the same facts that were relied upon by the defendant in that case to estop Mrs. Fuher, plaintiff therein, are also relied upon here to defeat the claim of the plaintiffs herein who acquired their title from Elizabeth Fuher. It appears that at the time plaintiffs acquired their title, as before stated, the defendants were in possession of these premises, so that the plaintiffs were bound to take notice of defendant's rights and title. It also appears from the stipulations and other evidence that Elizabeth Fuher had allowed her husband and Mr. Villwock to enter upon these premises to operate the same for the production of oil and that she had knowingly permitted them to hold themselves out to the world as the owners of all the oil being produced from the premises; in other words, as having the right to all of said oil without being required to share any part thereof with her, or render any rental.

It is urged by counsel for plaintiff that there is something anomalous, something strange and unusual, in one occupying the premises of another and taking the oil therefrom in this manner without being required to render a part of the oil as royalty or to pay rental, but our experience with this business, both in and outside of courts informs us that it is very common in practice for the producer to acquire the entire interest in the oil, either by an outright purchase thereof or by other arrangement, and we find from the evidence that under the circumstances the defendants dealt with Fuher & Villwock, in acquiring their security upon these wells and the oil, in the belief that Fuher & Villwock owned the entirety of the oil produced, and that this was done

under such circumstances of knowledge and acquiescence upon the part of Mrs. Fuher as estop and cut her off from asserting any claim against the defendants, and that the defendants having been in absolute possession when the plaintiff bought, as before stated, the plaintiffs were bound to take no tice, not only of the rights that defendant had acquired in dealing with Fuher & Villwock, but of the rights that they had acquired as against Mrs. Fuher, their grantor, by the estoppel.

But, it is urged by counsel for the plaintiffs that the utmost of the right that defendant had acquired was that of a tenant at will, and that, therefore, upon plaintiffs coming into the ownership of this land, they had a right to terminate that tenancy. If that were true, the right of the plaintiffs would extend to the whole of the oil produced and not merely to the rental or royalty; but we hold that that is not true; that Fuher & Villwock went into possession of these premises, drilled wells, and equipped and operated them under such circumstances that as against Mrs. Fuher they had a right in equity to compel her to execute to them a lease or grant, conveying to them the usual rights and interests that are conveyed by such instruments, and that the defendant has succeeded to the right thus acquired by Fuher & Villwock. This right we find would include a right to operate these wells and drill and operate other wells upon the premises in a reasonable and ordinary manner so long as oil may be produced therefrom in paying quantities. It does not appear that the right to thus occupy these premises and operate these wells or drill other wells, has yet terminated. As before stated, the right to hold the premises free from any obligation to pay rent or royalty, is acquired as against Mrs. Fuher by the estoppel; the two are merged in the defendant and the plaintiff's ownership is subject thereto.

We also conclude from the evidence that when plaintiffs acquired the ownership of these lands the conveyance of the oil underlying the same was not contemplated by Mrs. Fuher, but whatever right she had therein was intended to be reserved. Notwithstanding there is no such reservation in the deed, we hold that the defendant had a right to show that there was such a reservation in fact. At the time of this conveyance the rights of Fuher and Villwock had not been extinguished by the foreclosure and sale. It is clear that they then contemplated that the claim of defendant would ultimately be paid off, that the whole oil right would revert to them, and when that should occur it would also result that Mrs. Fuher, as against them, would have a right to exact royalty or rental and the occurrence of these events seems to have been contemplated by Mrs. Fuher and her husband, who acted in the transaction for her when the conveyance was made, and it seems to have been contemplated by Mr. Simmons, who acted in the premises for himself and for his daughter, Cora M. West. The oral testimony of the parties, both of Mr. Fuher and of Mr. Simmons, makes it clear to us that this is what was contemplated by the parties, and that the contract entered into between Mr. Fuher and Mr. Simmons, and which appears to have been on behalf of Mrs. Fuher, is to receive this construction. So that there is no hardship resulting to the plaintiffs from the conclusions of the court as to the rights acquired by the defendant by the way of estoppel against Mrs. Fuher and the plaintiffs. Making the claim for rental or royalty, seems to have been an after-thought on the part of Mrs. Fuher and on the part of the plaintiffs, occurring after the rights of Fuher & Villwock had been foreclosed and sold to the defendant, as set forth in the stipulations. The facts that as between Mrs. Fuher on

the one part and her husband and Villwock on the other part, there was an understanding that she was to be paid a rental, affords foundation for a claim on her part against them, but does not in any way affect the rights of the defendant in the premises.

The petition of the plaintiffs will be dismissed and the costs will be adjudged against them.

FALSE PRETENSES.

[Cuyahoga Circuit Court, February 18, 1901.]

Caldwell, Hale and Marvin, JJ.

EX PARTE AMANDA FITZPATRICK, HABEAS CORPUS.

FALSE PRETENSES—AFFIDAVIT CHARGE PRESENT PURPOSE.

An affidavit charging a person with unlawfully and falsely pretending that she was collecting money and funds for the relief of certain children, by means of which false pretenses she obtained money from complainant, "whereas in truth and in fact she was not collecting money and funds for said children or their benefit, all of which the accused then and there well knew," charges the accused with a present purpose and object in collecting the funds or thing of value obtained by such false pretense, and states an offense against the state of Ohio within the jurisdiction of the justice before whom the affidavit was made. It would not be a fair interpretation of the language to hold that for the accused to pretend that she was collecting money for such children was, in effect, saying that she was collecting money which she would apply to their relief, and that the negation is only to the extent that she did not thereafter so intend to apply the funds.

HEARD ON ERROR.

Frank Higley, for plaintiff in error, cited:

The affidavit filed with the magistrate is defective in the following particulars, to-wit:

First. It does not state the kind, value, or ownership of the property taken. *Redmond v. State*, 35 Ohio St., 81; *Wharton's Crim. Law*, Sec. 1223; *Spencer v. State*, 13 Ohio, 401.

Second. It does not state that the property was obtained by reason of the alleged pretenses. *Kennedy v. State*, 34 Ohio St., 310, 314; *Wharton's Crim. L.*, Sec. 1227.

Third. It does not sufficiently state any pretense which relates to a past event, or an existing fact. *Redmond v. State*, 35 Ohio St., 81; *State v. Trisler*, 49 Ohio St., 588 [31 N. E. Rep., 881]; *Campbell v. State*, 56 N. E. Rep., 665; *Cannon v. State*, 32 S. W. Rep., 129; *Wharton's Crim. L.*, Secs. 1167 and 1224; *Bish. Crim. Proc.*, Secs. 168 and 169.

The pretense must appear in the affidavit to have been the operative cause in obtaining the property. *Redmond v. State*, 35 Ohio St., 83; *Wharton's Crim. L.*, Sec. 1175; 12 Enc. of L., N. S., 811; *Winnett v. State*, 10 Circ. Dec., 245 (18 R., 515).

Where the affidavit does not state an offense, the magistrate acquires no jurisdiction by the consent of the defendant. His judgment is a nullity, and *habeas corpus* lies. Sections 7133, 7146, 7147 and 5279, Rev. Stat.; *McKnight, Ex parte*, 48 Ohio St., 588 [28 N. E. Rep., 1034; 14 L. R. A., 128]; *George, In re*, 3 Circ. Dec., 104 [5 R. 207].

P. H. Kaiser and *F. L. Taft*, for defendant in error.

Cuyahoga Circuit Court.

MARVIN, J.

Amanda Fitzpatrick filed her petition in the court of common pleas, alleging that she was unlawfully deprived of her liberty by McConnell, as sheriff of Cuyahoga county, Ohio, and praying for her release upon *habeas corpus*. The return of the sheriff set out that the petitioner was held by him as a prisoner under and by virtue of a *mittimus* issued by a justice of the peace of the county of Cuyahoga.

Upon a hearing, the court remanded the petitioner to the custody of the sheriff; and to reverse this judgment of the court, the present proceedings are had.

A bill of exceptions is filed, setting forth all the evidence introduced before the court. From this it appears that a warrant was issued by Irving E. Hershey, a justice of the peace of Cuyahoga county, for the arrest of the petitioner, and that such warrant was issued upon there having been filed with him an affidavit (which is Exhibit "B" of the bill of exceptions), which reads:

"The State of Ohio, Cuyahoga County, ss.

"Before me, Irving E. Hershey, a justice of the peace in and for said county, personally came Maggie Goette, who being duly sworn according to law, deposeth and saith, that on or about the 31st day of December, A. D. 1900, at the county of Cuyahoga, one Mary Jones (real name unknown) unlawfully did falsely pretend to the said Maggie Goette that she was collecting money and funds to provide shoes and clothing for certain children by the name of Oversell, who were destitute, and that after said children were provided with suitable shoes and clothing she had arranged to have them admitted to the German Methodist Orphan Asylum of Berea, Ohio, and by means of which false pretenses, she, the said Mary Jones (real name unknown), did solicit and receive unlawfully from the said Maggie Goette the sum of twenty-five cents, with intent then and there to cheat and defraud the said Maggie Goette of the said sum of money; whereas in truth and in fact the said Mary Jones was not collecting money and funds for said children or their benefit, all of which the said Mary Jones then and there well knew.

"(Signed) MAGGIE GOETTE.

"Sworn to and subscribed before me, this 31st day of December, A. D. 1900.

"(Signed) IRVING E. HERSHEY,

"Justice of the Peace."

The petitioner consented to have her case disposed of by the justice, and pleaded guilty to the charge, whereupon she was sentenced to the county jail.

It is urged that no offense against any law of Ohio was charged in the affidavit, and that, therefore, the justice was without jurisdiction, and that no consent of the petitioner could give jurisdiction to the justice.

The affidavit, as will be seen, charges that the petitioner unlawfully pretended, among other things, that she was collecting money and funds to provide shoes and clothing for certain destitute children named in the affidavit. Other pretenses are set out in the affidavit, which are said to be false; but it is the one named, which is distinctly negatived in the affidavit,—the words of the negation being: "Whereas, in truth and in fact, the said Mary Jones was not collecting money and funds for said

Ex Parte Fitzpatrick.

children or their benefit, all of which the said Mary Jones then and there well knew."

It should be said that the affidavit charged the offenses against "Mary Jones, real name unknown."

The charge is, as a result of the pretense set out in the affidavit, the petitioner obtained from one Maggie Goette the sum of twenty-five cents.

The argument made on behalf of the plaintiff in error is that the false pretense which was negatived in the affidavit, only relates to a future event and is, therefore, not such false pretense as is punishable by law.

It is said that for the petitioner to pretend that she was collecting money for these children, is, in effect, saying that she was collecting money which, when collected, she would apply to the relief of these children, and that the negation is only to the extent that she did not intend thereafter to apply the funds to such purpose.

We think this is not a fair interpretation of the language of the affidavit.

The representation charged in the affidavit that the petitioner was *then* collecting funds for a specified purpose, was a representation of an existing fact, or rather a fact alleged *then* to exist, to-wit, a present purpose and object in the collecting of the funds. This is distinctly negatived by the language already quoted.

It is further urged on the part of the plaintiff in error, that there was not such averment in the affidavit as shows that anything of value was obtained from the party making the complaint. The language is that "the petitioner received from said Maggie Goette the sum of twenty-five cents." We think this is a sufficient averment that she received something of value by reason of her false pretense; but it is said that the language of Sec. 7076, Rev. Stat., is, whoever by any false pretense *obtains*, * * * etc., and that the language of the affidavit is that the petitioner "received" this money. We think the distinction sought to be made, is not well taken.

One who *receives* from another, *obtains* from another.

Other questions are made by counsel for plaintiff in error, but the holding on the points already mentioned disposes of the case, and the judgment of the court of common pleas is affirmed.

CANAL LANDS.

[Cuyahoga Circuit Court, September Term, 1896.]

Caldwell, Hale and Marvin, JJ.

WILLIAM EDWARDS & CO., SUBSTITUTED, v. SCHLUND ET AL.

I. CANAL LANDS—EVIDENCE AGAINST OWNERSHIP BY STATE.

Where there was no record kept of lands condemned by the state for canal purposes, and a surveyor sent by the commission subsequently established to preserve evidence in regard to such lands, evidence that his survey includes lands which were unnecessary for canal purposes, and that the commission established the boundaries of the canal lands upon the maps and charts so as to include all such lands, is sufficient to overcome the *prima facie* evidence of ownership on behalf of the state.

Cuyahoga Circuit Court.

2. POSSESSION OF ADJOINING LAND TO PROTECT CANAL.

In building and maintaining the state canal, the commissioners had the right to enter upon adjoining land to protect the canal from being washed away by a river by driving piles, etc., along such river, but possession of adjoining land for that purpose does not give the state title thereto.

HEARD ON ERROR.

CALDWELL, J.

On July 5, 1892, there was a suit commenced of Lee against Schlund. On August 11, 1891, these lands were resurveyed. Schlund, the defendant, claims to own land lying between the Cuyahoga river and the canal. He says he became owner of this land in 1888, and that Ferdinand Lee became his tenant, and remained such for that year, or about that, and then became his tenant again immediately following, under another contract. That tenancy was continued for a year or so after that; that then Lee deserted him and went and got a lease from the state of Ohio of these lands, and refused any longer to pay rent to Schlund, and he has been from that time to this trying to get some rent from Lee for this land.

The defendant brought various actions for forcible detainer, and after bringing the third action of this character, Ferdinand Lee went to the court to enjoin him from any longer molesting him, and to quiet his possession under his lease to that property.

Lee died, but before he died he became insolvent and owed Edwards & Company a considerable sum of money. and he transferred his lease from the state and all his improvements upon the property, and his store and fixtures, etc., to Edwards & Company in payment of that debt.

From that time forward Edwards & Company have been prosecuting this case.

The question here presented is as to who owns this property. Is it owned by the state of Ohio, or is it owned by Schlund, the defendant?

This property lies along the canal, and between the canal and the Cuyahoga river. The distance between the canal and the Cuyahoga river, is, perhaps, less than one hundred feet, at any point in dispute.

A commission was established by the legislature some years ago to preserve evidence in regard to these canal lands. It seemed that there was no record of what lands the state condemned, or what lands it bought at the time the canal was established. Land was then cheap, and sometimes a large number of acres had been overflowed by waste water from the canal. Large basins in the canal were not used actually for purposes of navigation, but the waters were in one sense a part of the canal. The tow path of the canal had to be sustained, and in many places, in proximity to streams, piles had to be driven and earth and stone and brush put in to save the canal from being washed out. Lands were possessed in that way.

A surveyor was sent to look at these lands and survey them, and present the evidences of ownership on the part of the state to the commissioners, which evidences could only be made to appear by the situation of things when the surveyor went there, of what land was absolutely necessary, or was likely to have been used and was used by the state for this canal.

The surveyor made a survey, and included all the lands in question in this suit as canal lands, and it seems that the commission established

upon these maps and charts the boundaries of the canal lands, so as to include all the land in question as belonging to the state.

This act of the legislature provides that the finding of this commission establishing these lines, as I have said, makes a *prima facie* case in behalf of the state, and evidence sufficient to show that these lands were not state lands must be offered in the case to overcome that proof.

The question is whether Schlund has offered sufficient evidence in this case to overcome the *prima facie* case made by the plaintiffs who hold under the state; and as to how much land, if any, has he overcome this *prima facie* evidence?

It seems that there is a bridge across the Cuyahoga river and over the canal also at what is called the fourteen mile lock, or lock No. 37. This bridge passes over the lock right at the lowest end of it, so that the lock really lies south of the bridge, or the highway that passes over the bridge; and there is a drop on the canal so that the level of the water north of the lock is eight feet lower than it is above the lock. This makes an elevation south of this bridge of eight feet more than there is north of the bridge, and the same difference, no doubt, exists as to the tow path that exists as to the water.

The evidence clearly shows that the canal south of the bridge is all upon made land. The land there was low and flat land, so much so that the banks of the canal seem to be above the original land as it lay at that point, on both sides of the canal. The tow path, as well as the opposite bank of the canal seemed to be above the canal, and hence it is in evidence by a number of witnesses that the dirt used in making this canal and the tow path was all brought there, and the whole structure is artificial at that point. Just how high this tow path south of this bridge is above the bank of the stream, the evidence is somewhat conflicting, as might be expected, by persons who go and simply look at the lay of the land. They would not be expected to agree within several feet.

We think the weight of the evidence is that the slope that was made there for the purpose of sustaining the tow path extends substantially, if not entirely, to the edge of the water of the river, along all that portion of the land south; so that as to the land south of the bridge it is conclusive in this matter, that when the canal was built the authorities of the state took actual possession of so much of the land as was necessary to form the bed and banks of the canal and the tow path, and the bank necessary to hold the tow path and keep it in position. And that takes from the canal substantially to the river, if not entirely. There is so little land left there, appearing on the surface as the original land that was there before the canal was built, that it is substantially worth nothing to anyone, if there is any land at all.

But, after we pass below the lock north of the bridge, we meet with a different state of facts. There, the survey presented to us shows that the tow path, as well as the water in the canal, is above the land lying between the tow path and the river, but not very much above the land; and the surveys show that there is a slope at the outer edge of the tow path, and that the elevation between the land at the edge of the river and the land at the foot of this slope is just three feet. The charts of one of the surveyors show that. How much of that elevation, and just where it is does not appear from this survey. But the witnesses say that that land between the foot of the slope of the tow path and the river is substantially level; and three feet elevation would make it sub-

stantially level beyond a question. So that it appears that upon the north side of the bridge, the canal authorities certainly needed, for purposes of the canal, and the support of the tow path, nothing more than the ground on which the canal, its banks, and the tow path and the tow path slope are situated. The evidence ought to satisfy anyone that that is all that the state ever used for canal purposes north of the bridge, or substantially all.

The evidence goes to show that north of the bridge as well as south of it, and for a long ways up the river and for some distance down the river, the canal authorities at one time drove piles along the east side of the river bank in the edge of the stream. Behind these piles was put brush and rocks and material to keep the river from washing the bank. The piles that were put further south than this land were evidently driven for the purpose of throwing the water to the west, so that this bank at this particular point would not be washed so much. Those piles farther down than this land had a similar purpose, viz., to throw the water above and below, and keep the channel away from this particular point, because above and below this particular land the canal and river are not close together; there is quite a distance between them.

We are inclined to look at this in this way: That the canal authorities might easily have gone to some other person's land to protect themselves, even at quite a distance from their own land and from the canal, to protect themselves from water that might eventually wash away the banks so as to destroy the canal.

Now, taking possession of such lands for that purpose, we do not think ought to be construed as giving the state the right to that land. The owner allowed the state to pass upon that land as a mere matter of convenience.

We are inclined to think that the land between the foot of the tow path north of the bridge and east of the river belongs to Mr. Schlund, and never was owned by the state. And we will give to the plaintiffs sixty or ninety days as they may desire, to remove their buildings from that portion of the land, or make some other disposition of them.

We will give to the plaintiffs as tenants of the state all the land and all that is on the land south of the bridge, and allow the defendant to have the portion of the land north of the bridge that lies between the foot of the bank that sustains the tow path and the river. We cannot find the width of that strip from the maps. We cannot tell where the foot of that tow path is. If it becomes necessary we will have to send a surveyor to determine, in making this decree. There ought to be some definite lines established there.

NEGLIGENCE—RAILROAD CROSSINGS.

[Lake Circuit Court, October Term, 1900.]

Frazier, Burrows and Laubie, JJ.

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY CO. v. A. G. REYNOLDS, ADMR.

1. WHEN ALLEGED ERRORS WILL BE IGNORED.

Ordinarily, a reviewing court will consider all exceptions not presented by oral argument or brief as not well taken; and a request by counsel that the court examine the record, and pass upon all exceptions to the admission and rejection of testimony will be ignored, especially, where plaintiff in error is represented by experienced counsel.

2. RULE AS TO OPINION OF JURORS AS TO FACTS INVOLVED.

In an action for wrongfully causing death based mainly on the neglect of a railway company to give proper signals of warning of the approach of its train to an exceptionally dangerous crossing of a highway, jurors, otherwise competent, are not disqualified by reason of their familiarity with the crossing and their opinion as to its dangerous character; and where its exceptionally dangerous character is a fact conceded by the pleadings, the trial court ought not, in the exercise of its discretion, to sustain challenges to such jurors.

3. EVIDENCE AS TO FINANCES OF BENEFICIARIES.

In an action for causing death, under Secs. 6134, and 6135, Rev. Stat., evidence of the poverty of the widow and children of the decedent is incompetent, but where, as in this case, the evidence shows them to have been possessed of property valued at \$1,500, and there are no circumstances connected with such evidence calculated to excite sympathy or prejudice, its admission is not prejudicial error.

4. VERDICT MUST BE BASED UPON THE NEGLIGENCE ALLEGED.

Actionable negligence must be alleged before it can be made a ground for recovery and cannot be introduced into the case for the first time by the charge of the court. Where the actionable negligence alleged in the petition consists mainly of the charge that the railway company failed and neglected to give any signals of warning of the approach of its train to a grade crossing with the highway, it is error for the court to instruct the jury that it was the duty of the defendant company to give proper warning by bell and whistle, not less than eighty rods distant from the crossing, and where one or both could be distinctly heard at said crossing.

5. EVIDENCE OF SURROUNDING CIRCUMSTANCES COMPETENT.

Evidence that a road had been constructed under the railroad to avoid a dangerous crossing which was equally convenient to travelers upon the highway, and that by reason thereof such crossing was little used by the public, to the knowledge of the railway company, is competent as bearing upon the question of the negligence of such company in running its trains over said crossing at a high rate of speed.

HEARD ON ERROR.

BURROWS, J.

This case is here upon a petition in error to reverse a judgment against the railway company in the court below.

Upon the argument of the case very few of the numerous exceptions found in this record were insisted upon. Counsel for plaintiff in error suggested that the court should read this record, and that, while he only proposed to present a very few of the errors, he did not relinquish the others. The practice of this court is to consider only those errors that counsel for the plaintiff in error consider of sufficient impor-

tance to present by oral argument or upon their brief, especially where the plaintiff in error is represented by experienced counsel, and we therefore pass them by, with the remark that we find no errors in this record worthy of consideration except those which I shall mention.

The first question presented relates to challenges of jurors and the ruling of the court thereon.

It was admitted in the pleadings that the injury to decedent was received at what is known as the "diagonal crossing" of the highway with the railroad a mile or so east of the village of Painesville. Many of the jurors upon examination as to their competency stated that they were familiar with this crossing and considered it exceptionally dangerous. The challenges of the defendant to such jurors were overruled. We think this ruling was correct.

It is said in *Dew v. McDivitt*, 81 Ohio St., 189: "If a juror has formed or expressed an opinion in relation to a portion of the facts embraced in the issue, but not upon the whole issue, and, otherwise, stands indifferent between the parties, the allowance or refusal of the challenge is within the discretion of the court." Under the circumstances of the case at bar the court could not properly in the exercise of its discretion have sustained such challenges. The petition not only alleged that the crossing was exceptionally dangerous, but set forth the facts that made it so, and the defendant by its answer admitted the existence of these facts, and thereby rendered such knowledge and opinion of jurors immaterial.

2. Upon the trial the plaintiff below was allowed to prove against the objection of the defendant the financial condition of the widow and child of the decedent, for whose benefit the suit was brought.

Counsel for plaintiff in error contend that this evidence was incompetent and prejudicial; that the administrator was entitled to recover the full prospective value that would probably have accrued to them during the life of the decedent if he had not been killed; and that this would be so whether the beneficiaries were rich or poor; that such evidence had a direct tendency to excite sympathy for the widow and child of the decedent, and increase the amount of the verdict.

Counsel for defendant in error insist that this question has been settled by our Supreme Court in *Cincinnati St. Ry. v. Altemeier*, Admr., 60 Ohio St., 10 [53 N. E. Rep., 800]. In that case, however, the beneficiaries were parents—kindred, other than widow or children.

I read the syllabus: "While in the trial of a case for causing death by wrongful act, neglect or default, under Secs. 6134 and 6135, Rev. Stat., the recovery is limited to the pecuniary injury resulting from such death to the beneficiaries, and nothing can be allowed on account of bereavement, mental suffering, or punitive damages, yet any evidence which tends to show the amount of such pecuniary injury sustained by such beneficiaries, or which tends to show that such beneficiaries received financial aid from the deceased during his lifetime, and that they would likely have continued to receive such aid, had he lived, is competent. And for the purpose of showing that such beneficiaries needed and would likely have received such aid from the deceased, the circumstances, age, health and means of support of the beneficiary, if a parent or next of kin of the deceased, as well as the age, health, disposition and thrift of the deceased may be shown."

It is said in the opinion at page 17: "In the case of a widow and children the natural presumption, and in fact duty of the deceased, is to

Railway Co. v. Reynolds.

support them, and in the absence of a showing to the contrary, the presumption is that such support would be to the full extent of his ability after supporting himself; and in such cases there is no need of showing the poverty of the widow and children. But in case the widow and children should be wealthy in their own right, and having before the death of the deceased received little if any support from him, such facts might well be shown in evidence for the purpose of showing that the pecuniary injury was small and thereby reduce the damages."

We are not convinced that this case settles the question which we have to decide; on the contrary it is declared that "in such cases there is no need of showing the poverty of the widow and children."

While we are of opinion that this evidence was not admissible, we are also of the opinion that it was not prejudicial to the plaintiff in error. It was shown by this evidence that the widow and child were possessed of property of the value of \$1,500.

There was no evidence given of distress, dependence or other circumstance that would tend to excite the sympathy of the jury or influence their verdict; and when we look to the amount of the verdict and the whole evidence in the case, we are confirmed in the opinion that the plaintiff in error was not prejudiced by this evidence.

3. The claim is also made that the court erred in its charge to the jury upon the question of giving or neglecting to give proper signals of warning. On the trial all other grounds of negligence on the part of the defendant below were substantially eliminated by the charge of the court.

Upon the question of signals the court charged as follows: "If, upon a careful consideration of all the evidence in connection with the admitted facts, as herein stated, you fail to find that it has been proved that the bell upon the engine of train No. 23 was not rung, and the whistle was not sounded for said crossing, while the train was approaching it just prior to said injury, not less than eighty rods distant from said crossing, and where one or both could be distinctly heard at said crossing, then your verdict should be for the defendant."

"Before the plaintiff will be entitled to a finding in this case in his favor upon the charge of negligence in the petition, it must be proved that the crossing where the injury occurred was at the time it occurred and for a long time before, an exceptionally dangerous one to those passing over it, and that its dangerous character and liability of injury to those passing over it was well known to the defendant at and for a long time before said injury, and that said train at and before said injury was in charge of and was then being run and managed by the agents and servants of the defendant, who were then acting in the line of their duty as such agents and servants, in managing and running said train when it passed over said crossing, and for a long distance before it reached it, and was, by them, run at the high rate of speed of fifty miles per hour, and that said defendant, by its agents and servants, so managing and running said train, carelessly and negligently failed to give any notice by warning or signal, by ringing the bell or sounding the whistle, of its approach to said crossing when it was not less than eighty rods distant therefrom, and where it could be plainly and distinctly heard at said crossing, and that the negligent failure to give said notice and warning was the sole and proximate cause of the death of said Edward C. Corlett, then and in the event of such finding it will be your duty to find in favor of the plaintiff upon the first branch of this case."

In these two paragraphs the court instructs the jury that the defendant below should not be held guilty of negligence if the bell was rung and the whistle sounded not less than eighty rods from the crossing, and where one or both could be distinctly heard at said crossing; and that it should be found guilty of negligence in respect to giving signals, if it failed to give any notice by ringing the bell or sounding the whistle not less than eighty rods from the crossing, "and where it could be plainly and distinctly heard at said crossing."

We think this charge was calculated to mislead the jury. The learned judge who wrote this charge probably assumed that if the bell had been rung and the whistle sounded at a distance of not less than eighty nor more than one hundred rods from the crossing, such signals could have been distinctly heard at the crossing; and intended by the use of the phrase, "and where they could be distinctly heard at said crossing," to instruct the jury, that if these signals were given more than one hundred rods from the crossing and at such great distance therefrom that they could not be heard distinctly at the crossing, then and in such case the company would be guilty of negligence. In other words, he intended to say that these signals must be given not less than eighty rods from the crossing nor so far beyond that distance as not to be plainly and distinctly heard thereat. If such was his meaning the jury were likely to misunderstand him, as the question of giving these signals at too great a distance from the crossing was not in the case. The allegation in the petition was—"That the defendant company negligently and carelessly omitted while approaching said crossing to give any signal by bell or whistle or otherwise, by reason whereof said decedent was not aware of the approaching train, and that by reason of said negligence of the defendant, and without any negligence or fault on his part, the collision occurred and he was killed." No claim was made upon the trial that the signals given by the company were not distinctly heard at the crossing by reason of the great distance therefrom at which they were given. Numerous witnesses testified that these signals were properly given just before the locomotive reached the whistling post, and were continued until the train passed over the crossing. On the other hand plaintiff below produced witnesses who testified that they were in position to hear the signals if they had been given, and that they heard no bell or whistle until the train was very near to the crossing or upon it. So that, the question of signals having been given at too great distance from the crossing was not in the case either by pleadings or proof. The jury may have found that the railway company gave proper signals, but that the decedent did not hear the same; and this verdict may have been based upon such findings of fact, when we take into consideration the conceded fact that the embankment between the railroad track and the highway not only obscured the oncoming train from view, but might to some extent render the signals uncertain and indistinct to a person at or near the crossing. If ordinary care, under the circumstances, required that more than the customary and statutory signals should have been given at this crossing, then the insufficiency of such ordinary signals should have been alleged in the petition as a ground of negligence. It could not be properly introduced into the case for the first time by the charge of the court.

Counsel for defendant in error do not attempt to support this charge by argument or authority, but say: "The court told the jury over and over that the plaintiff could not recover, if the decedent was guilty of

any negligence whatever that contributed to his injury; and that the injury must have resulted solely from the defendant's negligence." We are unable to see how proper charges by the court on the question of contributory negligence of the plaintiff can cure his erroneous charge as to the negligence of the defendant below.

4. Upon the trial some evidence was given by the defendant below against the objection of plaintiff below tending to show that there was a safe and convenient road leading off from this highway just east of the crossing and returning into the same under the railroad only a short distance from said point of divergence. In permitting this evidence to be given the court remarked that the company might put it in if it pleased, but he did not see how it could have any effect. Afterwards, at request of plaintiff below, he charged the jury as follows: "If the jury find from the evidence that there was another road leading off from the road that crossed the highway east of the crossing where the decedent was killed, that he might have taken, this fact in no manner affected the decedent's right to follow the road he did and cross the railroad. The fact of another road leading off from the road that crossed the railroad which the decedent might have taken did not in any manner or degree lessen the responsibility of the railroad or relieve it from using due care and precaution in running its trains over said crossing."

This request we think ought not to have been given without qualification or explanation. If it were shown that a public road had been constructed so as to avoid this crossing by passing under the railroad, which was safe and convenient; and if it further appeared that the traveling public generally used the safe way instead of this dangerous crossing and these facts were known to the railway company such evidence would certainly be admissible as bearing upon the question of the defendant's negligence in running its trains at a high rate of speed over this crossing.

The judgment of court below is reversed and cause remanded.

SCHOOLS—CONSTITUTIONAL LAW.

[Cuyahoga Circuit Court, February 11, 1901.]

Caldwell, Marvin and Hale, JJ.

STATE EX REL. JACKSON V. GEORGE P. KURTZ, TREAS.

1. LAW RELATING TO SCHOOLS ARE OF A GENERAL NATURE.

Laws relating to the subject matter of education and the efficiency of our public school system, both from the vital interest which all people of the state have in them, as well as from the provisions of Sec. 2, Art. 6 of the constitution, are of a general nature.

2. ACT 94 O. L., 539, UNCONSTITUTIONAL.

The act of April 10, 1900, 94 O. L., 539, providing for the creation of a pension fund for the pensioning of teachers in city districts of the second grade of the first class, and making it the duty of the treasurer of the board of education in such city to reserve ten per cent. of teachers' salaries for such purpose, is within the inhibition of Sec. 26, Art. 2 of the constitution, providing that all laws of a general nature shall have uniform operation throughout the state, and is invalid, there being but one such city in the state.

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3. SECTION 6 OF THE ACT EXCLUDES OTHER CITIES FROM CLASS NAMED.

Section 6 of Act 94 O. L., 539, relating to the creation of a teachers' pension fund in cities of the second grade of the first class, in providing that the first election to the retiring board therein provided for, shall be held in September, 1900, determines the fact that no other city which is not of the class and grade named in the act at that time could ever come within its provisions, and, therefore, renders the law unconstitutional as lacking uniform operation throughout the state.

4. CANNOT BE UPHELD AS BENEFICIAL TO SCHOOL SYSTEM.

The law in question, being applicable to but one city in the state, cannot be upheld on the ground that it adds to the efficiency of the public school system, in making provision for teachers who, during long years of service, have given their best efforts to the betterment of society. That argument bears directly upon and supports the proposition that the law is of a general nature and should have uniform operation throughout the state.

5. RULES OF BOARD OF EDUCATION NOT CREATING CONDITIONS.

The fact that there are certain rules employed by the board of education of the city within the class named in the law in question, not in force in other places, does not so create conditions different from those in other parts of the state as justify or uphold the law.

6. MANDAMUS LIES TO COMPEL PAYMENT OF FULL SALARY.

Mandamus will lie to compel the treasurer of the board of education of Cleveland to pay one who is employed as a teacher in its public schools the full amount of salary due him, without deducting any part thereof for the pension fund authorized by act 94 O. L., 539, the law being unconstitutional.

APPEAL BY DEFENDANT.

White, Johnson, McCaslin & Cannon, for plaintiff.

Hogsett, Beacom, Excell, Carey & Gage, for defendant.

MARVIN, J.

This is a proceeding in mandamus. The relator is in the employ of the board of education of the city of Cleveland as a teacher in the public schools of said city.

Cleveland is a city of the second grade of the first class of the state of Ohio.

The salary of the relator as such teacher under his contract with the board of education is \$1,800 per annum payable by the defendant as treasurer of said board, in fixed installments; one of these installments being four-thirty-eighths (4-38) of the annual salary of the relator, became due and payable on October 12, 1900. Upon demand being made by the relator for such payment, the defendant refused to pay the entire amount thereof, but claimed the right to retain therefrom, and did so retain, the sum of \$1.26.

This action of the defendant he seeks to justify under authority of the act of the general assembly of Ohio, passed April 10, 1900, and found in 94 O. L., 539: "An act to create a pension fund to provide for the pensioning of teachers in city districts of the second grade of the first class."

This act in terms makes it the duty of the treasurer of the board of education in cities of the second grade of the first class, to reserve, at each payment of teachers' salaries, a certain per cent. thereof for the purpose of creating a fund to be used in pensioning teachers who shall have pursued their professional employment a certain length of time. The general plan of providing the fund for such pensions, and the manner of carrying the scheme into effect, are provided for in the act.

If the act is valid, the relator here must fail, because the defendant has pursued the course pointed out by the statute in retaining out of the

amount claimed by the relator the sum which he did retain. We come then to a consideration of the validity of the act.

The first section reads: "Section 1. That a teachers' pension fund shall be established in cities of the second grade of the first class."

On the part of the relator, it is claimed that the act is in violation of several provisions of the constitution of the state. It is said that it is inhibited by Sec. 26, Art. 2 of the constitution which reads:

"All laws of a general nature shall have a uniform operation throughout the state; (1) nor shall any act except such as relates to public schools be passed to take effect upon the approval of any other authority than the general assembly, except as otherwise provided in this constitution."

It can hardly be doubted that the act under consideration does *no* have a uniform operation throughout the state. If there could have been any doubt about this before, the recent decision of the Supreme Court of the state, in *State ex rel. Attorney General v. Cowles*, decided February 5, 1901, 64 Ohio St., 000, would seem to settle the question. That is the decision ousting the board of park commissioners of this city.

The act being considered by the court in the case last referred to, like the act under consideration in this case, applies in terms to all cities of the second grade of the first class. At the time of the enactment of each of these statutes, there was, and there now is, but one such city in the state; and whatever argument can be adduced in support of the proposition that the act now under consideration may have a uniform operation throughout the state because other municipalities may be advanced to the class to which the city of Cleveland now belongs, must apply with equal force to the act which was under consideration by the Supreme Court in the park board case.

The opinion in that case was delivered by Chief Justice Shauck, and in considering the question of whether because other municipalities may hereafter become cities of the grade and class now occupied by the city of Cleveland alone, and therefore that the act may be held to have a uniform application throughout the state, this language is used:

"The proposition necessary to give importance to that distinction is that the validity of legislative acts is to be determined not by their present actual operation, but by their possible future operation. No reason is offered in support of that proposition. Indeed, the proposition is uniformly suppressed. The inevitable reliance of counsel for the support of this legislation is upon the decisions of this court sustaining the validity of legislation, dividing the cities of the state into classes and grades so that said cities are isolated, for the purpose of receiving grants of corporate power not conferred upon any other city. Such legislation was originally sustained upon the theory that the classification would remain unchanged, and that in the progress of the state's development other cities would enter the class existing. It was a judicial prophecy that an act whose practical operation was special when it was passed and considered would, in time, operate generally. How this prophecy failed of fulfillment appears from the fact that for a quarter of a century the five larger cities of the state have, in important respects, been subject to acts conferring corporate power and operating in each of them separately. With but little modification the same observation might be made of many other municipalities."

After calling attention to various acts of the general assembly, which have been held not to be in violation of this provision of the constitution, this language is used in the opinion:

"We are not now to test these acts by our knowledge of their actual operation, but we are to imagine that the classification is to remain unchanged indefinitely, so that without limit of time other municipalities may enter the same grade and class with Cleveland and so become subject to all legislation which is valid as to that city, and then inquire whether all of the cities which may enter said grade and class will become subject to the acts now under consideration."

The opinion then goes on to show that because of a provision in the statute, that the first election to the board of park commissioners shall be held on the first Monday of April, 1901, only such cities as on that day shall be within the grade and class named in the act could ever come under its provisions.

The act now under consideration, provides, in Sec. 6, that the first election for the retiring board shall be held in September of the year 1900. So that the same reasoning which is used in the opinion from which quotations have been made, would result in a finding that no city which was not of the grade and class named in the act in September, 1900, could ever come within its provisions.

Without further quotation from the opinion in the park board case, we feel bound to hold that the act now under consideration by us is one which can not have a uniform operation throughout the state.

There remains for consideration the question of whether it is a law of a general nature. That the subject matter of education is one in which all the people of the state have a vital interest, cannot be questioned. That the efficiency of our public school system is equally of a general nature, can no more be questioned. Indeed, the constitution itself evidences this proposition by the language of Sec. 2 of Art. 6, which reads:

"The general assembly shall make such provisions by taxation or otherwise, (1) as with the income arising from the school trust fund will secure a thorough and efficient system of common schools throughout the state. * * *"

The strongest argument in support of the legislation now being considered, is that it adds to the efficiency of the public schools of the city of Cleveland. It is upon this ground and this alone, that the act is sought to be justified.

It is said that if provision be made for such teachers as have labored long and faithfully in the public schools of the city, when they shall have outlived their ability to earn a subsistence for themselves, an inspiration will be given to them to develop their best efforts to the work in which they are employed, and that the public and society at large will thereby be the gainer.

It is further urged that those who, during a long series of years embracing the best part of their lives, have given their earnest efforts to the betterment of society by imparting instruction to the youth of the community, are entitled to have provision made for them in later life.

Whatever may be said as to this last proposition, it in no wise bears upon the question of whether the subject-matter of this legislation is of a general nature.

The other proposition that the operations of this statute would be in the interests of the public because of the greater efficiency of the schools, brought about by the encouragement to the teachers, bears directly upon the question of whether the law is of a general nature. If such a statute could increase the good work done by the public schools in the city of Cleveland, what possible reason can be given why the same result would not come to every other portion of the state by the same legislation if it would be applicable to the other portions of the state.

It is urged that because of certain rules of the board of education of the city of Cleveland, conditions exist here different from those existing in other parts of the state. But these rules are only such as are provided by the board itself, and may be changed at any time and the same or similar provisions may be adopted by each of the boards of education in the state.

In *Weinman v. Wilkinsburg Ry. Co.*, 118 Pa. St., 201, an act was under consideration entitled "An act to provide for the incorporation and for the government and regulation of street railway companies now incorporated or which may hereafter be incorporated in cities of the second and third class of this commonwealth."

In the opinion this language is used:

"The subject of this statute is therefore street railway companies, which is a subject for general legislation, while the statute professes to deal only with a limited number of these railways and these are selected by reference to their location in certain cities; under the guise of a general law, we have here one which is special because it relates to a few members of a general class of corporations known as street railway companies and local because its operations are confined to particular localities, viz.: cities of the second and third class. The provisions of the constitution cannot be brushed aside so easily."

The case is instructive in investigating the question now under consideration. Surely the subject of street railways is not of a more general nature than that of our public schools. It is difficult to think of any subject which can be of greater importance, or of a more general nature, than the proper management of such schools.

Without undertaking to give a definition which shall be exact, including just enough and none too much, of what is a law of a general nature, which the courts have found it so difficult to do, we hold that this is an act of a general nature.

Many other questions were presented to the court in argument of this case but which we have not found it necessary to consider because we hold that the act is inhibited by Sec. 26, Art. 2 of the constitution.

Judgment will be entered for the relator, as prayed for in the petition.

MUNICIPAL CORPORATIONS—NEGLIGENCE.

[Cuyahoga Circuit Court, February 18, 1901.]

Caldwell, Hale and Martin, JJ.

MARTIN HEWITT V. CLEVELAND (CITY).**DANGEROUS EXCAVATIONS—GUARDS—CITY LIABLE WITHOUT NOTICE OF REMOVAL.**

The liability of a city in a case where it has granted permission to a property owner to make a dangerous excavation in a sidewalk, is precisely the same as if the excavation were made by the city itself; and in either case the city must respond in damages to one who is injured by reason of the unprotected condition of the walk, regardless of whether it had any actual knowledge of such unguarded condition.

HEARD ON ERROR.*R. S. Webb and C. W. Fuller*, for plaintiff.*Hogsett, Beacom, Excell, Gage & Carey*, for defendant.**MARVIN, J.**

The plaintiff here was the plaintiff below and brought his suit in the court of common pleas against the city of Cleveland for personal injuries received by him on October 18, 1898.

The city of Cleveland is a municipal corporation of the state of Ohio. Superior street is one of the principal business streets of said city, and the sidewalk upon said street in the vicinity where the plaintiff was injured, is extensively used by pedestrians.

The result of the trial was a verdict for the defendant. Motion for a new trial was made by the plaintiff, which was overruled, and by proper proceedings the case is now here for review upon a petition in error. There is filed with the petition a bill of exceptions containing all the evidence adduced upon the trial.

The facts are, that in the month of June, 1898, a license was given by the proper authorities of the defendant, to the owners of a lot abutting on the south side of Superior street in the city of Cleveland, to make an excavation to be used in connection with a building being erected on said lot. The owners of the lot, under the permission granted by said license, made the excavation which was still in the sidewalk at the time the plaintiff was injured. This excavation at the time of the injury was from eight to ten feet in depth, and not less than five or six feet in diameter. For the protection of the public in the use of said sidewalk, a fence was constructed extending from the southeast corner of the building across the walk to or near to the gutter, and then longitudinally westward along the side of the walk to a point directly north of the northwest corner of the building and then across the walk to such northwest corner. A plank walk was then built around this fence, extending from the sidewalk at the east of the fence to the sidewalk at the west of the fence.

Sometime before the plaintiff's injury, a part of the fence across the sidewalk at the east end of the building was removed for the purpose of carrying materials to be used upon the building, upon the lot. When it was not necessary to have this opening for the carrying of such mate-

rials, a plank was laid upon either boxes or barrels, across this gap in the fence and between three and four feet above the sidewalk.

At about eleven o'clock on the date first herein mentioned, the plaintiff was walking from a point east of this excavation westerly along the sidewalk, and walked into the excavation and received the injury on account of which he asks damages.

The plaintiff says that at the time when he thus walked along the sidewalk, there were no lights to indicate that there was any thing wrong with the sidewalk; and that there was no guard or protection of any sort across the sidewalk on the east side of the excavation.

This is denied by the defendant.

The evidence of the plaintiff tended to establish his claim in that regard.

The defendant claimed that if the plank hereinbefore spoken of was not, at the time of the injury, across the walk and supported three or four feet above it, upon the barrels or boxes, that it had been so placed on the evening in question and had so remained until within a very short time of the injury; that it had no actual knowledge that such guard was not in proper position at the time of the injury; and, that if it were not there, it had been removed for so short a time that it was not the duty of the defendant to know that it had been removed; and evidence was introduced by the defendant, tending to establish this proposition.

There can be no doubt, from the evidence, that the city knew of the opening in the walk, and knew of the removal of the fence, and of the manner in which the opening in the fence, caused by such removal, was guarded.

The claim on the part of the plaintiff was, and is, that it was immaterial as to his right of recovery, whether the city had either actual or constructive notice of the removal of this plank guard; that it, having knowledge of the dangerous excavation, and such excavation having been made under its license, owed to the public the duty of reasonable protection against the dangers arising from such excavation, and that the want of notice to the city of the removal of the guard or plank constituted no defense to the plaintiff's right to recover.

This question was directly presented in the case, and the court in its charge upon that proposition, used this language:

"If the city, or those engaged in the construction of this building, exercised reasonable care by barricading this place, or by light or otherwise guarded against the dangers incident to this excavation, and that this protection which had thus been furnished—reasonably furnished against the danger—was removed, on such short notice and under such circumstances as that the city had no knowledge of it and, in the exercise of reasonable and ordinary care, could not know it, would not be expected to know it, then no liability arises against the city for that reason."

And, again, this language is used in the charge:

"So that it is requisite as one of the things to be proven by a preponderance of the evidence, either that the city had actual knowledge or notice of the defect or unguarded condition, or that it had been unguarded so long and under such circumstances and surroundings as, in the exercise of reasonable and ordinary care it must have been held to have known it by reason of its long standing."

Cuyahoga Circuit Court.

Again, at the request of the defendant, the court charged the following:

"Before the plaintiff can recover in this case, he is required to prove by a preponderance of the evidence, that the defect in the street or sidewalk if you find there was any defect, was unguarded and that the defendant, the city of Cleveland, had knowledge of such unguarded condition, or that it had remained unguarded for such a length of time immediately preceding plaintiff's injury on account thereof, that said city ought, in the exercise of ordinary care and diligence, to have known that it was unguarded."

Again, at the request of the defendant, the court charged as follows:

"If you find from the evidence that the excavation complained of by plaintiff, was reasonably guarded at any time on the evening of October 18, 1898, and previous to the injury to the plaintiff, then, and unless it appears from a preponderance of the evidence that such excavation became unguarded previous to said injury and that the defendant city had notice that it had become unguarded, or that it remained unguarded for such length of time immediately preceding plaintiff's injury that the defendant in the exercise of ordinary care ought to have known of its unguarded condition, your verdict should be for the defendant."

These several parts of the charge, including the two requests quoted, are complained of by the plaintiff. Each of these propositions distinctly state the law to be that before the city could be held liable for the plaintiff's injury, it must appear that the city had actual or constructive notice of the unguarded condition of the excavation at the very time the injury was received by the plaintiff.

If this is not the law, the case should be reversed because the proposition was material to the plaintiff.

It is urged on the part of the plaintiff that in a case where the city has granted permission to a property owner to make a dangerous excavation in the street or sidewalk, its liability is exactly what it would be if the excavation were made by the city itself, and that, in either case, the city must respond in damages to one injured by reason of the unprotected condition of the walk or street regardless of whether it had any knowledge, actual or constructive, of the unguarded condition.

In *Shearman v. Redfield*, Sec. 368, this language is used:

"A municipal corporation which, in the exercise of a special or general statutory power, authorizes a temporary interference with its highway for a legitimate use by third persons, such as the laying of a railroad over or upon them, or gas and water-pipes beneath the surface, and like uses, is bound to see that while the highway is disturbed by the construction of such works, a passage is kept open, so far as practicable without interfering with the undertaking, and made reasonably safe for travel, by barriers, lights, or other protective measures. It is bound to use the same degree of care for the protection of travelers as if the work were being done by its own agents, for its own benefit; and if the interference authorized is intrinsically dangerous, if left unguarded—*e. g.*, an extensive street excavation—it is liable, without notice, for an injury due to the absence of guards."

A large number of authorities are cited in support of the proposition.

Hewitt v. Cleveland.

In *Mayor of Savannah v. Donnelly*, 71 Ga., 258, the syllabus reads:

"Where a municipal corporation gave express permission to an individual to open a ditch across the street in a city, in order to connect the water-pipes of a private person with the water-works belonging to the city, this was in effect the opening of the ditch by the city itself; it was the act of the city, and the latter became liable for any damage which might accrue to any person by reason of the careless and negligent manner in which the work was done. It was the duty of the city to have superintended and overlooked the work which it permitted to be done on its streets and to have seen that it was done in such a manner that no injury should come to passers on the streets from defects therein."

In *Blessington v. Boston*, 153 Mass., 409 [26 N. E. Rep. 1113], the second clause of the *syllabus* reads:

"If the city sees fit to intrust to the employees of a street railway company the duty of keeping properly guarded a defect which it knows to exist in a highway, it is responsible, under the Pub. Sts., c. 52, Sec. 18, to one injured thereby through their negligence, whether momentary or otherwise."

And in the opinion, on page 412, the court uses this language:

"If the city trusted to the agents of this company to properly guard the hole, the city is liable for their negligence, because it intrusted to them a duty which belonged to it. * * * If these agents are negligent it must take the consequences of it."

Dillon's Municipal Corporation, at Sec. 1027, uses this language:

"Whether the *duty* of maintaining the streets in a safe condition for public travel and use is specially imposed on the corporation or is deduced, in the manner before stated, *it rests primarily, as respects the public, upon the corporation*, and the obligation to discharge this duty cannot be evaded, suspended, or cast upon others, by any act of its own."

Our own Supreme Court, in *Ironton v. Kelley*, 38 Ohio St., 50, pass upon a question akin to the one under consideration. In this case, a man by the name of King was engaged in laying water-pipes in the streets of the city and for the city and, in the laying of such pipes, made an excavation on a street of the city and left it open without any proper guard or protection. A passer-by, in the night season, fell into the excavation and was injured.

The court, on page 52, use this language:

"Conceding for the sake of argument, all that is claimed by the plaintiff in error upon this point, it is manifest that the wrongful act which caused the injury was not the *digging* of the ditch, but *leaving it unprotected*. It is clearly the duty of a municipal corporation having the control of its streets to keep them in a condition safe for the passage of vehicles and foot passengers, using ordinary care, at all times during the night as well as the day. This responsibility cannot be avoided by showing that the danger was caused, not by the acts of the city's authorized agents, but by mere trespassers or wrongdoers."

In *City of Denver v. Aaron*, 6 Colo. App. 232 [40 Pac. Rep. 587], which is a case decided by the court of appeals of Colorado, this language is used in the opinion on page 588, speaking of the city:

"If it permits others to tear up its streets, it is its duty to see that they do the work in a safe manner. It is immaterial what measure of control of the work it has reserved in itself; nor does its liability rest

upon the doctrine of *respondeat superior*. Being charged with the care of its streets, it cannot relinquish its supervisory control of them; and whether it places them in a dangerous condition itself, or permits others to make them dangerous, it is equally responsible."

In this case, the city, by ordinance, had granted a license to a water company to lay pipes under the surface of the streets and, in the ordinance, it had provided that the company should save the city harmless from all loss through negligence in excavating the streets; and it was held that, though notice of the defective condition of the street was unnecessary to render the city liable, it would be presumed to have had notice by virtue of its own ordinance.

The question under consideration is very fully discussed in *Gable v. Toledo*, 9 Circ. Dec., 68 [16 R. 515]. A permission had been given by the city authorities of Toledo to parties to make an excavation in the street. The opinion is by Judge Scribner, and the following language is used, beginning on page 69.

"It was the duty, therefore, according to the established doctrine of the Supreme Court of this state, of the city, when it issued to the parties named in this record, the permit to make this excavation, and they went forward to make it, to guard the excavation against danger to these parties. It was bound to see to it that this necessarily dangerous work was done so as to protect the party from liability to danger in the use of the street; as I have already said, it mattered not so far as this liability of the city was concerned, whether it knew that guards had not been provided, or lights had not been placed there, to warn and guard the public—it was bound to know whether it was done or not."

The opinion is instructive, being by a most able judge, and distinctly holds that the liability of the city in cases where it has licensed others to make dangerous excavations in the streets, is precisely the same as where the excavations are made by the city itself.

And we hold in this case that the court erred in the use of the language quoted in this opinion, from its charge to the jury, including the requests quoted.

Questions are raised in the record, as to the rulings of the court upon the introduction of evidence.

Though these are not marked upon the bill, we have examined each of them and find no error to the prejudice of the plaintiff in the court's rulings upon any of the questions.

The jury were required to answer, and did answer, certain questions submitted to them, and these answers were returned as special findings of the jury. The answers given to these questions are not such as to relieve from the errors which have been pointed out, and the judgment of the court of common pleas is reversed and the case remanded for further proceedings.

MASTER AND SERVANT.

[Cuyahoga Circuit Court, October 27, 1900.]

Caldwell, Marvin and Laubie, JJ.

(Judge Laubie sitting in place of Judge Hale.)

JULIUS STRASSER V. UNION CLUB OF CLEVELAND.**1. EMPLOYEE WITH KNOWLEDGE CANNOT CHARGE NEGLIGENCE.**

A porter employed in a club house for several years and familiar with the surroundings, cannot in an action against the club for personal injuries from falling down an elevator shaft, charge it with negligence in failing to light a passage-way to the shaft, or to provide appliances to keep persons from entering the shaft, when the elevator was not there, or in the want of any rule as to the operation of the elevator, or of signals to indicate when the elevator was removed, when these facts were known to him at the time of his injuries.

2. RULES HABITUALLY BROKEN—EVIDENCE.

Where such case was tried by plaintiff on the theory that the rules of the club forbidding its employees to ride on an elevator were habitually violated with the knowledge of the club, it is not prejudicial error to permit an employee to testify that the managers of the club had told him not to allow the men to ride thereon.

3. SAME.

In such action it was error to refuse to permit plaintiff to testify that it was his practice to ride up and down on the elevator sometimes when loaded and sometimes when empty, to the knowledge of his foreman, and that the rule forbidding riding on the elevator was habitually broken.

4. SAME—ERRONEOUS INSTRUCTION.

A refusal to charge in such action, that if the jury should find that defendant could have avoided injuring plaintiff, he could recover, though negligent, was proper.

5. SAME—PROXIMATE CAUSE.

If, in such case, plaintiff's negligence contributed to his injury, which would not have happened except for defendant's negligence, such contributory negligence will not defeat the action unless it was the proximate cause of the injury.

6. COURT MAY REFUSE TO SUBMIT QUESTIONS—SEC. 5201, REV. STAT.

The particular questions of fact contemplated by Sec. 5201, Rev. Stat., requiring the court, upon request of either party, to submit questions to the jury, for special findings, are such that the answers to them will establish ultimate and determinative facts, and not those which are only of a probative character. Therefore, where the questions are not such as will enable the court, in the application of the law, to determine the rights of the parties, and are those which simply tend to prove them, the court may refuse to submit them.

HEARD ON ERROR.

Preusser & Wenneman, for plaintiff in error.

Wilcox, Collister, Hogan & Parmely, for defendant in error.

MARVIN, J.

The case of Julius Strasser against the the Union Club of Cleveland.

Suit was brought by Strasser in the court of common pleas against the Union Club, which is a corporation, for the purpose of recovering damages for personal injury which Strasser sustained on December 27,

1897, while he was an employee of the club. The facts, which are undisputed, are, that for some four or five years Strasser had been employed as a porter and to do other work about the club house of the Union Club; a part of his duties were to carry supplies from the basement to the second and third floors of the club building; those supplies usually were carried on an elevator or dumb-waiter, being placed upon the dumb waiter or elevator in the basement and carried up to the second floor, if they belonged on that floor; the dining-room is on that floor; or carried to the third floor, if the supplies belonged there; the kitchen is on the third floor. Among other things, it was his duty to carry coal to the kitchen.

The immediate superior of Strasser was a second steward of the club, Henry Grimm.

This elevator was not an ordinary passenger elevator at all; it has a platform, indeed, it is but a platform and comes up through a shaft; there are no doors or gates provided to protect those who may be upon the floors where there are openings into the elevator shaft. On the second floor of the club house the passage-way from the pantry to the elevator is only four or four and a half feet high, very narrow and very dark.

This accident happened at about eight o'clock in the evening, December 29. Strasser and Grimm, the second steward, were in the basement. They placed upon the elevator some coal which was to go to the third story, and several cases of wine which were to be taken off at the second story. Then Grimm, the second steward, went to the third story, walking up the stairs; the plaintiff remained in the basement, and the two, the plaintiff in the basement and Grimm on the third floor, pulled on the ropes or cords by which the elevator was caused to rise; these goods were on the elevator. They drew the elevator up so that the platform was about two feet below the second-story floor of the building. The reason it was not drawn up to the level was because the passage-way to the pantry in which these wines were to be placed, was low, and the goods were piled up to a considerable height or more than four and a half feet, in order that they might reach the goods and not have them interfered with by overhead ceiling or wall. They left the elevator some two feet below the level of the floor. Then the top of the goods was not higher than the ceiling of this passage-way, where they were to take them out. Having removed the wines at the second floor, and the plaintiff and Grimm both took part in the removal of these wines, and Strasser, the plaintiff, placed them in some order in the pantry which was some seven or eight feet back from where the opening from the passage-way was, into the elevator shaft, the coal remained upon the platform of the elevator after they had the wines removed. Strasser having completed his work of placing the wines in order in the pantry, went backward along this passage-way, and he had to bend over to do it, the passage-way being only four or four and a half feet high and it being dark. He went back to the elevator shaft, reached out with his foot to find the platform which had been left by himself and Grimm some two feet lower, lost his balance and fell over into the elevator shaft. As a matter of fact, that elevator had been, by Grimm, run to the third floor, so that there was nothing to stop the fall of Strasser until he struck the basement floor some thirty feet below; and he was injured.

The petition sets out the dark condition of the passage-way leading from the pantry to the elevator shaft, the want of light and the like, and then concludes by saying that the negligence of the defendant consisted in not providing said elevator with gates or doors or other appliances, which, working either automatically or by hand, would shut off access to the elevator shaft when the elevator had left the second floor; and in not providing said elevator shaft or said hall-way, leading to the elevator shaft on the second floor, with a light to illumine the said shaft or hall-way at night; and in not providing said elevator with a bell, signal, or other appliance to be used to indicate that the elevator was removed or was being removed from the second floor; and in not adopting a rule requiring the person operating or setting the said elevator in motion, to give a signal or warning thereof; and in moving said elevator from the second floor to the third floor without notifying or warning the plaintiff that said elevator had been or was being moved from where he had left it at rest.

The answer avers that so far as the darkness of this passage-way or hall-way was concerned, the failure to provide any gates or doors or other appliance to keep people from going into the elevator shaft when there was no platform there, and the want of any rule as to the operation of the elevator, and the want of signals to indicate when the elevator was removed, were all well known to this plaintiff who had been in the employ of the club for four or five years.

No reply is filed to that, and no claim was made on the trial that this was not true.

It is complained of on the part of the plaintiff here who was the plaintiff below, that the court erred in a statement or a ruling, made at the very outset of the trial. A witness, John Kerg, was placed on the stand by the plaintiff, and this question was put to him, "State your name." And thereupon the defendant objected to the introduction of any evidence under the petition. The court overruled that objection, holding that the petition states a cause of action, but that the only charge of negligence contained in the petition was the moving of the elevator from the second floor to the third floor by the second steward, without notification or warning the plaintiff that the elevator had been or was moving from where the plaintiff had left it at rest.

It is said that the court erred in this. Whether this question is so raised that if there were an error, it could be taken advantage of, it is not necessary to say. It seems that the proper thing would have been to have asked some questions and got some rulings. We think, however, the court stated the only issue the plaintiff could make under these pleadings.

We think the only issue that was to be tried, so far as any negligence on the part of the defendant was concerned, was whether it was negligent in removing that elevator without notifying the plaintiff. The evidence established that a notice was posted on the elevator, or at the sides, where it could be seen plainly, and in these words: "All persons forbidden to ride on this elevator."

Grimm, the second steward, who was the immediate superior of the plaintiff, and who was put upon the stand by the plaintiff, testified that he had himself ridden with the plaintiff and he had seen the plaintiff alone ride *down* on the elevator after the notice was posted.

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The purpose on the part of the plaintiff was to show that notwithstanding such notice was posted, it was habitually violated to the knowledge of the defendant or its foreman.

The question was asked of Grimm, as appears on the thirty-fifth page of the bills of exceptions, whether there was any instruction not to ride on that elevator other than that that was pasted or tacked on the elevator itself. The witness testified in reply, that he did not remember that he had ever communicated to the plaintiff any instructions that he should not ride on the elevator. Then he was permitted to answer a question as to what orders, if any, he had ever had from the managers of the club not to allow anybody to ride on the elevator, and the question was objected to; he was permitted to answer, that the managers of the club had told him he must not let the men ride there. That was answered over the objection of the plaintiff, but on the theory that the plaintiff was trying this case; that, notwithstanding there was a notice forbidding riding in this elevator, still it was habitually violated with the knowledge of the club, it is not clear that any error to the prejudice of the plaintiff resulted from that ruling.

Later, the plaintiff himself was upon the stand. It should be said that the second steward, Grimm, while upon the stand, testified that notwithstanding he had seen Strasser ride down on the elevator after that notice was put up, and had himself ridden *down* with him, that he had not seen him ride *up* on the elevator; and there was evidence as to the relative weight of the elevator and the counter-weight, affecting the question whether a man might ride up better than down.

Then Strasser was himself upon the stand, and this question was asked: "What was your practice during all the time that you were employed there with regard to riding up or down on the elevator?" To this question, objection was made; that objection was sustained; an exception was taken; and the plaintiff's counsel stated that he expected to show that it was customary for the plaintiff to ride *up and down* on the elevator sometimes, when loaded and sometimes when empty, and that his foreman knew of it. It seems to us that the court should have permitted that question to be answered.

One of the defenses upon which the club was relying in this case, was that Strasser was negligent; that he was negligent in that he violated a rule of the club. His claim was that they did not have any rule that anybody was bound by; and, of course, the theory was, that since the coal was to be carried *up*, not *down*, the theory, the claim on the part of the plaintiff was, that Grimm, the foreman, should have understood that, when that wine was properly taken care of on the second floor, the plaintiff would ride up to the third floor with the coal.

Indeed, counsel for the defendant below, and the court, seemed to recognize that it was an issue as to whether there was a rule which would forbid Strasser from riding upon this elevator, and one that was adhered to or was so often disregarded, so habitually disregarded, that he was not bound by it. Perhaps I ought not to have said that the counsel for the defendant recognized that counsel for the defendant requested this charge to be given; with a qualification, it was given. The request was made by the defendant.

"It appearing in the evidence that it was not necessary for the plaintiff, in carrying out the order he claims to have received from Grimm, to get upon the elevator, and that it was not his custom or that of the other employes to get upon the elevator while hoisting goods thereon,

no negligence is to be attributed to Grimm in moving the elevator from the second to the third floor notwithstanding the orders which he had previously given to the plaintiff."

And the court gave that with a qualification, in this language :

"If it should appear from the evidence that it was not necessary for the plaintiff in carrying out the orders he claims to have received from Grimm, to get upon the elevator, and that it was not his custom or that of other employes to get upon the elevator while hoisting goods thereon, no negligence is to be attributed to Grimm in moving the elevator from the second to the third floor notwithstanding the orders which he had previously given to the plaintiff."

Everybody seemed to recognize that it was a matter of some importance whether this rule, this notice, was habitually violated. The plaintiff offered to show that it was. The court refused to let him show it. That was error.

Complaint is made by the plaintiff that the court should have given some requests made by the plaintiff, which the court failed to give; one of them is numbered six. The court declined to give this. It is said it is error. The request is:

"6. If the jury find that plaintiff was guilty of contributory negligence, I charge you that such contributory negligence will not defeat his action, if the evidence in the case is such as to lead you to believe that the defendant by the exercise of reasonable care and prudence might have avoided the consequences of the injured party's negligence, in this case the plaintiff's negligence."

That is to say, that if the jury should find that the defendant could have avoided injuring the plaintiff, then, though the plaintiff was negligent, still he might recover. That was what the court was asked to charge. It is claimed it was error because it was not charged.

There was no error in this refusal. Courts have not gone so far. So far as I know, no court has gone farther than this court in *L. S. & M. S. R. R. Co. v. Schade*, Admr., 8 Circ. Dec., 316. In that case this court said that if after the defendant knew or by the exercise of reasonable care would have known of the dangerous position in which the plaintiff had placed himself, and could by the exercise of proper care, after having ascertained the dangerous position in which the plaintiff was put, have prevented the injury, the plaintiff might still recover.

The Supreme Court of our state, in *Schweinsurth*, Admr., v. *C. C. & St. L. Ry. Co.*, 60 Ohio St., 215, [54 N. E. Rep. 89], have used as strong language as anywhere excepting in the *Schade* case they may have gone farther. In this case last mentioned, they say that the defendant, after he knew of the danger in which the plaintiff had placed himself, if it could have saved him, it was bound to do it. That is the substance of it. I will not stop to read from it.

We think there was no error in refusing to so charge.

One of the requests made by the defendant below and which was given by the court, the second of the requests made by the defendant below is in these words:

"2. If the plaintiff went to this elevator opening in the dark, intending to step upon the platform, it was his duty, before attempting to get on to the platform, to use ordinary care to ascertain whether the elevator platform was where he supposed it to be, and if, under such circumstances, he failed to use ordinary care, and such failure contributed to his injury, he cannot recover."

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That was given. We think it ought not to have been given without a qualification. The authorities, we understand, are all to that effect; and, bearing upon that, is *Buchanan Bridge Co. v. Campbell*, in 60 Ohio St., 406, 425 [54 N. E. Rep. 372]. That should have been qualified to the extent that the contributory negligence must have been the proximate cause of the injury. And the jury must have understood the court to mean by that something more than the proximate cause, because immediately following this, followed the third request by the defendant, which the court gave:

"3. If the plaintiff's own negligence in any degree proximately contributed to his injury, he cannot recover."

We think that is the law. But immediately after, and as a distinct charge from that, the court said:

"If you find the defendant was so negligent, then you will proceed further and inquire and determine whether or not this negligence so found by you was the proximate cause of the injury to the plaintiff of which he complains, and if you find it was not such cause, you need not inquire further but return your verdict for the defendant; but if you find it was such cause, then you will proceed to inquire and determine whether or not the plaintiff himself was negligent, and if you find he was negligent and that his negligence contributed to cause or produce his injuries, the defendant would be entitled to your verdict;" and in that case the plaintiff cannot recover.

There is also the same proposition in the general charge.

It was clearly erroneous this giving the second request.

The plaintiff asked the court to submit certain questions to the jury for special finding under Sec. 4201, Rev. Stat., as amended in 91 O. L., 298. Without stopping to read, I will say that it provides that the court shall submit questions to the jury. The court submitted one of the questions which the plaintiff asked to be submitted; the second and third questions the court did not submit. There was no error in refusing to submit the second and we find it so under the case of *Schweinfurth, Admr., v. Railway Co.*, *supra*.

As to the third, it might as well have been asked if this accident could have occurred if the laws of gravitation had been suspended. The question was: "If the elevator had been left at rest, could the accident have happened?" That is to say, if something had been there so strong as to stop him from falling, could he have gone down.

The case is reversed and remanded to the court of common pleas for the errors pointed out, and for no other.

CHATTEL MORTGAGES—ERROR.

[Cuyahoga Circuit Court, February 18, 1901.]

Caldwell, Hale and Marvin, JJ.

WILLIAM E. GATES, RECEIVER, ET AL., V. MERCHANTS' BANKING & STORAGE CO.

1. ASSIGNEE OF MORTGAGEE MAY REPLEVIN FROM BONA FIDE PURCHASER.

An assignee of a chattel mortgage is not compelled to present his claim to and be paid out of funds in the hands of the receiver of the mortgagor, arising from the sale of the mortgaged property; he may replevin the mortgaged property though the same is in the possession of a *bona fide* purchaser at such sale, who is without notice of his claim.

2. EVIDENCE IN RECEIVERSHIP PROCEEDINGS INADMISSIBLE.

In an action to try the right of property replevied by the assignee of a chattel mortgage after the same had been sold to a *bona fide* purchaser without notice, at a sale by the receiver of the mortgagor, evidence of the proceedings taken by the receiver in selling the property was properly refused, it not appearing that the holder of the mortgage was a party to the action of the receiver, and therefore was not bound by anything that was done therein.

3. ASSIGNOR OF CHATTEL MORTGAGE—SUBSEQUENT ACTS WILL NOT DEFEAT.

The doctrine that any one who takes a chattel mortgage as assignee during the first year and before it is due, and before it is time to renew it upon the records, may be cut off from rights he has under that mortgage, by the actions of the mortgagee, his assignor, (consenting to receivership in case at bar) is a dangerous one and does not exist in law. Where an owner has parted with his property, and given title to another, he can make no admissions that will bind his vendee.

4. CLAIM OF USURY MAY BE ASSERTED AGAINST ASSIGNEE OF MORTGAGEE.

A chattel mortgage is a chose in action and is not negotiable paper, and does not so adhere to the notes which it secures as to become transferred with them so as to cut off equities of the mortgagor. Therefore the mortgagor has the right to set up usury against the assignee of a chattel mortgage, the notes not being sued upon, notwithstanding the mortgage was transferred before due and without notice of usury.

5. QUESTION NOT DENIED—SCINTILLA RULE.

A reviewing court will not say a verdict is contrary to the evidence where there is no contradiction of the question in issue, though the evidence containing the proposition is so slight and uncertain that it is a mere straw on which to hang the verdict.

6. GENERAL VERDICT—RULE AS TO REVERSAL.

A reviewing court will not disturb a general verdict if there is sufficient evidence to sustain it upon either of the two propositions, either of which would warrant the verdict.

HEARD ON ERROR.

Hessenmueller & Bemis, for plaintiffs in error.

CALDWELL, J.

The Gates Printing & Publishing Company gave to Bell & Davis on June 28, 1893, a mortgage for five hundred dollars. Two days thereafter and before due, the notes and mortgage were transferred to the defendant in error. In November, 1893, Erma E. Gates, who is the wife of William E. Gates, brought suit against the Gates Printing & Publishing Company and obtained a judgment, and thereafter, by consent of certain creditors or interested parties, William E. Gates was appointed receiver

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of the Gates Printing & Publishing Company. As such receiver, he, under the orders of the court, proceeded to sell the property in his hands, which included the property that the defendant in error replevined in the common pleas court when this action was there, where this action was commenced; and, upon the order of the court, he proceeded to sell the property, and he sold the same on December 19, 1893, to Carl Homan for the sum of five hundred dollars, and the sale was approved by the court. Of said five hundred dollars, \$150 was paid in cash, and \$350 secured by chattel mortgage, and it is claimed Homan has since paid all of said amount except \$100.

It is claimed that at the time said receiver was appointed and said proceedings had in court by which the property was sold, one Davis was the owner of the mortgage for five hundred dollars, which is claimed now to be owned by the Merchants' Banking & Storage Company, and that he consented to such receivership, and the proceedings being had without any knowledge that he was the owner, that the only remedy open to the Merchants' Banking & Storage Company was to come in and present its claim to the receiver and be paid out of the proceeds of the property that had been sold by the receiver.

After the Merchants' Banking & Storage Company had brought its action, it filed a motion in the common pleas court for that court to grant an order allowing the receiver to be made a party to its action, and that order was granted, and a motion was thereafter made by Gates to vacate the order, and that motion was overruled and no exception was saved.

It is now claimed that the common pleas court had no jurisdiction to hear and try this action, as it was brought by the defendant in error.

We think it was in the discretion of that court to say whether the defendant in error should work out its rights through the receiver, which it could have done by refusing leave to sue the receiver, or by working it out in the way in which it was done.

There are many authorities cited in the brief of the defendant in error, and we have seen many others showing that under the circumstances existing here the mortgagee may proceed to replevin the property; and we think the court had full and complete jurisdiction to proceed as it did in this matter.

It is claimed that the court erred in not allowing all the proceedings taken by the receiver in selling the property, to be offered in evidence.

It is sufficient to say, that, if we are right on the former proposition, then the Merchants' Banking & Storage Company was not a party to that action and not bound by anything that was done therein; and, when it had leave to sue the receiver for the property in his hands either as receiver or individual, and withheld from it by such receiver and other persons, then the proceedings had by the receiver cannot in any way bind the defendant in error, and there was no error in excluding those proceedings. Two questions arose to be submitted to the jury.

It seems that the mortgage was properly filed in 1893, was not renewed by the defendant in error in 1894, but was renewed by the agent of another who claimed to be the owner thereof, and the same was true in 1895. In the years thereafter, the defendant in error renewed the mortgage.

It is claimed that the party who purported to be the owner of the mortgage, having given consent to the proceedings before the receiver, and being a party thereto, that the bank is now estopped from setting up

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its ownership at that time. These proceedings were had during the first year of the mortgage. And, if this proposition is true, then any one who takes a mortgage during the first year and before it is time to renew it upon the records, may be cut off from any rights he has under that mortgage, by the action of the mortgagee. And this would lead to the conclusion that the mortgagee, after he has parted with the mortgage, may by his acts and conduct bind the assignee of the mortgage and may destroy his rights. This would be a dangerous doctrine and one that does not exist in law.

The first question above referred to, is this: The bank did not renew this mortgage in 1894 nor in 1895, but it was renewed as being owned by another, and that Homan, who bought this property for a valuable consideration, bought it without any knowledge that the bank was the owner of the same, and that, he, therefore, can be protected.

We may leave out of consideration the fact that this property was sold to Homan December 19, 1893, before time to renew the same. And the question was, whether the bank owned this mortgage in 1894 and 1895, at the time it was renewed in the name of another, and if the bank was the owner and did not renew it, then Homan who was a purchaser is ahead of the mortgage. There was some evidence, very slight, but nothing to contradict it, that the bank prior to 1894, undertook to convey this mortgage to another person, and that later on the arrangement for such conveyance having failed, the mortgage was transferred back to the company. This evidence, we say, is slight; but there was sufficient to go to the jury, and the court submitted the question to the jury that if the bank had made a transfer to another person, who renewed that mortgage in 1894, and the mortgage was renewed again in 1895, and then the mortgage was returned to the company who became the owner of the same again, then the bank's claim would be good as against Homan; but, if the jury should find that these transfers were not made, then the claim of the bank would not be good as against Homan if he was a *bona fide* purchaser and still retained the property.

There was evidence tending to show that Homan after he bought this property and paid his \$150, turned it back to Gates as an individual and he did not propose to retain it under his sale. As to just how this property was turned back, as to whether Gates took it upon the mortgage he held from Homan, or whether Homan turned it back no longer to be the owner of it, simply giving up his purchase and cancelling the purchase from the beginning, was in conflict in the testimony. And this question, with proper instructions as to the law, was submitted to the jury. The jury then had two questions to determine:

Whether or not the mortgage had been legally renewed so that the bank could maintain its rights as against Homan if he was a purchaser; and, second,

Whether Homan gave up his purchase and surrendered the property to Gates.

The verdict was a general verdict for the defendant in error. It may have been upon either one of these propositions; and, if there is sufficient evidence to sustain it upon either, this court cannot disturb the verdict of the jury.

We have read the entire evidence, and, while there is no contradiction in the matter as to the ownership of the mortgage at the different periods of renewal, yet the evidence is so slight and uncertain that it is

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a mere straw on which to hang a verdict; and yet we ought not to say that the verdict is contrary to the evidence.

As to the other proposition, the evidence is somewhat conflicting. But we think the jury, if they founded their verdict upon that proposition, founded it correctly.

We believe that this property was turned back to Gates, and between him and Homan the purchase by Homan was entirely cancelled, and that Homan was to be made whole by some arrangement between him and Gates.

The reading of Gates' entire testimony upon this question satisfies us that the jury were warranted in basing their verdict upon that testimony.

Many exceptions were taken during the trial to the court's ruling upon the evidence. On page 19 of the record, an exception is taken to the introduction of a copy of the mortgage, and the objection is confined to the fact that there may be on the original certain endorsements that are not found on the copy; and the record shows what those endorsements might be. The record shows clearly the points to be in favor of the defendants in the court below as to the points which they expected would be shown by the original; and there was some evidence before the court that the original could not be found, that it had been mislaid. And we think there was no error to the prejudice of the defendants below.

Erma E. Gates was a witness, and it is claimed that there was error in the court refusing her testimony upon a question of usury. On page 36, this question was asked her: "Did you have any conversation with him, that is, with Davis, in the year 1893, with reference to this chattel mortgage, and, if so, what was it?" There was an objection. The objection was sustained, and an exception taken, and an offer made to prove and the proof would be that on December 19, 1893, shortly after the receiver's sale of the property in controversy in this case, at that time Mr. Davis came into the office of the company where this sale had been had, and talked with her about the sale, and Mr. Davis said that he had expected to be present at the sale but had been detained and had heard that the property had sold for five hundred dollars and that he was perfectly satisfied with the price the property had brought and with all that had been done. The purpose of this testimony was to prove by the admissions of Davis that he was *then* the owner of this mortgage.

There is no plainer rule than that an owner after he has parted with the property and has given title to another, can make no admissions that will bind his vendee. And that testimony was properly ruled out. And if it was sought to introduce this testimony from the fact that Davis in the same way represented the Merchants' Banking & Storage Company, yet the evidence shows clearly that he was not an officer of that company, nor did he hold any position in the company that would enable him to bind it by his admissions.

On pages 37 and 38 is another exception. This question was asked of Mrs. Gates: "I understood you to say that you had some knowledge of the sums that were advanced and the interest that was paid from time to time upon the original indebtedness. Do you or do you not have knowledge upon that subject?" The answer is, "I did have at the time." "Now I will ask you the question, what was that?" This was objected to; the objection was sustained by the court; to which ruling

of the court the defendant then and there excepted. And the counsel for the defendants made a statement of what he expected the witness would answer; and that statement shows that there had been various loans made just prior to this loan of June 28, 1893, upon which there had been some payments, but none of those loans were paid in full; and then in June 28, 1893, the various amounts remaining due upon those loans were brought into a sum with \$185 additional, to make the \$500 note in question. And the purpose of this proof was to show that a considerable portion of the note of \$500 was composed of usurious interest.

The court refuse the testimony upon the ground, very likely, that the bank was an innocent purchaser of this claim before it became due, and, therefore, as to it, usury would not be a good defense.

This usury had been pleaded in the answer, and denied by the bank. So that it was a proper matter for the defendants to prove, if such proof was admissible. Had the bank sued upon the notes, sued the makers or the receiver, it being an innocent purchaser of the notes before due, unquestionably this usury could not be good against the bank. But this suit was upon the mortgage.

The bank was seeking to recover the property and as a basis of that recovery, it was setting up the title it had to it under its mortgage. A re-delivery bond had been given, and the case thereafter proceeded as one for money.

The amount the bank would be entitled to recover would be the amount due it under its mortgage, if the property was worth that much, and whatever damages might be assessed.

The suit, then, being founded upon the mortgage entirely, and the notes not being sued upon nor even placed in evidence (which was not necessary,) the question to be determined is, whether the assignee of a mortgage before it becomes due and without notice of usury in it, can defeat the usury?

In *Baily v. Smith*, 14 Ohio St., 896, it was determined in this state that a mortgage is a chose in action and is not negotiable paper, and does not so adhere to the notes which are negotiable, as to become transferred with the notes in such a manner as to cut off all the equities of the maker of the mortgage.

In that case the Supreme Court held that fraud was not cut off by the transfer of the mortgage; and, in some other states, following the doctrine of the case of *Bailey v. Smith*, *supra*, the court has held that none of the equities of the mortgagor are cut off by reason of the transfer of a mortgage by the mortgagee to an innocent *bona fide* holder before the debt is due. This doctrine is held not to extend to collateral equities nor equities existing in favor of third parties, but is held to exist as to the mortgagor because a person desiring to purchase the mortgage can always know who his mortgagor is, and can easily go to him and find out if he has any defense against the same and if he says he has none, he would thereafter be estopped from setting up any.

In *Olds v. Cummings*, 81 Ill., 188, the court held that the transfer of a mortgage by the mortgagee to an innocent purchaser for value, would not cut off the right of the mortgagor to set up usury in the same as against such assignee.

This we believe to be the rule in Ohio and must necessarily follow as the courts of other states have reasoned from the holding made in *Bailey v. Smith*, *supra*.

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It follows that the ruling of the court upon this testimony, was erroneous and prejudicial, for which the judgment of the lower court will be reversed.

We have examined all the other errors complained of. We find them to be entirely without foundation, or under the other evidence given in the case, were not prejudicial.

We might, in this case, put the bank to an election to take the amount awarded it less the amount of usury, but the court has no definite idea of what the usury is. Two witnesses testified to its being about \$125, but this is too uncertain for the court to undertake to name any sum which it will require the bank to deduct from its judgment in order to affirm the case. The only thing definite is what the attorney stated in his claim, but that is not proof. So we see no other way than to reverse this judgment and remand the case for a new trial, which is done.

CORPORATIONS—CONTEMPT.

[Lucas Circuit Court, February 18, 1901.]

Haynes, Parker and Hull, JJ.

JOHN ARBUCKLE ET AL. V. WOOLSON SPICE CO. ET AL.

1. DUTY OF CORPORATION FOR PROFIT—FAILURE TO PERFORM—EQUITY.

The object and purpose of a corporation for profit is to make money. Therefore, it is the duty of its directors, as trustees for the stockholders and for each of them, to use the capital of the corporation, for the purpose of producing profits, and their failure so to do may be inquired into by a court of chancery.

2. STOCKHOLDER MAY ASCERTAIN CAUSE OF FAILURE OF DIVIDENDS.

While the law permits a board of directors of a corporation in their discretion to keep money on hand for specific or certain purposes, the general rule is that stockholders are entitled to a dividend from the profits. Therefore, a stockholder has the right to demand that if profits are made by the company that they shall be awarded to him, that dividends shall be declared, and if no dividends are declared to ascertain the reason why.

3. INSPECTION OF BOOKS IN MAKING SUCH INQUIRY.

It is a *prima facie* rule of law that purchasers of stock in a corporation have the right to invoke the aid of a court of equity to compel the transfer of such stock upon the books of the company, to be permitted to examine its books and to make inquiry into the affairs of the corporation, to the end that their rights be protected, especially where it appears that the corporation was a successful, dividend paying company at the time of such purchase, but since, and for several years, has paid no dividends, and it is alleged that it is being managed in the interests of a rival company.

4. POWER TO PUNISH FOR CONTEMPT—SECS. 6906, 6907 AND 5290, REV. STAT.

The inherent power of courts to enforce their orders by summary proceedings in contempt is not abridged by Secs. 6906, 6907, Rev. Stat., which provide for securing attendance of witnesses, and this power is equally applicable to cases under Sec. 5290, Rev. Stat., relating to production of documentary evidence (books and papers of a corporation in case at bar) because, if it is necessary to the determination of a case to require the production of papers and documents, it is just as essential that it be done as it is that a living witness should be produced and heard upon the stand.

5. CIRCUIT COURT HAS POWER TO PUNISH FAILURE TO PRODUCE BOOKS, ETC.

The Supreme Court having held in *Hale v. State*, 55 Ohio St., 210 [45 N. E. Rep., 199, 60 Am. St., 691, 36 L. R. A., 254], that the general assembly has no power to and that Secs. 6906, 6907, Rev. Stat., do not abridge the power of

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courts to secure the attendance of witnesses, the circuit court has the right, independent of statute, to proceed as for contempt for disobedience of an order on a corporation to produce certain books and papers or documentary evidence for inspection.

6. OFFICERS OF CORPORATION ACTING UNDER ORDERS—IN CONTEMPT.

The secretary and general manager of a corporation, of which the principal directors are nonresidents and not within the state, is deemed in possession of its books and papers, and his refusal to obey an order of court directing an examination thereof is contempt of court for which he may be imprisoned notwithstanding he may be acting under the orders of his superiors.

7. PETITION IN ERROR DOES NOT DELAY INSPECTION—WHEN.

A stockholder in a corporation, having been granted leave to inspect the books of the corporation for the purpose of ascertaining its financial condition, has the right to proceed at any time thereafter to make his demand on its secretary and acting manager, and if the request is refused, to make an application to the court for proceedings as for contempt, and the filing of a petition in error or other pleadings in the Supreme Court should not delay proceeding under such order unless delayed by regular order from the proper court as in superedeas.

8. DISPUTES IN INSPECTION SHOULD BE REFERRED TO THE COURT.

Where, under an order of court granting an examination of the books and papers of a corporation, a dispute arises as to the right of the parties to inspect any books or paper, that matter should be brought before the court by the party making the objection to the examination.

Brown & Geddes, for plaintiffs.

Doyle & Lewis and *J. K. Hamilton*, for defendants.

HAYNES, J.

In this matter of John Arbuckle and others against the Woolson Spice Company and others, motion for parties to show cause why they should not be punished as for contempt of court. The motion has been argued very extensively on both sides and covered the whole ground. It has seemed to us that in announcing our opinion this morning, it would be very proper for us, although perhaps not necessary, to state a little more at length than we did in our opinion upon the original motion to permit the parties to examine the books (*post*, next case), and a little more fully the grounds upon which we are proceeding in this matter and what I may term a *prima facie* view that we take of the case upon the pleadings, and the evidence upon the original motion.

The action is in the nature of a petition in chancery. It is an action that sets up in three or four causes of action different matters, and it sets up in the first cause of action the fact that these plaintiffs are the owners of sixty-three shares of stock of the Woolson Spice Company and that the company refuses to transfer this stock upon the books of the company to these plaintiffs and asks for an order to compel the defendant company to make that transfer and an order permitting the parties who sold the stock and in whose names it stands upon the books of the company to make the transfer. The second cause of action asks that the parties have an order that they may be permitted at proper times and places, as members of the corporation, to examine the books of the company. The third and fourth causes of action are more voluminous, as are the answers to them, but the substance of all those causes of action are, substantially; that in 1896, in December, the stock of the company consisted of about eighteen hundred shares; that seventeen hundred and forty of these shares were transferred to Havemeyer and his associates, and they are now the owners and holders thereof. The petition

alleges that the Woolson Spice Company sold the entire number of shares, seventeen hundred and thirty-nine, "and transferred the same to Havemeyer and others, his associates," whose names are to plaintiffs unknown, but all of whom, and also the said Havemeyer, then were and still are, as plaintiffs are informed and believe, nonresidents of Ohio. Said Havemeyer and his associates then became, ever since have been, and now are, the holders of record of all the stock of said company, except the sixty-one shares owned by plaintiffs, unless the defendants, Secor and Doyle, and others to plaintiffs unknown have, that they may appear on the books of said company qualified to act as directors thereof being registered as holders of one share each of said stock."

They then aver that the defendant company has been controlled by these shares of stock, through its officers and agents, and that the plaintiffs have been excluded from any participation in the control or management of said company.

The substance of this is that during the four years that have transpired since the purchase of the stock by these parties in 1896, that this company, which prior to that time had done a very profitable business, and had been paying very large dividends, and had, for the nine months prior to the sale of that stock made dividends nearly equal to the face value of the stock, that this company has since that time, and from that time to this, utterly failed to make any dividends whatever upon the stock of the company. And they make averment upon knowledge and belief that the company is using the earnings of the defendant company for purposes of its own, or expending them in such manner that it is depriving these parties of any income or benefit from the workings of the said company.

They make various allegations in regard to that matter of more or less length, and wind up with a prayer that "The defendant, The Woolson Spice Company, its officers and agents, as well as the other defendants herein, be enjoined and required by appropriate process: [1] to transfer to plaintiffs upon the books of said company the said shares of stock so owned by plaintiffs, or to permit the transfer thereon by the vendors thereof, or their authorized attorneys in fact; [2] to issue and deliver to plaintiffs certificates for their said shares of stock; [3] to accord to plaintiffs the right, in person and by attorney in fact, to inspect the books and records of the defendant company, and to take copies therefrom, and to fix reasonable times for such inspection; [4] to accord to plaintiffs all other rights whatsoever to which, as stockholders of said corporation they may be entitled; [5] from conducting its business in the manner it has done in the three years last past; [6] from selling its products at such prices as will entail a loss upon its shareholders or deprive them of the dividends to which they would otherwise be justly entitled, or at less than the fair value thereof in the open market; [7] from conducting its business in any manner other than the equal pro rata benefit of the owner of its capital stock; and [8] from conducting business in the interests of persons or corporations, other than its shareholders, or for the purpose of injuring the plaintiffs, as shareholders or otherwise.

"Plaintiffs further pray that all the directors and officers of said company, and all its registered stockholders, and all persons and corporations actually owning any of its capital stock be ascertained and determined; that an account be taken of the state, condition, business affairs and management of the defendant company and of its profits and losses,

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and of the disposition made of its gains, if any, to the end that any surplus earnings available as dividends may be ordered paid to its stockholders; that an accounting may be had as to the loss and damage suffered by the defendant company and plaintiffs by reason of the reduction in the price of its product and the loss and diversion of its assets and income; that a master be appointed to take and state such accounts, that all of the defendants found liable therefor be decreed to pay the same; and that a receiver be appointed to take charge of the property and business of the defendant company and conduct the same for the equal pro rata benefit of all its shareholders, to convert its assets into money and pay its debts and divide the surplus, if any, among the owners of its capital stock. And plaintiffs pray for such other and further relief as may be equitable and just."

The answer, after making sundry admissions, denies all the other allegations of the petition, practically denying the ownership of this stock by these plaintiffs. However, further on in the answer the statement is made that large sums of money, to-wit, about one hundred thousand dollars, has been paid by plaintiffs to a certain party for his stock, so that they might control this stock of the company. The answer is quite lengthy and sets up, after making these denials, that these parties have purchased this stock for the purpose of interfering with and injuring the defendant; that is to say, that the Arbuckle Brothers are the owners and partners in business of the principal coffee-roasting institution in the United States, and are carrying on the business of roasting coffee, being the same business that is carried on by these defendants; and they aver, with many particularities, that they are rivals in business of this concern, and that the purchase of this stock has been made by these plaintiffs in order that they may interrupt and interfere with the carrying on of the business of this defendant company, because it is injurious to the interests of the Arbuckle Brothers, to have the defendant company carry on its business. They also allege at some length that combinations have been made throughout the United States, by the plaintiffs whereby the defendant company has been prevented from entering into certain states, territories and countries for the sale of its goods, and that in various ways the Arbuckle Brothers are seeking to harass, oppress and deprive these defendants of the benefits of the business that they are carrying on.

The case came on for hearing in the court of common pleas, before Judge Pugsley and a decree was entered, in which it was found that the plaintiffs were the owners of these sixty-three shares of stock in question, and it was ordered that the stock be transferred upon the books of the company to them, and that they should be permitted to have an examination of the books of the company, with perhaps some restrictions. As to the third and fourth causes of action the decree was against the plaintiffs. The matter was then brought into this court.

In common pleas an injunction was granted by decree restraining the defendant company from refusing to transfer the stock, and after it came into this court a motion was made to suspend that order, which was argued to the court at the time; upon hearing of that motion and consideration of it, the court partly for the reason that it seemed to think that the first cause of action in the petition, was in the nature of a decree for specific performance, because title and ownership were denied, and partly because counsel for the defendants were very urgent that they

desired to take the case to the Supreme Court, for the purpose, if practicable, of getting a modification of a certain decision that had been made by that court, the order was by us suspended.

Subsequently an application was made under Sec. 5290, Rev. Stat., for an order of court allowing an inspection of the books of the defendant company for the purpose of procuring evidence for the hearing in this court upon the final trial of the case, and especially and more particular perhaps upon the third and fourth causes of action. After hearing the arguments in that case, an order was made by this court that an inspection be had, under certain restrictions that were stated in the order. Subsequently a motion was made to this court, which is the motion now being considered, for an order upon these defendants to show cause why they should not be punished as for contempt, for refusing to obey the order that was made by the court.

Upon the hearing of the first motion, we made an examination of the case as to the apparent rights of the parties, under the law of the land, in maintaining this suit, and maintaining these various causes of action. (*supra.*) A leading case which we had, and upon which we relied, was the case of Iron Railroad Co. v. Fink, 41 Ohio St., 321. The case was decided at the January term, 1884. In that case the railroad had been organized about the year 1849, in Lawrence county, this state, at Ironton, a certain party had taken stock to the amount of four thousand dollars. He paid upon installments, as called for, something like three thousand dollars upon the stock and died. He left a will in which he made disposition of his property, and thereby made his son a residuary legatee of his estate. The matter passed into the hands of administrators; they were changed two or three times, and the matter ran along until some time in 1864. The road at that time was not paying very well and no dividends were declared. No call was made upon the administrators for the payment of any further amount upon the stock; but along about 1864, the road began to be profitable, and I think after that some little payment was made upon the stock, at any rate upon the winding up of the estate, the stock was transferred to the son, and the son sold and transferred his rights in the stock to a party by the name of Fink, who in about the year 1873, finally made a tender of the amount that was due on the stock to the company, and demanded that the stock should be issued to him as the purchaser and owner. He had previously made some inquiries of the officers of the company as to the stock, and upon which inquiries and information he relied. Finally when he made this demand on February 25, 1873, the company refused to deliver the stock or issue certificates therefor. And thereupon on December 31, of that year, suit was brought to compel the transfer of the stock. That case was heard in the court of common pleas and judgment rendered for the defendant company, and the matter then went by appeal to the district court, and there an amended petition was filed with a prayer for relief, which was quite lengthy, in which they set up and prayed that there may be an accounting for the gains and profits of the company and an accounting of all the dividends, and for the increase and gains of stock. It seemed that some stock had been issued or may have been issued, that the party might be entitled to as stockholder, arising out of dividends on stock from the profits and from various other matters, and thereupon the court, upon the hearing, found in favor of the plaintiffs in regard to the transfer of the stock; finding that he had a right to have it transferred, and sent the matter out to a referee, with an order

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to ascertain the amount remaining unpaid on these shares, the amount of cash dividends, the amount of stock dividends, and the amount of shares and cash dividends, to which the party would be entitled as owners of said shares, and also the amount of profits, if any, arising in any other way upon said eighty shares to which the plaintiff, as owner of said shares, is entitled.

The case was continued on that matter for a year, and at the end of the year the master reported, showing the amount of dividends that had been earned and made on the stock dividends, and finding that in fact there had been no other profits than those included in these dividends. The year before, upon the original finding, the petition in error had been filed in the Supreme Court and at the conclusion of this report it was affirmed by the court. Another petition in error was then filed and the whole matter came into the court. One great contest in that matter was that the plaintiff had no right to bring an action in equity to enforce the transfer of that stock. That was the leading matter. Some questions were raised in regard to the statute of limitations, but those are immaterial here, and we pass them by. Now the court in deciding that case say, on page 332 :

"But, the question arises had Fink the right to demand the issue to him of certificates for the stock he had purchased from the residuary legatee, and what was his remedy, when the company refused to comply with the demand? Though holding no certificates as indicative of legal ownership, he was doubtless the equitable owner of the shares subscribed by Henry Blake. As such owner, seeking not only a transfer to himself of the specific property—the eighty shares—but other equitable relief in reference thereto, it came within the province of a court of equity to extend to him its aid. It is said, however, that courts of equity do not entertain jurisdiction for a specific performance on the sale of stock, where a compensation in damages would furnish a complete and adequate remedy. But courts of equity will not refuse to entertain jurisdiction, when, in connection with the relief of decreeing a transfer of specific property, a further and essential relief is asked which those courts by their procedure are best adapted to furnish. Fink, as equitable owner, is seeking not only an issue to him of stock certificates, and to be recognized and treated as a stockholder, but he prays for relief by way of account,—running through many years,—of cash and stock dividends declared, of profits arising in any other manner upon his stock, of the increase and gains of the company since its organization, of the disposition of such increase and gains, and the shape in which they now stand—relief especially equitable in its character, and which he could not adequately obtain through an action at law for the recovery of damages. As far as his remedial rights are concerned, we do not think he should be treated as a delinquent subscriber to stock, and be debarred the privileges of a stockholder, for, although neither Henry Blake, nor his administrator, nor James H. Blake ever fully paid the original subscription, Fink, in that regard is chargeable with no default, his tender of the full amount due on the subscription having been refused by the company.

"The practice of courts in the exercise of chancery powers, to decree the transfer of stock by corporations is settled by well adjudged cases. In *Hill v. Rockingham Bank*, 44 N. H., 567, it was held that a bill in equity will lie to compel the delivery of certificates of stock to one who has already an equitable title to such stock, although a suit at

law might also be maintained therefor. In *Cushman v. Thayer M. Co.*, 76 N. Y., 365, which was an action to compel the corporation to transfer upon its books certain shares of stock and to issue a new certificate, the court say: 'The jurisdiction which courts of equity exercise over individuals, extends equally to acts done or omitted to be done by private or municipal corporations. And the power to compel a transfer of specific property is a salutary one and should be exercised where such relief alone will work a complete and ample remedy.' The same principle has been recognized in other cases in which courts in the exercise of a sound discretion have decreed a transfer of stock by corporations in connection with other equitable relief."

The decision concludes by saying, "In our opinion there should be an affirmance of the judgment of the district court." So that it appears that so far as that decision is concerned, it sustains this action, at least in many of its aspects in regard to the third and fourth counts in the petition, as well as the first and second counts.

In *State ex rel. v. Carpenter*, 51 Ohio St., 88 [37 N. E. Rep., 261, 46 Am. St. Rep., 556], and others is a decision by the Supreme Court where there had been an attempt made to compel the transfer of stock by action mandamus and the matter came up for hearing in the Supreme Court, where it was held that a writ of mandamus ordinarily was not the appropriate remedy; but in discussing the matter, Judge Williams uses this language—he had been speaking in regard to an action for damages and he comes now to speak of other remedies:

"Besides, 'remedy in the ordinary course of the law,' is not confined to those actions which before the adoption of the civil code were actions at law, but embraces what were suits in equity as well; and if, for any reason, an action for damages might prove inadequate for the full redress of the relator's injury, we see no reason why they could not obtain that complete measure of relief in equity. It was held by this court, in *Railroad Company v. Fink*, 41 O. St., 321, that a suit in equity may be maintained against a corporation to compel it to issue a stock certificate to a subscriber, or his assignee, upon tender of the sum subscribed. Indeed, that remedy is well established, and is the one generally pursued in such cases, and also in cases where the transfer of stock on the books of the corporation, or a certificate of such transfer is sought. Cooke on Stock and Stockholders, sections 61 and 391. In the last section cited, that author says the remedy by suit in equity is the most complete and most just one for compelling a corporation to register a transfer of stock, and is a remedy applicable to almost all cases arising under a refusal of a corporation to allow a registry of transfer. The case will be decided on equitable principles, however, and a transfer will not be decreed, if it involves bad faith. The relief usually demanded is in the alternative, being either for a registry of the transfer, or damages in lieu thereof. The reasons which conduce to the holding that a suit in equity is the most satisfactory and complete remedy to accomplish the registration of transfers of stock, apply equally when the object sought is the issue of certificates originally. Mandamus is not well adapted to the trial of questions of fact or the determinations of controversies of a strictly private nature. Its office is rather to command and enforce the performance of those duties in which the public have some concern, and where the right is clear, and does not depend upon a complication of disputed facts which must be settled from the conflicting testimony of witnesses."

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Bearing upon the rights of the stockholders in a company we have been cited in the argument of counsel to the Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St., 189, the first and second paragraphs of the syllabi reads as follows:

"(1) Injunction is the proper form of remedy to enforce the right of a stockholder in a private corporation, given by Sec. 8254, Rev. Stat., to inspect the books and records of the corporation.

"(2) The right to inspect does not depend upon the motive or purpose of the stockholder in demanding such inspection, and a petition which shows that the plaintiff is a stockholder, that he has requested the defendant to allow him to inspect the books and records of the corporation, and fix a reasonable time for the same, which request has been refused, states a cause of action."

I may say there was a very full argument before that court, and citation of authorities. In delivering the opinion of the court Judge Spear says:

"It being determined that the action was properly brought, and that the court had jurisdiction, is the petition sufficient, or must the plaintiff, before he can have standing in court, set out what his reasons for desiring the inspection asked are, and show that he is actuated by proper motives, and in the pursuit of justifiable ends? Such is the contention of plaintiff in error. The statute is, Sec. 8254: 'and the books and records of such corporation shall at all reasonable times be open to the inspection of every stockholder.' But it is insisted that this provision is not intended to enlarge the right, but is a mere affirmation of the common law rule and that rule embodies many conditions, among them that the stockholder must allege and prove that he is acting in good faith. Without stopping to discuss the extent of and the limitations upon the rule as established by the common law, (for the holdings are at variance upon it), we inquire, what reason there is for saying that the intent of the legislature was to merely affirm the common law rule? If that had been all why take the trouble to legislate on the subject at all? Is it not more reasonable to conclude that the object was to get rid of all uncertainty and of various conditions, whatever they were, and establish the right by a rule, clear, direct, simple and practically without qualification? The language is plain. The right given is clear. One condition, and one only is attached, viz.: that the right can be exercised at reasonable times. Ordinarily the motive or purpose of the party who is in the exercise of, or is about to exercise a clear legal right, is unimportant. Letts v. Kessler, 54 Ohio St., 73 [42 N. E. Rep., 765], and authorities cited; McDonald v. Smalley, 26 U.S. [1 Pet., 620]. A like rule prevails as to one's pursuits of an equitable remedy; Morris v. Tuthill, 72 N. Y., 575; Davis v. Flagg, 35 N. J. Eq., 491; Thompson on Corp., Sec. 4412, and authorities cited. No reason is apparent why the rule should not apply to the case at bar. We are of the opinion that where a suitor demands the enforcement of a clear right given him by law, whether the remedy be legal or equitable, his motive for such action is not a proper subject for judicial investigation. The petition stated a cause of action, and if supported by the evidence warranted the granting of equitable relief."

And then he discusses the form. Further on he says, on page 200:

"We would add, however, that the rights of the plaintiff in this case are based upon a recognition of his standing as an integral part of the corporation. The idea that the corporation is an entity distinct from the incorporators who compose it, has been aptly characterized as 'a nebu

lous fiction of thought.' Much learning has been indulged in and much space occupied by text writers and others in an effort to differentiate the essential character of a corporation from that of its stockholders, and great ingenuity has been displayed in the argument, but it has been in main a fruitless, metaphysical discussion. For the purpose of description and in defining corporate rights and obligations, and characterizing corporate actions, the fiction that the corporation is an artificial person or entity, apart from its members, may be convenient and possibly useful, but in the opinion of the writer the argument favoring the essential separate entity of the corporation fails, and it is believed that the effort has resulted in misleading conceptions and in much confusion of thought upon the subject. When all has been said it remains that a corporation is not, *in reality*, a person or a thing distinct from its constituent parts, and the constituent parts are the stockholders, as much so in essence and in reality as the several partners are the constituent parts of the partnership. Stripped of misleading verbiage, the corporation is a device created by law whereby an aggregation of persons who may avail themselves of its privileges by organization, are permitted to use their property in a way different from that which is permitted to others who do not so organize, and with certain special advantages, among which are a measure as to personal liability for debts, and the power to perpetuate the organization, denied by the law to all others. With this conception of a corporation, it would seem to follow as matter of course, that the property of a corporation, although subject under some conditions to rights of creditors, is, in the last analysis, that of the stockholders, and that when one seeks an inspection of its books, records, or property, he is in reality but seeking an inspection of his own, and that this should be accorded fully, freely, and at all times when such inspection will not unreasonably inconvenience others who have like interests in and rights to the property, and that the attempt to unreasonably hamper such inspection, by officers, managers, or others, is an unjust exercise of power, and one which courts should not sanction.

Now in regard to the rights of the trustees of a corporation, I desire to read from *Rouse, Trustee, v. Merchants' National Bank*, 46 Ohio St., 493 [22 N. E. Rep., 493; 5 L. R. A., 378; 15 A. S. Rep. 644]. I read from page 501, commencing about the middle of the page:

"The extent of the powers expressly conferred on them are, to sue and to be sued, contract and be contracted with, and acquire and convey such real and personal estate as may be necessary or convenient to carry into effect the objects of the incorporation, to make and use a common seal and to do all needful acts to carry into effect the objects for which they are created. It is obvious, that the corporate property, cannot with propriety be said to be owned by the corporation, in the sense of ownership as applied to property belonging to natural persons. The latter may, without restriction, acquire and dispose of property for any lawful purpose, while both the power of acquisition and disposition of the former, are limited to the special objects already mentioned. The corporate property is in reality a fund set apart to be used only in the attainment of the objects for which the corporation was created, and it cannot lawfully be diverted to any other purpose. As soon as acquired it becomes impressed with the character of a trust fund for that purpose, and the shareholder or creditor may interpose to prevent its diversion from the objects of the incorporation, injurious to him. *Taylor on Private Corporations*, Sec. 34."

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The custody and control of the property, and the management of the business of the corporation, are confided to a board of directors chosen by the shareholders. Into the hands of these officers through whom alone corporations can act, the shareholders surrender their funds, and entrust the management of the affairs and property of the corporation to them. A relation of trust and confidence, therefore, arises between the stockholders and directors of a corporation, out of which grow the duties of the latter, to so administer the trust as will best promote the interests of the former, to pay them their appropriate dividends from time to time, and upon the termination of the corporation, to distribute to them their respective shares of the corporate property, after the payment of its debts and liabilities. These duties are eminently of a fiduciary nature. It is now so well established as to be no longer a subject of controversy, that the relation of trustee and *cestui que trust* subsists between the directors and shareholders. And, since the directors, as such trustees, represent and act for all the shareholders, they cannot lawfully favor any particular shareholder or class of shareholders; but every authority and power possessed by them, must be exercised for the benefit of all alike. Otherwise, no corporation could endure. If the directors and officers of a corporation were allowed, in the conduct of the business, and disposition of the property, to favor one or more shareholders to the detriment of the others, the minority would be the prey of the majority; for, it would then be within the power of the majority to combine and elect the officers, who in turn should manage the whole business and apply the whole corporate property for the benefit of the majority, and thus practically confiscate the entire property interest of the minority. Corporations would thus become traps for the unwary, and legalized instruments of fraud. The doctrine that the directors are trustees for the shareholders, and for the equal benefit of all, it is obvious is essential to the existence of corporations."

Mr. Morewetz, in his work on corporations, uses this language in Sec. 403:

"Even the majority have no right to direct the affairs of a corporation, except in accordance with the provisions of its charter; for the powers of the majority are derived wholly from the agreement of the stockholders, as set out in the charter. And every individual stockholder has a right to stand upon his contract and forbid any departure from its terms. It may, accordingly, be stated as a rule, that any departure from the chartered purposes of a corporation is an injury to every individual stockholder, for which equity will under proper circumstances, provide a remedy."

And he cites a host of authorities.

Now from these authorities to which I referred it seems to us that the plaintiffs had the right to pursue their remedy in this case upon the third and fourth causes of action, and to have the cause heard in this court, and upon the showing made, as we found upon the former motion and hearing, it was necessary for them to have an examination of the books of the company for the purpose of ascertaining the manner in which the company, or the trustees, if you please, were proceeding in the exercise of their powers to manage this corporation, where it is apparent and is certain that there had been no dividends made upon this stock since the time these defendants had bought into this company and had had control of it. When the matter came up on the original motion in the

Kuhn v. Woolson Spice Co. case, 7 Circ. Dec., 289, the answer in it was offered in evidence before us on the motion, and this clause is found:

"Defendants expressly say that it is not true that said Woolson Spice Company is now running at a loss, at the price at which it is now selling its products and the cost of running its factory and business, but on the contrary by reason of the large increase in its business, since said reduction, it is now being operated at a very large aggregate profit, being between five hundred and seven hundred and fifty dollars per day, and the directors of said company have from the stockholders the assurance that if desired, said stockholders, other than the plaintiffs will give a good and sufficient bond in any reasonable sum to said Woolson Spice Company, or to said plaintiffs, that the aggregate profits of the said Woolson Spice Company for the year 1897 will aggregate as much and the dividends on the stock will be as great as the average profits of said company for any number of years that the court may name, and these defendants hereby state that they are authorized to offer, and do offer, any such security as may be decreed adequate and sufficient to the plaintiff that the result of the business of said Woolson Spice Company for the year 1897 will be thus profitable and that at the end of the year the assets of the said company will after paying the dividends on the stock aforesaid, be more valuable than they are now."

I might stop here for a moment and say that that case came up for hearing at that time on a motion to suspend an order dissolving an injunction made by the court of common pleas. Now that case had been filed by Kuhn, who owned one share, and by these plaintiffs, who owned sixty-two shares soon after the purchase had been made, for the purpose of restraining the defendant company from selling coffee at a lower rate than it had before. It was said they had lowered the price of coffee about two cents a pound. Upon that hearing and upon this answer and the allegations and statements made at the time, the court made an order suspending the order dissolving the injunction, and in delivering the opinion making that order, Judge King says, on page 296:

"It is claimed that defendants should be enjoined from selling their products at such unprofitable price. We are not satisfied from the evidence that they are making such sales. The evidence taken after the business had been operated under its new management for about three months tends to show that the corporation is doing business at a profit, but if it were not, for the reasons already given, the court will not interfere at the suit of a competitor in business to restrain the directors from exercising their judgment in the matter of prices. For aught that appears the reduction in price is a temporary expedient, having for its purpose and enlargement of the trade and business and may, if it does not already, ultimately result in increased profits. However that question is one in the control of the directors, and a court of equity cannot interfere with the discretion unless the proof clearly shows an abuse of it."

We did in that case hold and cited authorities to show, that under the facts of the case as they were at that time, inasmuch as those plaintiffs were tiffs were members of a co-partnership that was a rival of defendant corporation, and as we thought at that time were seeking to control the defendant corporation in the sale of its products for the purpose of protecting themselves, that is protecting their own firm that that was one reason why the order should be suspended. But a large element in that decision was, that at that time the defendant company showed that in the short time it

had control—and we could not find the fact otherwise than as it claimed—it was making a profit and asserted it would make large profits the coming year and therefore at that time that order was made. That case is still pending, never has been tried. Since that time, however, the decision has been made by the Supreme Court that I read in the Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St., 189.

It would seem, going back to these various decisions, that the *prima facie* rule of law is that these plaintiffs may maintain this action; that they had a right to be heard upon the averments that had been made, not only in the first and second, but also in the third and fourth causes of action. They had a right to inquire why it was that this corporation, which had been so profitable and successful for the year 1896, when the Havemeyers obtained possession of it, had not from that time to this made or declared one cent of dividends. The averments that were set out in this petition are sufficient we think to invoke the action of a court of equity to make inquiry into the condition of the affairs of the company to the end that the rights of these stockholders may be protected.

Under the decisions I have read, these stockholders, though owning only sixty-three out of eighteen hundred shares, have rights that are just as sacred as the rights of the seventeen hundred and thirty-seven shares of stock, or the owners of those shares of stock, and the court is bound to protect them; and hence we made the order that we did.

Now I come to the question of the remedy. It is said here, and it was incidentally argued here, that the court had no authority to make this order in this form, and if it had authority, it has no right to make an order on these parties to show cause or to punish them as for contempt of court; and that brings us to the history of the contempt proceedings and this section of the statute, 5290. It is claimed that under this section of the statute, the remedy provided in said Sec. 5290, Rev. Stat., is the only remedy given, and that the right of inspection can be used only in a jury case. Now I will read this section (5290) of the statute:

"Either party, or his attorney may also demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper, or document in his possession, or under his control, containing evidence relating to the merits of the action or defense, which demand shall be in writing and shall specify the book, paper or document with sufficient particularity to enable the other party to distinguish it."

Now, as we said in delivering the opinion upon the motion, that is not confined to any court nor to any class of cases. It is broad and universal; it seems to be applicable to all cases that are to be tried by the court. Then it is further provided by the statute:

"If compliance with the demand within four days be refused, the court or judge may, on motion, and notice to the adverse party, order the adverse party to give the other within the time specified an inspection and copy, or permission to take a copy, of such book, paper or document; and on failure to comply with such order the court may exclude the paper or document from being given in evidence or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party by affidavit, alleges it to be; but this section shall not be construed to prevent a party from compelling another to produce any book, paper, or document, when he is examined as a witness."

I confess I have not always been clear in my mind as to what the idea was in the mind of the persons who drew that act. Now this section, or a substantial part of it, is a part of the code as it was drawn in 1853, 51 O. L., 116, Sec. 360, and I think it is almost verbatim of the present Sec. 5290 of the code; the original code contained three sections, one was that a party may be required to admit a paper to be genuine; then comes this section. However, I will read Sec. 360:

"Either party or his attorney, may demand of the adverse party, an inspection and copy or permission to take a copy of a book, paper or document, in his possession or under his control, containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper or document, with sufficient particularity to enable the other party to distinguish it, and, if compliance with the demand within four days, be refused, the court or judge, on motion and notice to the adverse party, may, in their discretion order the adverse party to give the other within a specified time, an inspection and copy or permission to take a copy of such book, paper or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence or if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party by affidavit alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness."

The next section, 361, provided as the section does now, requiring a party to deliver any paper he intends to offer in evidence. Now I should say the proceedings for contempt were not in the code as they are at the present time.

As I have said, I have been sometimes in a quandary to know what was in the minds of the parties who drew Sec. 360 of the code. There was a book published at one time by the code commissioners, giving reasons why certain provisions were adopted, but I think that book has been lost; at least I know of no copy now. It seems to us that the code commissioners proceeded upon the assumption that the court in equity cases had the right to enforce the orders that it made in respect to these provisions.

Now perhaps it is not very material, but I will say that the provisions in regard to contempts of court that were in force at that time were enacted in 1834. See 32 O. L. (1834), 18. The act there provided "That the power of the several courts of the state of Ohio to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except to the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice; the misbehavior of any of the officers of the said courts in their official transactions; and the disobedience or resistance by any officer of the said court, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of said courts, which charge shall be stated in writing and the accused shall be heard in his defense by himself or counsel."

The second section provided that if any person or persons shall corruptly or by threats or force endeavor to influence, intimidate or impede any juror, witness, or officer, in any court of this state in the discharge of his duty, or shall corruptly, or by threats, or force, obstruct or impede the administration of justice, such person shall be liable to

prosecution therefor by indictment before the court of common pleas of the proper county. So that contempts were, so far as the statute was concerned, provided for in the first section, and that law continued in force until the revision of the code in 1878, when the chapter governing the practice in contempts became a part of the code. 25 O. L., 745. The second section was repealed by the revision of the criminal laws in 1877. But in that revision, as has been cited by counsel, after dividing the first section, making two sections of it, practically, and after adding quite a number of sections in regard to proceedings, punishments, etc., relating to contempts of court, Sec. 5650, Rev. Stat., was inserted, which provides that "This chapter is not cumulative to the provisions of division three, chapter three of this title, nor to chapter five, title three of this part, but furnishes a remedy in cases not thereby provided for." We have had considerable discussion on this question, and it has seemed to us—though we do not think it necessary to the decision of this case—that this provision in regard to the statute being cumulative should apply to those sections of the statute in Chap. 3, which provide for a remedy for contempt in certain cases in respect to obtaining the testimony of witnesses, etc.; that is, this statute shall not be cumulative in proceedings for contempts that are provided for in the aforesaid Chap. 3.

Now I will say here in regard to another matter that has been argued to considerable extent, that the statute in regard to interrogatories to be attached to pleadings, was not in the original code, was no part of it, nor, as I have said before, was the section in regard to discovery. The statute providing for these was passed March 6, 1857. 54 O. L., 23. But it is sufficient to say that the section in regard to interrogatories was passed, and the first two sections of the act are made Secs. 5099, 5100 and 5101, Rev. Stat. Section 5099 provides that a party may annex interrogatories to his pleadings, etc. Section 5100 provides that when annexed they shall be answered within the time limited, etc. Section 5101 provides that: "Answers to interrogatories may be enforced by non-suit, judgment by default, or by *attachment*, as the justice of the case may require; and, on the trial, such answers, so far as they contain competent testimony on the issue or issues made, may be used by either party." The making answer, it will be seen, may be enforced by attachment. Those sections were passed at the same time, and are a part of the act passed in regard to discovery. That section of the act in relation to discovery provides that a party desiring information to enable him to commence an action may file his petition and attach interrogatories to be answered by the defendant, etc.; and I apprehend that the provisions of the first section in regard to enforcing answers would apply to the section in regard to discovery, they being part of the same act and touching the same subject matter. It was the intention that these answers should be enforced by attachment, the only difference being that in the last case the petition is filed for the purpose of obtaining evidence to commence the suit, while in the other the interrogatories are attached to the petition, to obtain evidence for use upon the trial.

I have gone through these provisions because they have been argued, and because they seem to throw some light on the matters that have been under discussion; but it seems to us that the Supreme Court has now made a decision that is declaratory of the law as it exists today, and which covers this case, and is sufficient warrant for the action we propose to take. In *Hale v. State*, 55 Ohio St., 210 [45 N. E. Rep., 190; 60 Am. St. Rep., 691; 36 L. R. A., 254], the court held:

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"The general assembly is without authority to abridge the power of a court created by the constitution to punish contempts summarily, such power being inherent and necessary to the exercise of judicial functions; and Secs. 6906 and 6907, Rev. Stat., will not be so construed as to impute to the general assembly an intention to abridge such power."

In *Baldwin v. State*, 11 Ohio St., 681, the court held that punishment could not be inflicted in that case under the first section of the act of 1884, holding that it must be under the second section by indictment. But in the *Hale v. State*, *supra*, the court say, in the second paragraph of the syllabi:

"Removing a witness from the county of his residence where he is under subpœna to attend upon the trial of a cause pending, with the purpose and effect of preventing his appearance upon the day of trial, being a wrongful act which obstructs the administration of justice, is a contempt of court. *Baldwin v. The State*, 11 Ohio St., 681, overruled."

I shall not take the trouble to read this decision at length; I shall only read a clause, on page 218:

"The difference between the jurisdiction of courts, and their inherent powers is too important to be overlooked. In constitutional governments their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. The power to maintain order, to secure the attendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised."

It was suggested that this decision was not in accordance with the general rule of decisions of other states. Perhaps it was intended to mean some particular phase of the decision. In 36 L. R. A., 254, appears *Hale v. State*, *supra*, and in a foot note is the following:

"In Georgia the constitution declares that the power to punish for contempt is limited, and requires legislation to prescribe the limits (see Bill of Rights, par. 20). *Harrell v. Word*, 54 Ga., 649.

"But in most states the question depends on general principles and general provisions of the constitution. The conclusions reached by nearly all the courts which have decided the question are in harmony with that reached by the Supreme Court of Ohio in the main case of *Hale v. State*."

"The general declaration that the power to punish for contempts is inherent in a court is made in many cases" (citing a very large number of cases).

It is sufficient for us, however, that the Supreme Court has made this decision, and it seems to us, in making the statement that this power applies to securing the attendance of witnesses, makes it also clearly applicable to cases under Sec. 5290, Rev. Stat., because if it becomes essential to require inspection or the production of papers and documents for the purpose of having the case heard and arriving at a just and correct conclusion regarding the facts of the case, it is just as essential that it be done as it is that a living witness should be produced and heard

upon the stand. We cannot conceive of any reason why it would be applicable in one case and not be applicable in the other.

For these reasons we have come to the conclusion that under the decision in *Hale v. State*, 55 Ohio St., 210 [45 N. E. Rep., 199; 60 A. S. Rep., 691; 86 L. R. A., 254], this court has the right, independent of these sections that have been referred to, to proceed as for contempt for disobedience on the part of the parties on the order made in pursuance of that section of the statute in this case.

We are of opinion, or at least as at present advised, that the court did not err in the original order it made. We are clear, as we have already said, that the court has the right to proceed, for disobedience of that order, as for a contempt of court, against the parties who disobey.

Now in regard to the notices that have been served on Mr. Brigham and the action taken in regard to him, for he is the only party whom we shall consider at the present time, an application was made to him, and a demand under the order of the court was made upon him, in regard to an examination of the books. Mr. Brigham, as appears by the testimony on the examination before us at the time the motion was heard, is the secretary of the company and its acting manager, and as such he has charge of the books relating to the transfers of stock and also has general charge of all the books of the company. He further testified and designated the particular character of all the books kept by the defendant company, and that the company kept such books as are usually kept by mercantile establishments. It seems to us then, and we can only repeat that it appears to us now, that an examination of these books is necessary for this party plaintiff to obtain the facts that will enable him to proceed in the hearing of this case.

If those books are kept as merchants ordinarily keep their books they should contain a very full history of all the transactions that are had by the company, and the parties should be enabled to obtain from them the amount of sales, the prices received, the amount of purchases and the prices that are paid for the purchases; and generally to obtain that knowledge which will enable him to know whether the company is in fact making a profit, and if it has made a profit, what has become of the money, what they are doing with it, and whether they are keeping it for lawful purposes, or whether they are using it for purposes which the law will not sanction. Plaintiff have the right as a party to demand, at the same time, if profits are made, that they shall be awarded to them, that dividends shall be declared. It is true, of course, that the law permits a board of directors in their discretion to keep money on hand for specific or certain purposes, but the general rule is that the stockholders should have a dividend from the profits.

As I have already read in *Rouse v. Merchants' Bank*, *supra*, the directors are trustees for the stockholders and for each of them. The object and purpose of a corporation is to make money. It is a corporation for profit. It is the duty of these directors, as trustees, to so use the capital of the company, so far as they can, for the purpose of producing profits and making profits for the stockholders; if they fail to do that, and if they abuse their trust in that respect, we have no doubt ourselves, as at present advised at least, of the powers of a court of chancery to call them to account.

Now when the matter was before us three years ago, the company was then, as it appeared, experimenting, and it was declared, and we so found the fact to be, that they were then making money. It now

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appears that they have not made any money which they are willing to divide as profits, and, so far as we can gather from their assertions, there is no money that can practically be available for that purpose.

We think we clearly have the right to make an order under this section of the statute that these parties shall have an examination of those books, so far as will enable them to obtain the facts, and evidence of facts, that are necessary for the purpose of enabling the court to pass upon the questions that raised in the pleading. It may turn out, in the end, that the plaintiffs are all wrong and the defendants all right but under the allegations of the petition and under this section of the statute the plaintiffs have the right to invoke the action of a court of equity, and the court has the power to take steps proper to obtain the necessary evidence.

Some question was made in regard to the interpretation of the order. We will say in respect to that, as we understand it and as we understood it at the time the order was before us—and at the time some interlineations were made by my brother Parker and approved by the court—if there is any question in regard to any book or paper as to whether it is proper for these parties to see it or inspect it, that matter should be brought before this court, or before the judges of this court, and that duty would devolve upon the party who made the objection to the examination.

Now in regard to the company, in regard to the defendants other than Mr. Brigham, we shall take no action today. It appears that Mr. Brigham is the party who is placed in the possession of these books, acting as secretary and general manager in the management of the company—he is the acting manager of the concern. The principal directors are non-residents of the state and are absent therefrom so far as we know; and he is the only party that is here in possession of the books and papers, so far as it appears from the evidence before us. It is evident to us that he is acting under the orders of his superior officers, and the directors of the company.

It is clear to us from the evidence, and we think the arguments proceeded upon the line, that these persons do not desire and are determined that those plaintiffs shall not become members of that corporation or have their stock registered on its books. We think under the decision of the Supreme Court that we have read, and under the principles laid down by that court and which are to be followed by us, that this court has the right to enforce its orders in regard to an examination of the books, by whatever power it has at hand.

We have endeavored, and shall endeavor, to proceed in a conservative manner, but we shall proceed with firmness and determination to enforce the orders of this court, and see that the orders of the court are respected and obeyed by all persons who are within the jurisdiction of the court.

We proceed in this matter upon the principles laid down in Sec. 3646, Rev. Stat., which provides:

“When the contempt consists in the omission to do an act which is yet in the power of the accused to perform, he may be imprisoned until he performs it.”

And the order of the court will be that Mr. Brigham be confined in jail until such time as he obeys the order of the court.

It was suggested that the parties desired to take this case to the Supreme Court by petition in error, for the purpose of raising the questions that have been raised before us in regard to the power of this court to make any order at all, under Sec. 5290. We will give you until March 5th to file a petition in error in the Supreme Court and obtain a hearing on motion for a suspension of our order in the case.

CORPORATIONS.

[Lucas Circuit Court, January 12, 1901.]

Haynes, Parker and Hull, JJ.

* JOHN ARBUCKLE ET AL. V. WOOLSON SPICE CO. ET AL.

1. PURPOSE OF CORPORATION FOR PROFIT—STOCKHOLDERS' RIGHT.

The real object and purpose of a corporation for profit is to make a profit and to make dividends for the stockholders, and a person who holds the stock of such a corporation has a right to have the business of the company conducted, so far as practicable at least, so that it will make profits and pay dividends.

2. MOTION FOR LEAVE TO INSPECT BOOKS OF DEFENDANT CORPORATION.

In an action by minority stockholder against the corporation claiming mismanagement of the corporation by its officers and a failure to pay earned dividends on stock, or management in the interests of a rival corporation of which such stockholders were members, and asking for an order allowing plaintiffs to examine the books of the corporation, under Sec. 5290, Rev. Stat., an order may be granted on motion allowing an examination and inspection of such books before the trial, for the purpose of enabling plaintiffs to obtain evidence therefrom as to the profits made by the concern.

3. SCOPE OF ORDER ALLOWING INSPECTION.

Such order may be made notwithstanding plaintiffs may be members of a rival firm, but will be so framed as to confine such examination to the matters relevant to the issue.

4. RIGHT TO SUBPOENA "DUCES TECUM" NO DEFENSE.

The fact that parties may compel the production of books by a subpoena *duces tecum* is no defense to an application under Sec. 5290, Rev. Stat., for an order for the inspection of the books of corporation.

5. SECTION 5290, REV. STAT., NOT LIMITED TO JURY CAUSES.

Section 5290, Rev. Stat., providing that either party or his attorney may demand inspection of books, etc., is not limited to cases triable to a jury, notwithstanding the clause providing that on failure of the party to comply with the order, the court may direct the jury to presume such facts as the party seeking the examination alleges.

6. GENERAL DEMAND—COURT NOT REQUIRED TO REJECT OR ALLOW.

The mere fact that the demand for an inspection of books of the corporation is general in its nature, or that the demand includes all of a certain class of books, papers or documents, does not make it necessary for the court to either reject or allow the inspection in accordance therewith. The court has power, in such cases, to modify or make such an order as will be compatible with the purpose for which the evidence is sought.

ON MOTION for order of inspection and copy.

Brown & Geddes; Peckam, Warner & Strong, for plaintiffs.

Hamilton & Kirby and Doyle & Lewis, for defendants.

HAYNES, J.

In the case of John Arbuckle and others against the Woolson Spice Company, there has been submitted to us a motion for an order to permit the plaintiffs to inspect the books, or certain books of the defendant company; the matter has been argued at some length and we have endeavored to give to it, as a matter of importance, careful consideration. We have re-read the pleadings in the case.

* See also preceding case.

The petition, briefly, sets up that the plaintiffs are the owners of sixty-three shares of the stock of the Woolson Spice Company, of which there is a total of eighteen hundred shares, they owning sixty-three shares of the eighteen hundred. They claim, in the first cause of action, that they have been prevented from having the sixty-three shares of stock registered or transferred into their names and they pray the court for an order requiring that to be done.

Secondly, they say that as members of the corporation they have a right to examine the books of the corporation, which has been refused them by the defendant company, and they pray that they may have an order to be allowed to examine them.

Thirdly, in a statement made at some length, they set up, substantially, that since 1896, at which time they became stockholders, the defendants have failed to make any dividends and they claim that the majority of the stockholders have so conducted the business of the company that it would not make any dividends; that the majority stockholders were opposed to these plaintiffs becoming members of the corporation and their conduct has evinced a disposition on the part of said majority to so conduct the business of the defendant company as to render the stock of but little value; and, further, that they have also conducted it for the purpose of benefiting, not the stockholders, but for the purpose of benefiting other interests outside. The statements are voluminous and varied.

This is denied by the answer of defendant, and it is a very long and voluminous statement of the matters in controversy between the parties. It is sufficient to say that the defendants claim that the plaintiffs have bought in the defendant company for the purpose of controlling this company, or injuring it, or preventing its becoming a competitor of the firm of which the plaintiffs are members, and they claim that plaintiffs have entered into a combination with what is called the Grocers' Association, whereby they have undertaken, so far as they could through that organization, to prevent the defendant company from doing any considerable business. In short, the pleadings show or set forth that these plaintiffs and the parties who hold the stock of the defendant company are rivals in business and that they are seeking each to injure the other by the methods in which they desire to have the Woolson Spice Company conducted.

We will lay aside, the question of rivalry. The case must be tried, so far as this motion is concerned, upon the real issues joined between the parties. The object of pleading is to narrow the issues and state distinctly the issues between the parties and then the evidence should conform to the issues made.

The gist of the action, so far as the third cause of action is concerned, is that defendants are so conducting this business as to prevent the plaintiffs from receiving any dividends from their stock; so conducting it as to render the stock in the hand of these plaintiffs valueless, and plaintiffs claim that in so doing they are conducting the business in part for the benefit of the interests that are owned by the individual stockholders in other companies and other interests. We shall discuss this motion and dispose of it upon this single issue; that the plaintiffs have the right, if the facts stated in their petition really exist, to invoke the powers of a court of equity to inquire into the question at issue, and if found to be true, to make some order in regard to the matter.

Plaintiffs by their pleadings and also by the evidence produced upon the motion show that up to the year 1896, the defendant company had been paying dividends which amounted to almost dollar for dollar of par value of the stock, annually; that there is no reason pertaining to the circumstances of the business why it should not have continued to make profits and pay dividends ever since, and they claim that the books of the company will show that its business ought to be profitable—ought to enable it to make a dividend and to make it a paying concern. The real object and purpose of a corporation for profit is to make a profit and to make dividends for the stockholders, and a person who holds the stock of a company has a right to have the business of the company conducted, as far as practicable at least, so that it will make profits and pay dividends.

We are of the opinion from the evidence before us that the claim of these plaintiffs is true, that it is necessary for them to have at some time an inspection of these books, or, in other words, that these books really contain the evidence which will enable them to ascertain the condition of the corporation and of the condition of its business for the last four years, and enable them to ascertain whether in fact it has been making money or whether it has been so conducting its business that it has been losing; enable them to ascertain the prices that it has been paying for the goods that it has purchased and the prices at which it has been selling, and enable them to ascertain from the yearly statements and inventories which have been taken of the stock, its financial condition.

The section under which the parties are proceeding is Sec. 5290, Rev. Stat., and it is claimed, on the one hand, that they have a right to this proceeding under this section; and it is claimed on behalf of the defendants that the court ought not to make an order allowing them to inspect the books of defendant company. Sec. 5290 provides:

"Either party, or his attorney, may also demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper or document in his possession, or under his control, containing evidence relating to the merits of the action or defense, which demand shall be in writing, and shall specify the book, paper, or document, with sufficient particularity to enable the other party to distinguish it; if compliance with the demand * * * be refused, the court or judge may on motion, and notice to the adverse party, order the adverse party to give the other, within the time specified, an inspection and copy, or permission to take a copy, of such book, paper, or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party, by affidavit, alleges it to be; but this section shall not be construed to prevent a party from compelling another to produce any book, paper or document, when he is examined as a witness."

Some exception was taken, that this order or demand was general, in its nature, that is to say, it demands all of a certain class of books, papers or documents, and it was intimated—I don't know that it was intended to be presented—that the court should either allow or disallow it as it stands. We do not think that follows. We think that it is within the discretion of the court which makes the order to make it in such a manner or form as it thinks will be compatible with the purpose for which the evidence is to be produced; that is to say, such as will have

a bearing on the issues joined between the parties, and the demand should be granted according to the exigencies of the case.

It is strenuously objected here that we ought not to make this order because these parties plaintiff are adversaries, that is to say they are rivals of this company in business, and that to allow them to inspect the books and papers of this company will be to put them in a position where they can obtain information that may be detrimental to the defendant company. We appreciate that objection and in any order that we shall make we shall endeavor so far as practicable to prevent anything of that kind occurring. We shall endeavor so far as we can to confine the examination to matters that strictly bear upon the issues between the parties presented by these pleadings; that is to say, those which bear upon the question as to whether the company has been making profits, or whether it has been so conducting the business as to squander its earnings or prevent its making earnings sufficient to have a dividend or profits. Although plaintiffs may be rivals, they are nevertheless owners of stock in the company and have the right to have the business conducted to all lawful ends and purposes for which the corporation was formed.

It was said that we ought not to allow this order because courts will not allow an order of this kind where the parties can compel the production of the books by a subpoena *duces tecum*. We do not so construe the statute. The parties who made the code intended to do away with a good many things which had existed prior to that time, and which had grown up under the old common law practice. They declare that the whole structure of the code is for the purpose of justice and they seem to have opened the doors as wide as they could for the conveyance of information to and throwing light upon the matters before the court, and to enable the parties to produce evidence, to the end that the court may decide a matter according to the general principles of law and according to the justice of the case. We do not think that that objection is tenable; we do not think that the granting of the motion would make a material difference with the parties.

It is said that order granting this motion cannot be taken up upon error. But suppose the parties came in here with the books upon a subpoena, it is needless to say that the books and papers of this company would be voluminous, covering a period of four years, because the business of the company is very extensive. But it is said that the court can adjourn and let counsel take the time to make an examination of these papers. The court in that case would allow the plaintiffs to do the same thing that defendants are objecting to under this motion, that is, to have an examination of the books and papers in the case *before final judgment* upon the merits of the case, because, as I understand the views of counsel for the defense, they want to have the question placed in such a shape that they can take the case to a higher court before these parties shall be allowed to look at the books at all. It seems to us that the parties plaintiff should have the right to obtain all necessary evidence relevant to the issues, even to examining the books for evidence before the trial and final judgment of the court on the case. The case, so far as the third cause of action is concerned, may depend wholly upon the evidence thus obtained, and the more orderly way will be to have it done under this order and the examination made under this statute.

If I have not stated, I do state it now, that while there is some suggestion that it is not shown that these books and papers are material, we

think it is shown that they are material; we think that these books contain the very essence of what is necessary to decide this case.

It is contended in argument that Sec. 5290, Rev. Stat., is intended to apply in cases triable to a jury only, and in support of that is cited the clause of the section providing that on failure of the party to comply with the order, the court may direct the jury to presume (the evidence) such as the party wanting the examination, by affidavit alleges it to be. But the statute in the commencement is broad and says either party, or his attorney, not limiting the right to any case or class of cases. We think the right of the party to apply for and of the court to make the order, is not limited to jury cases but applies to other cases also, and that the statement as to what order the court may make in a jury case does not limit the right of the court to make the order.

I have endeavored to, and I believe I have touched upon the leading points which were made by counsel. There was some discussion and some objection made, that by allowing this motion we were practically granting everything that is in discussion and in dispute and in contention in the second cause of action, to-wit, the right of these parties to examine the books of the concern, but we think these matters are entirely different: The second cause of action asks that they may be allowed from time to time to make an examination of the books of the concern as members of that corporation, while this is simply an application on behalf of a person who is a suitor and who sets up in his pleadings, *prima facie*, the right to have some relief in regard to the matter in controversy, or at least to have a hearing of it in a court of justice. It is the means the code provides for enabling a party to procure evidence for the trial of his case, and extends only so far as touches evidence relevant to the issues in the case.

We shall allow the order to be taken, but we shall endeavor to so limit it and hedge it as that these parties shall be confined—as they say they are willing to be—to certain matters which are relevant to these issues.

The following was the order allowed by the court, at said hearing:

“This cause came on to be heard upon plaintiff's motion for an order that defendants give plaintiffs an inspection and copy, or permission to take a copy, of books and papers in the possession or under control of defendants. And the court, having heard the evidence and the arguments of counsel, finds that due demand in writing was, on December 17, 1900, made by the plaintiffs of the defendants therefor; that compliance therewith was by defendants refused; that said books and papers contain evidence relating to the merits of this action and the defense; that due notice of said motion was given by plaintiffs to defendants; and that plaintiffs are entitled to an inspection and copies, or permission to take copies, of the books and papers as hereinafter mentioned and set forth.

“It is therefore ordered that the defendants, within eight days from January 14, 1901, give the plaintiffs herein an inspection and copy, or permission to take a copy, of the following described books and papers, or such thereof as are in the possession or under the control of defendants, to-wit:

"All books and papers showing purchases and sales, and prices thereof, of coffee; receipts and disbursements; earnings and expenses; and the ledgers, journals and other books of account; and all letters, telegrams and other communications, between the officers, directors, stockholders, agents and employes of the Woolson Spice Company, or any of them, relating to the management or financial affairs of said company, and all letter books or other copies of such correspondence; also

"All records and minutes of any and all meetings of stockholders, directors and committees, respectively, of said defendant, The Woolson Spice Company, held since October 1, 1896; also

"All books and papers of said defendant company specifying or containing entries showing any and all holders of the capital stock of said company since the first day of October, 1896, and any and all transfers thereof since said date, including stock book, stock register, stock certificate book, stock transfer book, stock ledger and stock journal, or such thereof as are or have been kept by or for said company; also

"All statements made by directors, officers, accountants and other employes respectively of said defendant company since October 1, 1896, showing or purporting to show the financial condition of said company at any time since said date, or the profits made and losses incurred by said company since said date, or the periodical results of business transacted by said company; also

"Monthly and other general balance sheets showing the general results of the business of said defendant company since said October 1, 1896; also

"All statements, schedules and classifications of expenses incurred or disbursements made by said defendant company for advertising, premiums and other devices and for any and all other purposes, for each successive annual or other period since the year 1896; also

"All statements of expenditures for betterments and additions to the plant and tangible properties of said defendant company for each successive period since the year 1896; also

"All statements and accounts of dividends paid by said defendant company during the year 1896; also

"All communications, letters, telegrams and messages received by said company, its officers, agents and employes, respectively, since said first day of October, 1896, from or purporting to be from, the owners, and any and all representatives of owners, of any part of its capital stock, directing, instructing, advising or recommending concerning any action to be taken at any meeting of stockholders, or directors, or of any committee of said defendant company, or concerning any change to be made in the selling prices, or in the terms or conditions of sale of any of said company's manufactured products; also

"All copies in possession of said company, its officers, agents or employes, of communications, letters, telegrams and messages sent by any of them to stockholders or representatives of stockholders concerning any actions taken or proposed to be taken at any meeting of stockholders or directors or of any committee of said defendant company, or concerning any change to be made in the prices, terms or conditions of sale of any of said company's products.

"Provided, however, that unless the court shall hereafter determine the same to be necessary for the ascertainment of the financial condition and management of the company, defendants are not required to dis-

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close to plaintiffs the individual names or addresses of the customers of the defendant, The Woolson Spice Company, nor the manufacturing processes or formulas of said defendant company. And if defendants shall claim that any one or more of the books or papers hereinbefore mentioned, or any part thereof, is of mere private interest, or of such character that it ought not to be produced, or an inspection and copy thereof taken, said defendants shall forthwith submit any and all such books and papers, or part thereof, to the court for its determination upon such claim.

"And the court, deeming that such inspection may, with the least inconvenience to defendants, be had at the office of said defendant, The Woolson Spice Company, in Toledo, Ohio, orders that such inspection shall be had at such office, unless said defendants shall give reasonable notice to plaintiffs, or to their attorneys, or some other convenient and proper place where such inspection may be had in said city of Toledo.

"It is further ordered that the right of inspection and copy hereby granted shall continue from time to time, and for such length of time, as may be necessary to enable plaintiffs to fully inspect and copy so much of said books and papers as contain evidence relating to the action or defense, or until the further order of the court herein; and that plaintiffs may make such inspection and take such copies in person or by such attorneys, agents and copyists, as they or their attorneys of record herein, may designate, by notice to the defendant twenty-four hours before such inspection and taking of copies shall begin, or twenty-four hours before any person so designated shall enter upon such inspection and taking of copies; and if objection shall be made by the defendant to any person so designated by the plaintiffs, the question whether such person shall be permitted to so act with or for the plaintiffs shall be at once submitted to and determined by this court, or to the judges of this court.

"To all of which findings and orders of the court said defendants by their counsel then and there excepted."

NEGLIGENCE—PLEADING.

[Lucas Circuit Court, March 2, 1901.]

Haynes, Parker and Hull, JJ.

JAMES H. GRIFFIN V. TOLEDO & MAUMEE VALLEY RAILWAY.

1. PROXIMATE CAUSE—RECOVERY NOT DEFEATED BY NEGLIGENCE, WHEN.

The fact that a deaf person was guilty of negligence in walking on the track of an electric railway company will not defeat his recovery if it appears that the motorman, after discovering such person's danger, and the fact that he paid no attention to warning signals, might, in the exercise of ordinary care, have stopped the car and thus have avoided the injury.

2. CHARGING WILFUL WRONG—RECOVERY FOR NEGLIGENT ACT.

When plaintiff in an action against a street railway company for personal injuries sets forth the facts complained of and denominates them "wilful conduct," if the facts so charged constitute negligence, the case should be submitted to the jury, although the evidence is insufficient to establish wilful wrong.

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8. VARIANCE NOT PREJUDICIAL TO DEFENDANT.

The fact that a petition sets forth acts which constitute negligent conduct and denominates them as wilful conduct, and alleges that the injury of which plaintiff complains was intentionally committed, while the evidence shows that it was not committed intentionally, but negligently, does not constitute such a variance between the pleading and proof as to be prejudicial to the defendant.

HEARD ON ERROR.

T. N. Bierley and *A. Alius*, for the plaintiff in error.

King & Tracy, for the defendant in error.

HULL, J.

This is a proceeding in error to reverse the judgment of the court of common pleas. The action was brought by the plaintiff against the defendant for personal injuries which he sustained on account of being struck on the track of the defendant by a car, near the village of Maumee, in this county. The defendant, a street railway company, operated a street railroad between the city of Toledo and the villages of Perrysburg and Maumee. The case came on for trial before the court and a jury and at the conclusion of plaintiff's testimony, the court directed a verdict in favor of the defendant on the ground that the plaintiff had failed to sustain the case set forth in the petition. The plaintiff claimed in his petition that the defendant, through its agents, wilfully ran the car upon and against him and injured him. The petition sets forth in detail the acts and conduct of the defendant of which the plaintiff complains, and the court of common pleas found from the evidence offered by the plaintiff that there was no evidence that the defendant had wilfully injured the plaintiff, and that therefore he had failed in his claim, and a verdict was directed in favor of the defendant and judgment entered thereon. It is to reverse this judgment that this proceeding in error is brought. To understand the question, it will be necessary to read a part of the petition.

"Plaintiff says that on the said date of January 13, 1900, he was walking on the said street car track in a northerly direction and at the hour of about four o'clock P. M. That it was broad daylight at the said time when he was thus walking on the said track. That he was thus walking on the said street car track at or near the northeasterly line of the limits of the corporation of said village of Maumee. That at the said time and place and while the said plaintiff was walking on the said street car track, the defendant's passenger car number 24 which was at the same time and place in charge of the conductor, Frank Hollenback, and which was being run by motorman Jack Stevenson, came running up behind him on the said street car track, and running in the same direction in which the plaintiff was walking, in a northeasterly direction, on said track. Plaintiff says that he did not see nor hear the said car at said time. And plaintiff says that there was nothing to obstruct the view of the motorman from seeing him walking ahead on the said track at the said time and place. That the said motorman did see the plaintiff walking on the said track ahead of his car at the said time and place, and that the said motorman there and then wilfully ran the said car against the plaintiff, upon the plaintiff and dragged the plaintiff along under his car for a distance of about fifteen feet before he stopped his car, that he could have stopped his car and prevented running the same against and upon the plaintiff. And plaintiff says that in consequence of said wilful conduct on the part of the said motorman in running his car as aforesaid upon

him, the said plaintiff, and in thus dragging him under the car, he was greatly injured," etc.

The evidence offered by the plaintiff tended to show that the plaintiff was walking along the highway, near Maumee, in the direction of Toledo, and that near the point where he was injured he had stepped upon the street car track; and it appears to be admitted in the record, on page 2, that this part of the track where he was walking was private right of way—was owned by the street railway company—the railroad company using in some places, according to the testimony and statements of counsel, the highway for the use of its tracks and at other places had private right of way. The car came around a curve in the road and at that time the plaintiff was about three hundred feet, perhaps, or a little more, ahead of the car; and it is plain, according to the testimony, that there was a clear view for that distance. Some of the testimony tended to show that the car was running about eight miles an hour. There was some conflict in the testimony as offered by the plaintiff as to whether the speed of the car was slackened any before the plaintiff was struck or not. Some of the testimony was to the effect that the car was not slackened in its speed nor any attempt made to stop it until it struck the plaintiff, or at about the very time the car struck the plaintiff. This testimony tended to show that the car continued at the same rate of speed—about eight miles an hour—until the plaintiff was struck. The testimony showed that the motorman sounded the gong or rang the bell, indicating that he saw the plaintiff and was ringing the bell to call his attention to the fact that the car was approaching and to warn him off the track. I should have said before that the plaintiff was entirely deaf, and the testimony tended to show that he had no knowledge that the car was coming until he was struck; he continued walking along the track, paying no attention to the car and gave no indication, so far as the record discloses, that he was aware that the car was in fact coming up behind him. According to the testimony, he was seriously injured.

Counsel for plaintiff in error claims that the court erred in directing a verdict in favor of the defendant, for the reason that there was some evidence, at least a *scintilla*, tending to show that this was done wilfully, and that the case should have been permitted to go to the jury; although counsel concedes that the evidence is probably not sufficient to warrant a judgment against the railroad company on the ground that the motorman *wilfully* ran its car upon the plaintiff, but claims that the evidence tended to show that the company was guilty, at least of negligence and that there was some evidence tending to show wilfulness. The court, however, held that there was no evidence tending to show that the defendant injured the plaintiff *wilfully* as alleged in the petition—with a wilful intent to do him harm, and for that reason, the case was taken away from the jury. Counsel for defendant in error conceded in argument that if the charge against the railroad company was that of negligence and not of wilful conduct, that there was perhaps sufficient in the evidence to require the court to submit the case to the jury on the question of defendant's negligence, but claimed that plaintiff was barred from recovering by his own negligence in going upon the track and walking on it in the way he did, being deaf. It may be true that a jury would be warranted in finding that the plaintiff was guilty of negligence in going upon the track and walking on it, and the fact that plaintiff was deaf would not increase the amount of care required of defendant unless it had knowledge of it. But although plaintiff was guilty of

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negligence, still, if the motorman, in the exercise of ordinary care, had time and opportunity to see that plaintiff was apparently, for some reason, unconscious of the approach of the car and had opportunity, by the exercise of ordinary care, to stop the car in time to avoid injury to the plaintiff, the failure to do so was negligence and became the approximate cause of the injury. *Railroad Co. v. Schade*, Admr., 8 Circ. Dec., 816. (Affirmed without report ; 57 O. S., 650.)

If a recovery could be had on the petition, for negligence alone, should the case have gone to the jury upon the evidence offered?

Now it will be observed from the petition, a part of which I have read, that the plaintiff sets forth fully the acts and conduct on the part of the defendant of which he complains. He sets forth all of the facts which he claims constitute the tort of the defendant, and he denominates those acts as he sets them forth as "wilful conduct," and he does not denominate them as negligence. That being true, if the evidence here was not sufficient to warrant a verdict on the ground of wilful conduct, ought the case to have been submitted to the jury on the question of negligence, notwithstanding the adverb or adjective which the plaintiff uses in his petition in describing and denominating the conduct of the defendant in this action? Was there such a variance here as was prejudicial to the defendant, so that the court was warranted in directing a verdict for the defendant? It is true that there is a difference between "wilful conduct" and "negligent conduct," and this difference is pointed out by the authorities. A wilful act, a wilful tort, is one done intentionally, where one injures another with the wilful intent to do him an unlawful injury, which is sometimes used as a definition of legal malice, and the use of this adjective "wilful" and the adverb "wilfully" in this petition was intended to designate this injury on the part of defendant to the plaintiff as an intentional injury. While negligence is simply a disregard of duty; a failure to exercise ordinary care without the intent formed to do an unlawful injury, which is included in the term "wilfulness." There is a brief discussion of this in *Jaggard on Torts*, where several authorities are cited. I read from page 823:

"It is vigorously insisted that wilful negligence involves a contradiction in terms, and is a misleading and dangerous expression. The cases of negligence, as they arise in practice and are found in reports, are not determined by theoretical considerations. The same state of facts may give rise to a cause of action which may be based on either wilfulness or negligence. Gross and reckless negligence, indeed, may in law amount to intentional mischief. A plaintiff would naturally claim moral wrong on the defendant's part whenever possible, both for the purpose of increasing the measure and extent of his damages and to avoid the defense of contributory negligence. If, however, he should fail to prove wilfulness, he may be able to recover for negligence. At common law, under some circumstances, this would affect the form of the action and necessitate the use of trespass instead of trespass on the case. Under the code system of pleading there is no corresponding reason why the two wrongs should be separated with greater definiteness than is required to meet the appropriate difference in pleading and evidence. Hence, actions for "wilful negligence" and "wanton negligence" are continually brought. And the plaintiff is not required to show the appropriateness of every adjective used in his complaint. Therefore, if he alleges that the defendant wilfully, wantonly, neg-

ligently and unlawfully did wrong, he can recover on proof of negligence. But there is no harmony on the point."

And a large number of cases are cited in the foot notes. Upon the question of variance, provision is made in the code, Secs. 5294 to 5296. Section 5294 provides, among other things, that :

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits, and when it is alleged that a party has been so misled, that fact must be proved," etc., and

Sections 5295. "When the variance is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment, without costs."

The plaintiff set forth in his petition the same state of facts that he would plead if he were counting on negligent conduct instead of wilful conduct. He states that the track was clear; that the motorman could see plainly; that the plaintiff was deaf; that he didn't know the car was approaching; that defendant made no effort to stop the car, but continued to run at the same rate of speed until it struck him; that they could have stopped the car and have avoided striking him; and, having stated all these things he denominates the conduct of defendant as "wilful."

In our judgment, the case should have gone to the jury upon the question of negligence; if it be true that the evidence was insufficient to warrant the court in submitting it to the jury upon the question of wilful wrong, that still the plaintiff, under the allegations in the petition and the evidence should have had his case submitted to the jury upon the question of negligence. Plaintiff had alleged a tort or a higher degree than negligence against the defendant; had set forth acts which might constitute negligent conduct, but had alleged that this injury had been done and committed intentionally, whereas the court found that under the evidence it was not committed intentionally; that there was no evidence to show that it was committed intentionally; but it seems to us that it can not be said that the defendant was prejudiced in any way by this description of the conduct of defendant. He was advised by the petition exactly of the facts which the plaintiff claimed constituted the tort of which he complained; he knew exactly what he would be required to meet, but plaintiff had alleged, in addition to this, that it was done intentionally, and the proof, it is said, failed to show that; but we are unable to see how this variance, if it be a variance, could be prejudicial to the defendant.

There is a case in 25 N. Y., p. 252, that seems to be directly in point. The third paragraph of the syllabus is :

"The plaintiff may recover for negligent waste, as in suffering a building to be burnt, although the complaint charge the defendant with having wrongfully set fire to it."

And on page 251, in the opinion, the court say :

"The judge charged the jury that the plaintiff could recover for the woodshed without showing that the defendant set fire to it on purpose if it was burned through his negligence. The tenant was answerable for waste of the premises through his negligence; and although it was averred in the complaint that the defendant wrongfully set fire to and destroyed the woodshed, and it turned out from the proof that he had negligently set fire to it, and it was burned up, the plaintiff could recover.

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That was this case. It was the same kind of waste the complaint averring that it was committed wrongfully, and the proof showing that it was done negligently."

As in the case at bar, the petition alleged that the act was done wilfully, while the evidence tended only to show that it was done negligently. Under the code of this state and the construction that has been put upon it by the courts and the provision of the statute that it should be construed liberally, we hold that this case should have been submitted to the jury, and that therefore there was error in directing a verdict for the defendant.

For these reasons the judgment of the court of common pleas will be reversed, the verdict set aside and the cause remanded for a new trial.

PARTNERSHIPS—ADMINISTRATORS.

[Lucas Circuit Court, January 26, 1901.]

Haynes, Parker and Hull, JJ.

ELIZA RUSSELL V. REUBEN R. FENNER.

1. ADMINISTRATRIX OF DECEASED PARTNER—FACTS NECESSARY TO CHARGE AS PARTNER.

In order to charge the administratrix of the deceased member of a partnership as a member thereof, and liable as such for the payment of certain claims against the firm, it is necessary that an agreement in the nature of partnership contract should appear, although it need not be in writing.

2. PROMISE TO PAY CERTAIN CLAIMS—NO SUBSEQUENT LIABILITY.

The fact that from the circumstances and manner in which a business was carried on there was some holding out of a partnership relation between the administratrix of a deceased member of the firm and surviving copartners, but which was in fact merely a co-operation of the administratrix, under a mistake as to her duty, in carrying out on behalf of the estate a contract previously made by the decedent with the firm, and the obligations of which she aided in fully discharging, is not sufficient to establish a partnership as against the undisputed and positive declarations of the administratrix and members of the firm, that no such relation existed, and the trial court, upon a verdict finding that, as to claims subsequently arising, such a partnership actually existed, improperly refused to grant a new trial.

3. SUCH PROMISE AMOUNTS SIMPLY TO A GUARANTY.

The statement of an administratrix that she would pay or see that certain labor claims connected with a business in which her decedent was a partner were paid, would simply amount to a guaranty, and not to holding herself out as a member of such partnership, or as being so jointly interested in the business as to justify her being held as a principal.

4. MUST BE IN WRITING AND SUED UPON.

And if the promise referred to amounted to a guaranty by an administratrix to pay certain claims of a partnership in which her decedent was a member, it cannot be enforced unless it is in writing, nor unless sued upon. Such a promise is not available in an action based upon averments that the administratrix was, by agreement or otherwise, a member of the partnership.

5. RULE AS TO CREATING PARTNERSHIP LIABILITY.

The holding out, in order to create liability as for partnership debts, must be of a character to fairly give reason to believe that a partnership exists. And in this case, in order to make the administratrix liable, it must have been a holding out that she was personally a partner and jointly interested personally. A reliance upon the magnitude of the estate, or upon any promise

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which the administratrix may have made, that she would settle claims, etc., would not have the effect of creating a partnership, particularly where it does not appear that creditors were deceived as to the authority of the administratrix, and they are as much bound to know the law upon that subject as she.

6. DECLARATIONS WHICH DO NOT ESTOP.

Declarations made by such administratrix after the completion of the work do not bind her upon the theory that she held herself out as a partner and was estopped from denying the existence of such relation, for in order to give rise to an estoppel there must have been reliance and performance upon such declaration by the persons whose claims are asserted.

7. STATEMENTS BY AGENT OR ATTORNEY.

Statements of the attorney of an administratrix that she was intending to come down and settle the estate of her decedent, and would see all the claims against a partnership of which he was a member in the performance of work undertaken before his death, were paid, and in giving assurance that the work would continue to be paid for, do not amount to representation of a partnership by the agent; and if such statements were sufficient, they would impose no such liability on the administratrix unless it appeared that they were made in her presence or upon her authority.

8. QUESTION OF ESTOPPEL NOT INVOLVED BELOW NOT REVIEWED.

In an action against the administratrix of a deceased member of a partnership in which such administratrix and surviving members of the firm are charged with being partners, the reviewing court will not consider the question of estoppel against the administratrix, because of her acts and holding herself out as a partner, to deny existence of partnership, where there is no averment of such a state of facts in the petition and no such question was presented to the jury.

HEARD ON ERROR.

A. W. Eckert and Wickham & Wickham, for plaintiff in error.
Marshall & Fraser, for defendant in error.

PARKER, J.

In the court of common pleas Fenner brought an action against David F. Brubaker, Mary L. Brubaker, E. Balliet (first full name unknown), Eliza Russell and Eliza Russell, administratrix of the estate of Sylvester Russell, deceased, to recover a judgment on account of certain indebtedness alleged to have arisen out of the operation of a stone quarry at Clarksfield, Huron county, in this state; an indebtedness to workmen in the quarry, represented by time-checks which had been issued and which came into the hands of the plaintiff, Fenner. It is averred in the petition that all these persons, excepting Eliza Russell as administratrix of the estate of Sylvester Russell, deceased, and including Sylvester Russell himself in his lifetime, were partners doing business under the firm name of the Furlong Stone Company, at Clarksfield, Huron county, Ohio. That Russell had died and Eliza Russell had been appointed administratrix and that subsequently to the death of Sylvester Russell the defendants, David F. Brubaker, Mary L. Brubaker, E. Balliet, (first full name unknown), Eliza Russell and Eliza Russell administratrix of said Sylvester Russell, continued said partnership and operated the business pertaining thereto.

The case went to trial to a jury and resulted in a verdict in favor of the plaintiff for the greater part of his claim against David F. Brubaker, E. Balliet and Eliza Russell personally, and in favor of Mary L. Brubaker and Eliza Russell as administratrix of the estate of Sylvester Russell.

A motion for a new trial was made on behalf of Eliza Russell, on various grounds, one ground being that the verdict, as to her, was against the weight of the evidence.

It will be observed that it is charged in the petition that these persons were all partners. It is said to us on behalf of the defendant in error that, if they were not actually partners by virtue of their having entered into a partnership agreement, Mrs. Russell may be held as a partner by the plaintiff because of her having held herself out as such partner; because of her having conducted herself in such a manner towards the public and towards those who gave the credit and performed the labor out of which these claims arose, and towards the plaintiff, as that she is estopped from now asserting that she was not a partner, and bound as such to discharge these claims.

There is no averment of such a state of facts in the petition, and no such question was submitted to the jury by the trial judge. It is charged in the petition that they were actual partners, and when the trial judge came to charge the jury upon that subject he said:

"The plaintiff charges that Eliza Russell, together with David F. Brubaker and E. Balliett, after the death of Sylvester Russell, continued the stone business theretofore entered upon at Clarksfield, in Huron county, as a partnership; and that the claims or accounts set forth and which he holds as assignee, are valid claims against that partnership, of which these three parties were members, as he alleges. The defendant, Eliza Russell, in her answer, denies that she entered into any partnership contract or arrangement with this defendant or any of the defendants, for the prosecution of this business, as charged in the petition, and the burden is upon the plaintiff to establish this fact, and he must establish this fact to your satisfaction, by a preponderance of the evidence in the case, before there can be a recovery against the defendant, Eliza Russell. It is charged that the relation existing between Eliza Russell, David F. Brubaker and E. Balliet, from April 17, 1892, or thereabouts, was that of partners; that they did business as a partnership. A partnership is a contract between two or more persons to place their money or effects or labor or skill, or some or all of these, in a lawful business, and to divide the profits and bear the losses, either equally or in certain proportions. A partnership cannot exist without an understanding or agreement between the minds of the members of that partnership; and the question for you to determine from the evidence in this case is, whether or not these three parties, as charged in this petition, made a contract to embark in or continue this business after the death of Sylvester Russell. It is conceded that during Sylvester's lifetime, he had an arrangement with some of these defendants to prosecute the stone quarry business in Huron county; that he was associated with David F. Brubaker and E. Balliet as a partner. As a matter of law, the death of Sylvester Russell terminated that partnership, and ended the contractual relations as between the parties; and anything that was done with reference to continuing that business subsequent to the death of Sylvester Russell must have been done by virtue of an understanding or agreement between other persons. It could have been carried on by an agreement between the surviving partners. They were at liberty to take others with them into the enterprise; and the only question in this case is, whether, as a matter of fact, it is shown by the testimony that they did take in with them and associate with them in continuing that business Eliza Russell, the defendant here. This is purely a ques-

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tion of fact. If Eliza Russell did not enter into an arrangement with them to continue this business, then she was not a partner in the stone company, so-called; and, under the pleadings in this case and the evidence, cannot be held to respond to the plaintiff in this action."

Further along, counsel on behalf of the plaintiff below remarked to the court:

"I would like to suggest that, of course, a partnership contract need not be in writing."

Whereupon the court said:

"It is necessary that a partnership contract should be in writing. There must, however, have been an agreement between these parties in the nature of a partnership contract; and it must appear from the testimony in the case that such agreement was entered into between them, before there can be a recovery as against Eliza Russell."

The trial having entertained that view of the law and the issues, we are unable to understand why the court did not grant the motion for a new trial, because it appears perfectly clear to us from this record that the verdict is against the weight of evidence upon the proposition that they actually entered into a contract of partnership.

The alleged partners, when they come to testify, all declare most positively that they never did enter into such a contract, and nobody disputes it; and the circumstances that are presented as to the way the business was carried on, while they may have tended to establish that there was some holding out of that relation, some sort of representation that the relation existed, are certainly not sufficient to establish, as against the positive declarations of the parties, that that relation did actually exist by virtue of an agreement of partnership. But, assuming that under the pleadings, the question was presented whether Eliza Russell had so held herself out as a partner as that she may be bound to the plaintiff, on that aspect or phase of the case, the trial court did not go far enough in its charge, in that it did not present that question to the jury.

But this charge was not prejudicial to the plaintiff in error, so that we are required to pass upon the question whether the plaintiff below was entitled to recover under the evidence notwithstanding the limitations upon his right declared and implied in the charge of the court; and we have examined this evidence to determine that question.

I need not go into the history of this matter very fully, as counsel understand it as well if not better than the court. It may be said in a general way, that this stone quarry was located at Clarksfield, in Huron county, and that Mr. Russell lived in Lucas county. Upon his decease, Mrs. Russell, his widow, still continued to reside in Lucas county. During the period that this labor was performed out of which this claim arises, Mrs. Russell went to Clarksfield three times; Mr. Russell having died upon April 17, 1892, she visited Clarksfield to look after his affairs, as administratrix, on May 12, on July 2, and again on August 13, 1892. These visits were brief, one of them extending over a day or two, perhaps, and while there she was in consultation with Mr. Balliet, who appears to have been the active man in the transaction of this business after the decease of Russell. It appears that before the death of Russell he had entered into a contract with the partnership that he would do a certain job of work in the quarry, which is called "stripping," which we understand consisted in removing the dirt and debris from the surface and exposing the stone beneath, so that workmen might proceed with

the quarrying of the stone. At the time of his decease but little work had been done upon that job. After his decease, his widow, as administratrix, and perhaps her attorney, Mr. Eckert, conceived that it was her duty, or at least that it was proper and advisable for her, to fulfill on her part as administratrix the obligations which had been incurred by Mr. Russell in his lifetime in entering into this contract; and the fact that this view of the matter was taken by Mrs. Russell and her counsel, serves as an index to very much of the evidence.

The evidence, it seems to us, tends to show that all which Mrs. Russell did in the premises was in the way of assuming and carrying out this contract, which had been entered into by Mr. Russell, and that she had no purpose of entering into a partnership or entering into an arrangement with Mr. Balliet and Mr. Brubaker to carry on the business of quarrying stone after this contract should have been completed, but quite the contrary. According to her own testimony and according to that of Balliet she declared most positively that she would not proceed to carry on the business and that she had no authority to do so. Mr. Balliet was called as a witness on behalf of the plaintiff, and he testified positively, and there was no contradiction of it, that all the obligations, whether of Mrs. Russell, or of Mrs. Russell as administratrix, or of the company growing out of this stripping contract had been discharged; that all the claims for labor had been paid; he said that positively in the course of his testimony, and of all these witnesses who were called here to sustain this claim of the plaintiff—a large number of them being men who actually performed the work and whose claims the plaintiff has obtained and is bringing suit upon—none of them testified that their claims in this case arose out of the work performed in the stripping of this quarry. It appears that this contract was taken by Mr. Russell for \$350 or \$360; that is to say, he was to receive that compensation for the stripping. Mr. Balliet testified that as a matter of fact the stripping cost over \$1,500, and that it was paid for by the stone company. He said that in one place in his testimony, and yet it appears that he had testified on another occasion, a matter which he seems to have forgotten—that it cost \$915.79. As to this having been paid by the company, Mrs. Russell testified that Mr. Russell had paid \$140 on the contract in his lifetime; that is, toward discharging the labor claims arising out of it, and after his decease she went with Balliet and Brubaker to the bank and borrowed \$400, three hundred of which she afterwards paid, this \$400 being to pay labor claims arising out of the performance of this contract; and that in addition to that there was another amount of \$400 which she brought down and paid in addition to the \$300 which she declared she paid on this note.

If that is true, she had herself discharged practically all the claims arising out of the labor of stripping. But it may be that the company had paid something that should have been paid by Mrs. Russell or by the Russell estate. That might give rise to an equity in favor of these laborers as the creditors of the firm, or in favor of the plaintiff here who stands in the shoes of these laborers, as a creditor of the firm, to enforce the claims of the firm against Mrs. Russell, or the Russell estate, growing out of such payment by the firm; but we have no such case here; that kind of a case is not presented; this is simply an action at law to recover against Mrs. Russell as a partner, or, to give it the most liberal construction, as one who has held herself out as a partner and therefore is bound as such.

Now, the saying by Mrs. Russell that she would pay these labor claims (assuming for the purpose of argument that she may have been referring to other claims than those arising out of the claims for the stripping work), or that she would see that they were paid, would amount to a guaranty of payment, a declaration of a purpose to pay, or an assurance that she would pay them, but would not, standing alone, amount to her holding herself out as a member of a partnership, or as being so jointly interested in the prosecution of that work as to justify her being held directly as one of the principals. Though there may have been a guaranty it cannot be enforced because it is not sued upon and because it is not in writing. The holding out must have been of a character to fairly give reason to believe that she was a partner; it must have been a holding out that she *personally* was a partner, that she was jointly interested *personally*. The reliance of the men on the magnitude of the estate of Mr. Russell, or the reliance of the men on any promise that she may have made, or any expectation they may have had that she would go ahead as administratrix and settle these things up, would not justify the holding of Mrs. Russell personally as a partner.

There is no sufficient evidence to show that she deceived them as to her authority as administratrix, and they are as much bound to know the law upon that subject as she. A mere mistake upon her part as to her authority would not give rise to a cause of action in their favor as against her, even if she made a promise as administratrix which she did not fulfill; and even if there is such a thing in law as innocently misleading a person as to her legal authority as administratrix in such a way as would require her to respond personally. But it is enough to say that we have not that question in the case here, though it may be that there was evidence tending to show that state of facts. She is sued as one who was intentionally holding herself out as a partner, and one who actually was a partner in this enterprise. Now what was said by Mr. Eckert, as testified to by Mr. Malloy and as reported by him to Mr. Moon, even if it were authorized, does not amount, in our judgment, to the holding out by him as her agent, that Mrs. Russell was a partner. According to that Eckert declared that she was intending to come down and settle that estate; that she would see all these claims paid; that she would pay them. Mr. Malloy said that he so understood it, and that there was one other person by who heard it, Mr. Sharpe (it is not pretended that anybody else heard it), and thereupon Malloy made the declaration which appears to have been heard by Mr. Moon, to the effect that Mr. Eckert told him, Malloy, that he should give the men working upon the bank all the encouragement that he could, and the assurance that all the work would be paid for, and they should go ahead and continue to do it. But there is this objection to giving effect to that (even if it went so far as to amount to a declaration that would hold Mrs. Russell if she were present); Mr. Eckert does not appear to have been authorized to make any such declaration on her behalf, and she surely would not be bound by it unless it came to her knowledge that he had made such a declaration and assumed to speak for her, and that the men in reliance upon it, were proceeding with their work; but the only testimony upon that point is that of Mr. Balliet, to the effect that he communicated to Mrs. Russell on one occasion that Mr. Eckert had said to the men *when working at the stripping* that it should go forward to completion. As before stated there does not appear to be any obligation

here sued upon arising out of the work of stripping. Those labor claims appear to have been discharged.

We note respecting the testimony of the other witnesses who were at work there as to what was said to them by Mrs. Russell, that in nearly or quite every instance they testified to what was said to them by Mrs. Russell *after the work was completed, or about the time when it was completed.* There may have been an instance or two in which certain witnesses testified that they proceeded with their work thereafter in reliance upon what she said. Any declaration that she may have made after the work had been done could not bind her upon the theory that she had held herself out as a partner and was therefore estopped from denying that the relation existed, for in order to give rise to an estoppel, there must have been reliance and performance upon the faith of such declaration, by the persons whose claims are asserted. Therefore Mrs. Russell's promise to Fenner, assuming that his testimony is correct, and what she promised to Scott (accepting his statement) with respect to the discharge of these obligations, by reason of which they were afterwards encouraged to buy up the claims, cannot be asserted by them here and given the force of declarations on her part which would amount to a holding of herself out as a partner upon which they relied and proceeded, because they did not proceed to give credit to the partnership, but they did proceed to buy up some existing claims against the partnership, which we think amounts to an entirely different thing; we think that if this claim is enforceable upon what Mrs. Russell declared to them, it can be enforced only upon the theory that she guaranteed its payment, and that they must bring themselves within the provisions of the law upon that subject by their pleadings and by their proof. I may remark that as to most of these claims, the persons in whose favor they existed in the first instance do not appear here to testify that they gave credit upon anything that came to their knowledge or any information that they had received which led them to believe that Mrs. Russell was a partner.

We also entertain very serious doubts as to whether Mr. Fenner has title to a great bulk of these claims upon which he can maintain this action, *i. e.* whether he is the real party in interest. It seems from his testimony and that of other witnesses called on his behalf that he has taken the claims to collect them very much as an attorney might. A few of them, about \$50 in amount, were bought before the death of Mr. Russell. Mrs. Russell personally would not be bound upon those. The remainder of the claims came into his hands subsequently to the death of Mr. Russell. He admits that since the death of Mr. Russell there has been little or nothing paid by him upon any of these claims, and his testimony tends to show that he took them practically as a collector or an attorney might. There may be a part of the claims that, according to his testimony, he would have a right to recover upon, notwithstanding the way he holds them, so far as that question is involved. But we hold upon the question whether Mrs. Russell has so held herself out as a partner as that she is bound to discharge any of these claims, that the verdict is manifestly against the weight of the evidence.

NEGLIGENCE.

[Ashtabula Circuit Court, March Term, 1901.]

Burrows, Laubie and Cook, JJ.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. v. D. P. DUER,
GUARDIAN.

1. BOYS RIDING ON HAND CAR FOR PLEASURE—NOT A LICENSE.

The fact that boys of immature age have been accustomed to ride on a hand car of a railway company, for their own pleasure, by the consent and invitation of the section foreman, although continuing at irregular periods, for over a year, is not sufficient to constitute a license upon the part of the company to so use the hand car, when the rule of the company prohibits such use to the knowledge of the foreman, in the absence of a showing that some one of the managing officers of the company had actual or constructive knowledge of such permission and use.

2. COMPANY'S LIABILITY—SAME.

Where a boy, fifteen years of age, requested the section foreman to permit him to accompany the section men upon a hand car, which was about to go down the track to bring in a signal, which request the section foreman granted, and the boy was injured by falling from the car, while assisting in propelling it, no recovery can be had on the ground that the section men permitted the boy to assist in propelling the hand car, and in so doing, to stand in a dangerous place, without at least a showing that the section men wilfully and intentionally caused the injury.

3. WHETHER COMPANY OWED ANY DUTY, QUÆRE?

Whether the company owed any duty, or was responsible at all in such a case, *quære*.

Theo. Hall, for plaintiff in error.

Perry & Roberts, for defendant in error.

HEARD ON ERROR.

COOK, J.

Corwin F. Duer was a boy fifteen years of age, residing at Andover, Ashtabula county, upon the line of Lake Shore and Michigan Southern Railway Company. Andover was the northern terminus of one of the sections of the railway for repair purposes, and the section extended south a distance of five miles. This section was under the control of a section foreman by the name of Terrill. Young Duer, with several other boys about his own age, had been in the habit of riding on the hand car during the summer of 1894, and up to the time of his injury, in the summer of 1895, by the consent of Terrill and his men, sometimes by their invitation; this occurred two or three times a week during said period. On June 20, 1895, about five o'clock in the evening, Terrill ordered two of his men to take the hand car, and go south about a mile, and bring in a flag signal that had been placed along the track, to notify approaching trains of the repairs that were being made a mile north. Duer requested of the section foreman, Terrill, the privilege of accompanying the men, and this request was granted, as it was also to the three other boys who had been accustomed to ride on the hand car. After the signal was obtained, and upon the return of the hand car, north, Duer stood upon the front of the hand car, and outside the handle bar, with his back to the north, assisting in propelling the hand car, while the two men were

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immediately in front of him, but behind the handle bar, facing north, and also assisting in propelling the hand car. The other three boys were upon the rear end of the hand car. The hand car was going rapidly, in order to make Lashure's crossing, where the hand car could be more easily removed from the track. It was raining, and the handle bar being wet and slippery, young Duer's hands slipped from the handle bar, and he fell off in front of the hand car, and was run over by it, and lost his left leg. The evidence does not show that any of the officers of the company knew of the practice of the boys riding on the hand car, neither does it show that any of the employees of the railway company knew of this practice, except Terrill and his men. The roadmaster, the immediate superior of Terrill, testified that he did not know of the practice, and never heard of it until after the injury to Duer; and so far as he knew, none of the officers or agents of the company, knew of it. This evidence was uncontradicted. The evidence further shows that there was a rule of the company, absolutely prohibiting any person or persons, from riding on the hand car, except those engaged in repairs.

It is a well settled principle of law, that the owner of dangerous machinery, or appliances can not permit such machinery or appliances to remain in a public place where children are liable to congregate, and be attracted thereby, and get upon the same, and be injured; or even upon his own premises when the place is not public, and if he has reason to anticipate that children will get upon the same, and be injured, without taking proper and reasonable precaution to so lock or protect such machinery, or appliances, that children will not be injured in the innocent use of the same.

Of such character are the cases where torpedoes are left upon a path upon a railway, where the public generally have traveled for a long time, with the knowledge of the company. Such is the character of the cases of leaving turn-tables, and other dangerous machinery in public places, or upon the premises of the owner, where he should anticipate that children would get upon the same, and be injured. In all such cases it is the duty of the owner to use reasonable care to guard and protect the same, so that children will not be injured from the exercise of their youthful instincts to play around, and get upon novel and attractive machinery or appliances.

This case is entirely different. The hand car was placed in the hands of a trusted agent, and his subordinates. No complaint is made that they were not competent or careful, or if not so, that the company had any knowledge of such fact. They were expected to be constantly with the hand car, and when not in use to safely lock the same up.

This injury occurred when the hand car was in use, and under the control of the section foreman and his men. Furthermore, there was a rule of the company, that boys should not be upon the hand car, and there was no evidence that the company knew or should have known of such use of the hand car. Under these circumstances, it can not be claimed that there was any license by the company, that the boys should ride upon the hand car.

What then, was the legal effect of the section foreman permitting the boy, at his request, to ride upon the hand car, and of the men working under the orders of the section foreman, permitting him to occupy the position he did, and which caused his injury.

The section foreman was employed for, and his duties were of a specific and definite character; his duties and that of his men, were to keep

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the track in repair, and the hand car was in their possession, and under their control for that purpose alone. The hand car was not placed under their control for the purpose of carrying persons, either for compensation or gratuitously. Hand cars are not for the carrying of passengers, but for the transportation of tools and implements, and the section men. It differs in that regard from the caboose of a freight train, which under the orders of the conductor, specially given, may be, and frequently is, used for that purpose. There can be no implication that the foreman of the section or his men, had any authority to so use the hand car, as it was in no wise in the line of their duties, and they were specifically prohibited by the rule, from so doing. The rule was not waived by the company, as there is no evidence that the company knew of its violation; indeed, no one interested in the company knew of the violation but the foreman, and his men, and they would hardly convey the information. Unless the acts of the section foreman and his men can be legally attributed to the company, it is clear the company was not the cause of the injury, as the maxim *qui facit per alium facit per se* can apply only when there is an authority either general or special.

We are therefore persuaded that the section foreman had no authority whatever, express or implied, to permit young Duer to ride on the hand car, and his act, and that of his men, under the circumstances, set forth in the record, in no manner binds the company, and the company is not responsible for the injury complained of.

The case of *Flower v. Pennsylvania Co.*, 69 Penn. St., 210, cited by counsel for plaintiff in error upon argument, is directly in point. In that case it was held: "At a station where defendant's train of cars had stopped, the engine, tender, and one car ran down to the water tank in charge of the fireman, who asked a boy ten years old, standing there to put in the hose, and turn on the water; while the boy was climbing on the tender, to comply with the request, some detached cars belonging to the train, came down with ordinary force, and struck the car next to the tender, whereby the boy was thrown down, and crushed to death. In an action by the parents of the boy, held: That the defendant was not liable."

To the same effect is *Hoar v. Maine Central Railroad Co.*, 70 Me. 65, where it was held that a person injured while riding on a hand car has no cause of action against the company, in absence of proof that the company was accustomed to carry passengers upon a hand car.

The case of the *Cleveland Terminal and Valley Co. v. Marsh*, 63 Ohio St., 236, recently decided by our Supreme Court, if it does not directly decide the contention in this case, in our judgment, comes very close to it. In that case, a boy of ten years of age was employed by a station agent—whose duty it was to light the switch lamps—to assist him in lighting the lamps for an agreed consideration. While the boy was engaged in his duties under his agreement with the agent, he was injured in handling a torpedo he had picked up from the track by the side of the rail, on his way to place one of the lighted lamps; the torpedo exploding in his hands. Counsel for the railroad company requested the trial judge to instruct the jury that under the circumstances, damages could only be recovered for a wilful injury upon the part of the company's servants, or agents. These instructions, the trial judge refused to give, and the Supreme Court held that the common pleas court committed no error in that regard, for the following reason that "one who is invited by a servan

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of a corporation in charge of its work or service, to assist him therein, and does so with some purpose or benefit to be subserved in his own behalf, in addition to the purpose of so assisting, is not a volunteer, and is entitled, while so assisting, to be protected against the negligence of the servants of the company."

The court based its opinion and judgment upon the fact that the boy was acting for a purpose or benefit of his own, as well as for the benefit of the station agent, the servant of the company, and holds, that if Marsh had not been working for a purpose or benefit of his own, then he would have been a volunteer, and could not recover, except upon the showing of wilful injury upon the part of the agents and servants of the company. On page 244 the court say: "The requests are all founded upon the theory that one who, upon request, voluntarily assist the servant of a corporation in the performance of his duties, without the knowledge of the officers, the servant having no authority to procure such assistance, is a volunteer, and can recover from the company only for wilful injuries inflicted upon him * * *. Where a person, at the request of a servant of a corporation, assists such servant in the performance of his work, without any purpose or benefit of his own, to be secured by such assistance, he is regarded as a mere volunteer, and the requests to charge, would be applicable to such a case; but where he has a purpose or benefit of his own to be served, by such assistance, in addition to the purpose of assisting the servant, he is regarded as acting in his own behalf, with at least the acquiescence of the company. A trespasser who is upon the company's premises, wrongfully, and a mere volunteer, stands upon substantially the same footing, and is entitled to recover only for such negligence as occurs after the servants of the company discovered his perilous situation, that is, for a wilful or intentional injury."

From this decision of our Supreme Court, it will be seen that a person who assists a servant of a corporation in the performance of his duties, without any purpose or benefit of his own, is a mere volunteer, and can only recover for a wilful or intentional injury, and we see little, if any, difference in the facts of that case, and this.

To the same effect, is *Davidson v. Railway Co.*, 23 S. E. Rep., 593 [41 W. Va., 407]. That was a case in which a boy was killed, while riding on a hand car by invitation, and there was no claim made that the company would be liable, except the servant of the company acted negligently, after discovering the perils of the boy. The statement of what constitutes a wilful or intentional injury in that case, may be different from what is determined in some other cases, but it is to the same effect.

Our attention has been called by counsel for defendant in error, to *Missouri, K. & T. Ry. Co. v. Rodgers*, 35 S. W. Rep., 412. There is no doubt but that case is directly in point, and sustains the position taken by counsel, but the case is in direct opposition to the cases cited, *supra*, including this one of our Supreme Court. Neither are we satisfied with the reasoning of the case, and if we were, after the decisions made in *Cleveland Terminal and Valley Railroad Co. v. Marsh*, *supra*, we could not be controlled by it. It might be observed that this case differs in some respects from the case of the *Cleveland Terminal and Valley Co. v. Marsh*, *supra*. In that case the boy was employed by the agent of the company, while in this, the boy was upon the hand car for pleasure, and in direct violation of a rule of the company, of which the section foreman, and his men, were fully informed; the violation of

which rule, the company, or any managing agent, had no knowledge. Under these circumstances, we are not sure that the company owed Duer any duty whatever, or would be responsible at all for the acts of the section foreman, or his men. However that may be, the evidence in this case, in our judgment, does not show that the employees of the railway company, plaintiff in error, were guilty of wilful or intentional injury, and the court having charged the jury, that it was only necessary for plaintiff below to show, by the preponderance of the evidence, that the railway company, its agents or servants, did not exercise ordinary care, in order to recover, it follows that the judgment of the common pleas court must be reversed, for the reasons that the verdict was against the evidence, and the court erred in its charge to the jury.

RAILROAD STATIONS.

[Franklin Circuit Court, January Term, 1901.

Wilson, Sullivan and Summers, JJ.

RAILROAD CO. v. ANDERSON.

1. ACCOMMODATION AT STATIONS—DEGREE OF CARE.

It is not the duty of a common carrier of passengers to exercise the highest degree of care in the matter of station accommodations for the safety of its passengers, but only to provide such as are reasonably safe for persons exercising ordinary care, and when it is not so obviously dangerous to permit passengers to pass from a train to an unlighted station platform that the court can say it was negligence to do so, it is error for the court in its charge to assume that it was the duty of the carrier to furnish light.

2. EVIDENCE AS TO PREVIOUS ACCIDENTS.

In an action to recover damages from a common carrier of passengers, for injuries received in alighting from a train at a station, on the ground of negligence in not providing reasonably safe accommodations, it is error, where the danger was not obvious, to exclude testimony that in the use for a long time in the same condition no similar accident had happened.

HEARD ON ERROR.

Watson, Burr and Livesay, for plaintiff in error, cited:

Lighting platforms—Safeguards: *Alabama & G. S. R. R. Co. v. Arnold*, 84 Ala., 159 [4 So. Rep., 359; 5 Am. St. Rep., 354]; *Laffin v. Railroad Co.*, 106 N. Y., 136 [12 N. E. Rep., 599; 60 Am. Rep., 433]; *Hanrahan v. Railway Co.*, 6 N. Y. Rep., 395 [53 Hun., 420]; *Palmer v. Penn. Co.*, 111 N. Y., 488 [18 N. E. Rep., 859; 2 L. R. A., 252]; 4 *Elliott on Railroads*, p. 2392; *Adams v. Railway Co.*, 4 C. P., 739; *Shearman and R., Neg.*, Secs. 92, 207 (5th ed.); *Coal Co. v. Estievnard*, 53 Ohio St., 43 [40 N. E. Rep., 725]; *Vicksburg v. Hennessey*, 54 Miss., 391, 396 [28 Am. Rep., 354]; 2 *Woods Railway Law*, p. 1343; *Philadelphia Pass. Ry. Co. v. Whipple*, 5 W. N. C., 68; *Junior v. Light and Power Co.*, 127 Mo., 79 [29 S. W. Rep., 988]; *Cummins v. Syracuse*, 100 N. Y., 637 [3 N. E. Rep., 680].

Rejection of Testimony: 8 *Elliott on Railroads*, p. 2590, Note 2; *Laffin v. Railroad Co.*, 106 N. Y., 136 [12 N. E. Rep., 599; 60 Am. Rep., 433]; *Alabama R. R. Co. v. Arnold*, 84 Ala., 159 [4 So. Rep., 359; 5 Am. St. Rep., 354]; *Burke v. Witherlake*, 98 N. Y., 562;

Loftus v. Union Ferry Co., 84 N. Y., 455 ; *Dongan v. Transportation Co.*, 56 N. Y., 1 ; *Abbott's Trial Ev. (New Ed.)*, p. 722 ; *Brewing Co. v. Bauer*, 50 Ohio St., 560 [35 N. E. Rep., 55 ; 40 Am. St. Rep., 686].

Powell & Minahan, for defendant in error.

The plaintiff, Alice Anderson, in her second amended petition, avers in substance that in November, 1896, she was a passenger on a passenger train of the defendant, The Cleveland, Akron and Columbus Railway Company ; that it was dark when the train reached her destination ; that the station platform was distant about eight or ten inches from the steps of her car, and that in attempting to step from the steps of the car to the platform she fell between the steps and the platform, and sustained permanent injuries in her right leg ; that such injuries were caused by the negligence of the defendant in insufficiently lighting the station platform and car step, and so making it unsafe for the plaintiff in passing from the car to the platform, and that the conductor and brakeman carelessly and negligently failed to provide a light for her or to warn her of the danger.

The answer is a general denial and an averment of contributory negligence.

The evidence shows that the horizontal distance between the lower step of the car and the station platform was three and one-half inches and that the plaintiff in leaving the car had a small box in one hand and her dress in the other ; that she did not take hold of either of the railings at the end of the car, and that when on the second step, supposing she was on the bottom step, she stepped for the platform but missed it, and her foot went between the bottom step and the station platform, and her leg was injured. She testifies that she could not see the platform ; that the brakeman stood on the platform, between her car and the smoking car, with a lantern under his arm, but in such position that his body shut off all light from the steps and platform. The brakeman testifies that he held his lantern so as to light the way, and that he lifted his hand to assist her, but that she pushed it away. The defendant had made no provision for lighting the station platform, other than the lights in the bay window of the station about a car length from the place of the accident, and there is a conflict in the testimony as to how those lights lighted the platform.

It appears that the station and platform and the manner of lighting it are common, and the defendant offered testimony, which the court excluded, that no similar accident had ever happened.

The trial resulted in a verdict and judgment for the plaintiff, and the company contends that the verdict is not sustained by the evidence ; that the court erred in excluding evidence, and in its charge to the jury.

SUMMERS, J.

A carrier of passengers is not an insurer of their safety. Where, however, the danger of loss of life or limb from any defect in the vehicle or negligence in operating it are great, the carrier in those respects is bound to provide for the passenger's safety as far as human care and foresight will go ; but in respect to its stations and grounds and in matters where no such serious consequences are to be apprehended, the duty resting upon the carrier is to exercise ordinary care, that is, such care as prudent men are accustomed to exercise under similar circumstances. *Pitts. Ft. W. & C. Ry. Co. v. Brigham*, 29 Ohio St., 374 ; *McDonald*

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v. Chicago & N. W. R. R. Co., 26 Iowa, 124 [95 Am. Dec., 385]; McGrell v. Buffalo Office Building Co., 153 N. Y., 265 [47 N. E. Rep., 305], and cases cited.

The court charged the jury that "it was the duty of the defendant company, as a common carrier of passengers, to furnish a reasonably safe passage for its passengers going to and from the trains, and a reasonably safe place for getting on and off its trains, and to have its platform reasonably sufficient and safe in all respects, to be used by its passengers in getting on or off its trains. It is not necessary that it should be perfectly and absolutely safe; so great a degree of perfection is usually impracticable; but it must be reasonably safe and sufficient for all persons using it, who are themselves in the exercise of ordinary and reasonable care. Such lights as are necessary to render the use of the platform and the passage over it from the cars reasonably safe, should be at or about the platform, when passengers are leaving the train.

"If the accident happened without any negligence on the part of defendant alleged in the petition, the plaintiff cannot recover, though she may have used ordinary care and prudence. The defendant is not an insurer of the safety of its passengers, and is not liable for accidents not due to its negligence.

"It was the duty of the railway company to see that there was sufficient light at the point where plaintiff attempted to get off the car to enable her, by the exercise of reasonable care on her part, to do so in safety; but it is immaterial how or by whom the light was furnished, and if you find that the light so furnished was sufficient to enable her by the exercise of reasonable care and caution to get off in safety, then the plaintiff cannot recover, whether the light came from the lamps in the depot, or lights in the car, the brakeman's lantern, or the street light, or from all combined.

"It was the duty of the railway company to use ordinary and reasonable care in having the platform and steps lighted so that the plaintiff using ordinary and reasonable care on her part could alight in safety; on the other hand it was equally the duty of the plaintiff in descending from the car to the station platform, to use ordinary and reasonable care in view of all the circumstances to avoid receiving injury.

"While it was the duty of the railway company to see that the steps and platform were sufficiently lighted to enable the plaintiff to get off in safety, yet its failure in that respect would not excuse the plaintiff from the duty of exercising reasonable care and caution on her part, and if you find that when the plaintiff started down the steps of the car, the steps and platform were not sufficiently lighted to enable the plaintiff to see her way, but the brakeman was standing with a lighted lantern within a few feet of her, apparently for the purpose of assisting passengers to alight, but that the lantern was so held as not to shed light on the steps and platform, then it was the duty of the plaintiff in the exercise of reasonable care to proceed down the steps with care and caution proportioned to the danger arising from the want of sufficient light, and to use ordinary care and prudence for her own protection and safety."

These charges do not accurately state the law. They assume that lights were necessary to make the car steps and station platform reasonably safe for use by passengers. It may be contended that these charges impose the duty to light the steps and platform only if necessary to make them safe, and that the implication is that it was not defendant's duty to furnish any light if it was safe to use the platform and steps without such

light. The jury could not have so understood the charge. The principal contention was whether the steps and platform were lighted, and the attention of the jury was not directed to the question whether the passage to and from the cars was reasonably safe without any artificial light, and the jury might well assume that they were warranted in finding the defendant negligent if they found that it had not lighted the steps and platform. There are many stations where no light at all is furnished that are reasonably safe for passengers, and are safely used by many, and the testimony in this is that this station and platform were constructed and lighted as is usual at similar places.

It cannot be said as a matter of law that it is the duty of the carrier to light every station. His duty is to do what prudent men engaged in like business usually do or should do under similar circumstances. That is the standard by which it is to be determined whether he was negligent, and if the jury should be unable to find that under similar circumstances prudent men usually lighted or would light such places, or lighted them better, or that this place without a light, or without more light, was not reasonably safe for use by passengers in the exercise of ordinary care, then it was its duty to find for the defendant.

Patten v. Chicago & North Western Ry. Co., 32 Wis., 524; *L. N. A. & C. Ry. Co. v. Treadway*, 143 Ind., 689 [40 N. E. Rep., 807; 41 Ib., 794], and *Gaynor v. Railway Co.*, 100 Mass., 208 [97 Am. Dec., 96], are cited contra, but they are not in accord with the decision of our supreme court previously cited.

But the last three of these charges, excepting as hereinafter noticed, were given at the request of the defendant, and the giving of them therefore is not reversible error.

The last charge as requested by the defendant concluded with an instruction that in the event the jury found the facts therein narrated, it was the duty of the plaintiff to request the brakeman to shift his lantern so that she could see. This would not be so unless she should have apprehended danger. It does not appear that she had any reason to do so. She had used the station on previous occasions. It does not appear that she had observed that the steps did not overlap the platform and that there was a small space between them. It is not charged that the platform was faulty, and for aught that appears she may have been without fault in assuming that she could safely step off without seeing the platform; and even if she had never been at the place before, and did not know that there was a platform there, it might very properly be held to be a question for the jury whether she was not, in the absence of any warning from the brakeman, justified in walking by faith.

The cases are in apparent conflict on the question of the admissibility of testimony that no similar accident had happened.

In *Temperance Hall Association v. Giles*, 33 N. J. L., 260, *Depue, J.*, says: "It would not be competent for the party suing, to prove, as tending to show that it was a nuisance, that at other times other persons fell into the excavation. *Collins v. Dorchester*, 6 Cush., 396; *Hubbard v. Railroad Co.*, 39 N. E. Rep., 506. Nor is it competent for the defendant to introduce evidence that other persons, at other times, when the area was in the same condition, passed the place complained of without receiving any injury. *Aldrick v. Pelham*, 1 Gray, 510; *Kidder v. Dunstable*, 11 Gray, 342. The reason for excluding all evidence of this character is, that it would lead to the trial of a multitude of distinct issues involving a profitless waste of the time of the court, and tending to distract the

attention of the jury from the real point in issue, without possessing the slightest force as proof of the matters of fact involved."

In *Phillips v. Willow (Town)*, 70 Wis., 6 [84 N. W. Rep., 731, 732], where plaintiff's sleigh was overturned by a stone, and the question was whether the stone was in the traveled track of the highway and constituted a defect therein, and where it is held that evidence of similar accidents at the same place was admissible, Cole, C. J. says: "It is apparent that if this testimony was relevant to prove a defect, as was said in the *Bloor case*, *Bloor v. Town of Delafield*, 34 N. W. Rep., 115, 117, it would have been competent to show that these persons were not driving carefully, or had skittish teams; also that hundreds had passed over this highway in safety with carriages, notwithstanding the alleged defect. So, issue after issue would be raised, and facts collateral to the issue made by the pleadings would multiply; the main issue forming new ones, and the suit itself expanding like the banyan tree of India, whose branches drop shoots to the ground which take root and form new stocks until the tree itself covers a great space by its circumference."

See also *Moore v. Richmond* 85 Va., 538 [8 S. E. Rep., 387], where testimony that plaintiff's witness fell into the same hole the same night is held collateral and inadmissible. *Langworthy v. Green Township*, 88 Mich., 207 [50 N. W. Rep., 130], that it is not error to reject testimony, that no one had been previously injured by a log in the highway. *Hodges v. Bearse*, 129 Ill., 87 [21 N. E. Rep., 613], where it is held proper to refuse evidence that no previous accident had happened to the elevator during the four and a half years it had been in use. *Branch v. Libbey*, 78 Me., 321 [5 Atl. Rep., 71; 57 Am. Rep., 810], where it is held error to admit evidence that other persons had passed safely over an alleged defective street crossing. *Bremner v. Newcastle*, 83 Me., 415 [22 Atl. Rep., 382], a defective highway. *Hudson v. C. & N. W. R. R. Co.*, 59 Iowa, 581 [13 N. W. Rep., 735; 44 Am. Rep., 692], where evidence of a similar accident at a railroad crossing was held incompetent.

On the other hand, in *Lombar v. East Tawas*, 86 Mich., 14 20 [48 N. W. Rep., 947], McGrath, J., says: "The fifth error assigned is the admission of testimony that others had stepped into the same hole in the walk before the time of plaintiff's injury. Although there is a conflict of authority upon the question, yet, in my judgment, the testimony was admissible. The character of the walk in question was the subject of inquiry, to which attention was directed by the pleadings and the proofs. This testimony is clearly competent as bearing upon the existence and character of the defect complained of, and defendant should have been prepared to meet any proof aimed in that direction. Testimony of this character clearly tends to show the existence and nature of the defect in the walk. It may also tend to show constructive notice to defendant; and where the accident results in death or great bodily injury, it may, by reason of its publicity, tend to show actual notice to the municipality. It is not competent to show the exercise of reasonable care by the plaintiff, and should not be admitted for that purpose; but when testimony is admissible for one purpose and inadmissible for another, its improper application by the jury may and should be guarded against by proper requests limiting it to its legitimate purpose. Counsel for plaintiff, in offering the testimony, distinctly stated that he offered it for the purpose of showing the existence of the hole at that time; and for this purpose it was clearly admissible. From an examination of the cases it will be seen that the force of the argument against the admissibility of this class

of testimony is materially lessened when the testimony is restricted to its legitimate purpose."

In *Field v. Davis*, 27 Kan., 400, 405, where plaintiff's mules had backed him out of defendant's elevator, and the question was whether the defendant was negligent in not providing a barrier, Valentine, J., says: "The main question involved in the present case is, whether the elevator and the east approach thereto were reasonably safe for teams with loaded wagons to be driven up the approach and into the elevator and unloaded; or in other words, were they such as a reasonably prudent person exercising reasonable diligence, would consider safe for the purposes for which they were designed? And it seems to us that proof that thousands of teams, with loaded wagons, had for a period of five years been driven up the inclined plane and into the defendant's elevator and unloaded and the teams driven out again, and that no accident had ever before occurred, would be some evidence that the inclined plane and elevator were reasonably safe for that purpose, and that a reasonably prudent person, exercising ordinary diligence, would consider them safe, and for this reason we think the evidence was competent. If an accident had ever before occurred at that elevator, it would have been an easy matter for the plaintiff to have ascertained the fact, and to have shown it to the jury. * * * It would seem from the evidence that no such thing had ever before happened. Not even the railing had ever before been injured to any extent. This would seem practically to prove that the inclined plane and the elevator, with all their appliances and accompaniments, were reasonably safe. Of course, independent facts, not tending to prove any issue in the case, are not admissible in evidence; but facts which do tend to prove some issue in the case, although seemingly independent, are admissible, unless they are incompetent from some other reason than merely that they are independent facts."

In *the City of Topeka v. Sherwood*, 39 Kan., 690, 695 [18 Pac. Rep., 938, 936], a case of a defective sidewalk, Holt, C., says: "When the question of the proper condition or safety of anything constructed is to be determined, evidence tending to show that it served the purpose for which it was designed is always competent, and often the most satisfactory and conclusive in its character. On the other hand, evidence to show that frequent and repeated accidents resulted from its use, would be testimony tending to show that it was not properly constructed."

In *District of Columbia v. Armes*, 107 U. S., 519 [2 S. Ct. Rep., 840], it is held, in an action to recover for injuries from a defective sidewalk, that evidence of similar accidents at that place is competent as tending to prove the defective condition of the sidewalk and knowledge by the city of its condition. And on page 525, Field, J., says: "The frequency of accidents at a particular place would seem to be good evidence of its dangerous character,—at least, it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject."

In *Calkins v. Hartford*, 83 Conn. 57 [87 Am. Dec., 194], it is held that evidence that others safely passed over ice on a sidewalk when the ice was in the same condition as when the plaintiff received her injury is admissible to show that it was not dangerous to one using ordinary care. In *Doyle v. Railway Co.*, 42 Minn., 79 [48 N. W. Rep., 787], it is

held, when the conduct of a railroad company is not obviously dangerous, proof may be made that the conduct in question is in accordance with the general custom of other railroads under like circumstances; as tending to prove that it had exercised such care as ordinarily prudent men are accustomed to exercise under like circumstances; and when a thing is not obviously dangerous, that proof may be made that in long and constant use of it an accident had been unknown, as tending to prove that the company was not negligent in not anticipating an accident from its use. In *Bloomington v. Legg*, Admr., 151 Ill., 9 [37 N. E. Rep., 696], where the accident resulted from a horse's bridle catching on the spout of a drinking fountain, evidence of similar accidents is held competent as tending to prove that the fountain was dangerous, and knowledge of it by the city. In *Fraser v. Schroeder*, 163 Ill., 459 [45 N. E. Rep., 288], such evidence was held competent to show that certain machinery when unskillfully handled was dangerous. In *Mo., Pacific Ry. Co. v. Niswanger*, 41 Kan., 621 [21 Pac. Rep., 582], evidence of a similar accident was held competent as tending to prove negligence with respect to a railway station. In *Kent v. Lincoln*, 32 Vt., 591, such evidence is held competent as tending to show the fitness or unfitness of a highway for public travel. In *Matthews v. Cedar Rapids*, 80 Iowa, 459 [45 N. W. Rep., 894], *Hudson v. Railway Company*, *supra*, is followed, but *Granger, J.*, in the opinion, said if the question was an open one in that court, some of its members might take a different view. In *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y., 306, 310, *Folger, J.*, says: "A carrier of passengers is not bound to foresee and provide against casualties never before known and not reasonably to be expected. * * * Hence his duty is not to be estimated by what, after an accident, then first appears to be a proper precaution against a recurrence of it. * * * There is no proof that such an accident, or one like it in any of its features or causes, ever took place before. * * * If it be conceded that the occurrence of just the same thing again would be an act of negligence, it is still to be ascertained that it was one which on that, or any evening, was then reasonably to be anticipated, and which the defendant ought to have expected, as liable to take place in the natural course of things." Experience had not shown that such an accident ever happened; the danger was not obvious, consequently the defendant was not negligent in not apprehending it, and the conclusion reached was that there was error in overruling the motion to non-suit.

Loftus v. Union Ferry Co., 84 N. Y., 455, is to the same effect, and in the opinion *Andrews, J.*, says: "If the structure was intrinsically insecure, the fact that it had been used without injury before this would not exempt the company from responsibility, when an accident did happen from its defective condition." The learned judge evidently meant obviously insecure.

In *Laffin v. Railroad Co.*, 106 N. Y., 186 [12 N. E. Rep., 599; 60 Am. Rep., 438], it is held: "As a general rule, when an appliance or machine or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness." The case upon the facts is much stronger than the one under consideration. In that case there was not more light than here; the platform was higher than the lower step of the car and nineteen inches therefrom, and the plaintiff in attempting to step from the second step of the car to the platform missed it and fell. In the opinion

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on page 139, Earl, J., says: "It was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient and useful. It was bound to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purposes to which it was devoted. In the case of a platform which had always been safe, and answered its purpose, for men, women and children, and in all kinds of weather, by night and by day, for many years, what was there to suggest to any prudent person any change or improvement for the purpose or making it more safe or convenient?" Again he says: "On the evening when this accident happened, the evidence tends to show that it was dark, and that the platform was not plainly visible. It was somewhat lighted by light which came from the car windows, the depot windows and a lantern in the hands of the conductor; and it does not appear that it was ever lighted in any other way, or that it was usual to light such platforms in any other way. The fact that it was dark made it incumbent upon the plaintiff to take the greater care. She could have kept hold of the iron railing until her foot touched the platform, and then she would have been safe. It was not the duty of the defendant to furnish some one to aid her in alighting from the car." And it is held that the defendant was not liable.

In *Frobisher v. Fifth Avenue Trans. Co.*, 151 N. Y., 431 [45 N. E. Rep., 839], where it was averred that an accident to a passenger on an omnibus was caused by a step with an open back, it appearing that such steps were in general use and that no similar accident had happened, it was held that the defendant was not liable. To the same effect are *McGrell v. Buffalo Office Bldg. Co.*, 153 N. Y., 266 [47 N. E. Rep., 305], an elevator accident, and *Del Signore v. Hallinan*, 153 N. Y., 274 [47 N. E. Rep., 308], an accident in a trench.

No attempt has been made to collect the cases. Some of those referred to cite and consider others. In the New York cases the precise question is not made, but the reasoning of the court in each case proceeds upon the assumption that such evidence tends to show due care.

In *Temperance Hall Association v. Giles*, *supra*, page 263, Depue, J., says: "It is not practicable to lay down any principle by which a judge should be governed in determining whether any class of facts offered to be proved, comes short of the requisite of affording a reasonable presumption as to the matter in issue, but the inclination of the cases is to exclude all proof of facts which are *res inter alios acta*, unless their probative force, as presumptions, clearly appears, for the obvious reason that the other party cannot be presumed to meet such proof by counter proof, as to the truth of the fact offered. When such evidence is offered, everything depends on the nature of the case, to sustain which, or against which the evidence is offered."

It may not be practicable to lay down a rule so definite as to be easily applied, but that a rule may be prescribed is determined in *Brewing Co. v. Bauer*, 50 Ohio St., 560 [35 N. E. Rep., 55], where it is held that: "Any fact is admissible in evidence, though collateral to the main issues, which tends to prove or disprove the matter or fact in dispute."

In that case it was held competent to show a similar accident as tending to prove the dangerous character of a machine and the employer's knowledge of it, and much of the reasoning of the judge writing the opinion supports the conclusion here reached.

If it is competent to show a similar accident to prove that a machine is dangerous and the employer's knowledge of it, certainly it is equally competent where a machine is not obviously dangerous, to show that during a long period of use no similar accident has happened as tending to prove that its owner had no knowledge of its dangerous character, and was not negligent in not apprehending danger from its use.

The question here is whether the carrier had fulfilled his duty to provide reasonably safe accommodations, that is, whether in that respect he had exercised that prudence and foresight that a man of ordinary prudence would have exercised under similar circumstances, and in determining that question, the danger not being obvious, what stronger evidence could be offered that he was not guilty of negligence in not apprehending such an accident, than evidence that in daily use during a long period of time under like conditions no similar accident had happened?

For these errors the judgment is reversed and the cause remanded for a new trial.

ANIMALS.

[Franklin Circuit Court, January Term, 1901.]

Wilson, Sullivan and Summers, JJ.

THOMAS V. BOYSON.

1. INJURY BY VICIOUS DOGS—RECOVERY.

In an action to recover for personal injuries sustained by being bitten by vicious dogs kept by the defendant with knowledge of their viciousness it is error to instruct the jury that the plaintiff, if without fault, is entitled to recover.

2. WHEN EXEMPLARY DAMAGES—EVIDENCE.

In such an action, exemplary damages being sought, it is error to exclude testimony tending to prove that the defendant was not wanton or reckless in his manner of keeping the dogs.

HEARD ON ERROR.

W. C. Bates, for plaintiff in error.

John J. Chester and *A. T. Seymour*, for defendants in error.

The plaintiff below, Joseph E. Boyson, sued to recover for personal injuries inflicted by dogs belonging to the defendant, Daniel Thomas.

The averments of the petition are, in substance, that the defendant harbored and kept on his farm three vicious and dangerous dogs that he knew were accustomed to bite mankind, and that in wanton and willful disregard of the safety of others he unlawfully and negligently and habitually allowed them to go at large, and that they attacked and bit and wounded the plaintiff.

The answer admits that the defendant owned and kept the dogs, but denies each of the other allegations of the petition, and avers that he kept the dogs properly and carefully secured, and that they are not fierce or dangerous unless irritated and provoked; that he is about eighty years of age and lives alone with a female servant on his farm west of the city of Columbus; that he has no near neighbors, and that his farm is and has been overrun by tramps and thieves; that he suffers

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from nervousness induced by an attack of robbers who tortured him to secure his money, and that he keeps the dogs solely for the protection of himself and property ; that on the day plaintiff claims to have been bitten, and for years prior thereto, there were posted up at numerous places about his house and on the farm notices to all persons to beware, that he would not be responsible for injuries that persons might receive by coming upon the premises ; that the plaintiff was a trespasser, and that the dogs were under the restraint and control of his servant at his house until the plaintiff provoked them by menacing them with sticks and stones.

The evidence shows that the plaintiff came from the east to Columbus seeking employment, and that on the day he was bitten he went in search of work, walking from the city on a railroad track, and that seeing the defendant's residence, he went to it, across the fields, and when approaching the house, not by any walk or path from the public highway, but through the yard in the rear, the dogs came upon him, and he was seriously injured.

The defendant was not permitted to introduce evidence tending to support the averments of his answer as to his farm being infested with tramps, and as to his having been robbed.

The court, after stating the issues, charged the jury as follows :

"To enable the plaintiff to recover, he must prove that the dog was accustomed to bite mankind, and that the owner of said dog knew at the time that he was so accustomed to bite

"The owner of a dog is not in general liable for an injury committed by such animal while in a place where it rightfully might be, unless it be shown that the animal was vicious, and that the owner had knowledge of such vicious propensity.

"If you should find that said dog possesses the propensity to bite, you may determine whether the owner had knowledge thereof by anything that he may have said upon the subject, or any admission he may have made in this regard, if he said anything or made any such admission ; also by what may have been the general reputation of the dogs for viciousness and a disposition to bite, in the community where he resided and kept the dogs.

"A ferocious dog, known to the keeper to be accustomed to bite mankind, is to be regarded as at large, within the common import of those terms, when he is so free from restraint as to be liable to do mischief to man, and this such a dog is always liable to do when not restrained.

"You will, therefore, determine from the evidence whether or not the defendant properly restrained the dog in question, as the keeper of a vicious and ferocious dog is bound to keep it from doing injury, at his peril.

"If you find that the injuries were received in the manner and by the means alleged, and that the dogs were vicious and disposed to bite mankind, you will then inquire whether or not the injuries were received through the negligence of the defendant.

"Plaintiff has the right to keep the dogs for the purpose of protecting his life and property, but in so doing he must use due diligence in preventing the dogs from being at large and assaulting or wounding those who may lawfully come upon his premises in the day time.

"If the plaintiff, without fault on his part, was bitten by the defendant's dogs, then he is entitled to recover in this cause.

"If the plaintiff came upon the premises of the defendant for the purpose of seeking employment, and did not seek to provoke the dogs, or invite their attack, then the defendant is liable for the injuries, if any, received by the plaintiff.

"But if the plaintiff came upon the ground for any unlawful or criminal purpose, or after being upon the premises provoked the attack on the part of the dog, then he can not recover.

"If you find for the plaintiff, by way of compensatory damages you may allow him for reasonable expenses incurred for care and medical attendance made necessary by the injury ; value of clothing destroyed, if any ; loss of time that may have been sustained by reason of said injuries ; and the pain and anguish he may have suffered by reason of such injuries, including anguish of mind by reason of fear of hydrophobia, also reasonable attorney fees.

"If you, having found for the plaintiff, should further find from the evidence that the conduct of the defendant in keeping the dogs was wanton ; that in keeping the dogs he was wanton and willful, that he was reckless of all consequences, you have the right to add to compensatory damages, exemplary or punitive damages."

The trial resulted in a verdict for seven hundred and ten dollars, the jury specifying that \$500 was compensatory damages, \$10 punitive damages, and \$200 attorney fee.

SUMMERS, J.

It is contended that the verdict is against the weight of the evidence ; that the court erred in excluding the testimony tending to justify the keeping of the dogs, and erred in its instructions to the jury, and that the damages are excessive, because the plaintiff was seeking work, and the fact of his being bitten being the means of his obtaining employment was a benefit rather than an injury. These contentions other than the last will be considered.

In *Hayes v. Smith*, 62 Ohio St., 161, it is held that : "The gist of an action to recover damages for a personal injury inflicted by a vicious dog, is the keeping of the dog in a negligent manner, after knowledge of his vicious propensities, rather than the keeping of the animal with such knowledge."

This seems to be *contra* to the almost unbroken current of authority.

In *May v. Burdett*, 9 Q. B., 101 ; 3rd Eng. Ru. Ca., 108, in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the plaintiff, it was objected on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal. Lord Denman, C. J., in the opinion, says : "A great many cases and precedents were cited upon the argument ; and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it ; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities."

Then, after considering some of the cases, he says : "But the conclusion to be drawn from an examination of all the authorities appears

to us to be this: That a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed, without express averment. The precedents as well as the authorities fully warrant this conclusion. The negligence is in keeping such an animal after notice."

The same principle was applied at the same term (1846) by the court of exchequer in *Jackson v. Smithson*, 15 Mees & Wels, 565, a case of injury by a ram. Alderson, B., observing: I can see no distinction between the case of an animal which breaks through the tameness of its nature, and one that is *ferae naturae*;" and was applied also in the court of common pleas, in 1848, in *Card v. Case*, 5 C. B., 622, a case of a dog known to be ferocious.

In *Spring Company v. Edgar*, 99 U. S., 645, a case of an attack by a male deer, the same principle is applied. Mr. Justice Clifford in the opinion quoting from *May v. Burdett*, *supra*, says (652): "And the Chief Justice added, what it is important to observe, that the gist of the action is the *keeping* of the animal after knowledge of its mischievous propensities."

These English cases are cited with approval and the same ruling is made in *Popplewell v. Pierce*, 10 Cush., 509, a suit to recover for injuries inflicted by a horse accustomed to bite mankind and kept by defendants with knowledge of the fact. The same ruling is made in *Muller v. McKesson*, 73 N. Y., 195 [29 Am. Rep., 128]. The cases are reviewed in the opinion, and the defenses of contributory negligence, assuming the risk and negligence of fellow servants, are considered. In the opinion (199), Church, C. J., says: "It may be that, in a certain sense, an action against the owner for an injury by a vicious dog, or other animal, is based upon negligence; but such negligence, consists not in the manner of keeping or confining the animal, or the care exercised in respect to confining him, but in the fact that he is ferocious, and that the owner knows it, and proof that he is of a savage and ferocious nature is equivalent to express notice." Again, on page 200: "In some of the cases it is said that from the vicious propensity and knowledge of the owner negligence will be presumed, and in others that the owner is *prima facie* liable. This language does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal, and unless he can be relieved by some act or omission on the part of the person injured, his liability is absolute." And again on page 201: "The apparent conflict on this point (contributory negligence) arises, I think, mainly in not making a proper application of the language to the facts of the particular case. If a person with full knowledge of the evil propensities of an animal wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it can not be said, in a legal sense, that the keeping of the animal, which is the gravamen of the offense, produced the injury."

And again, on page 204, he says: "As negligence, in the ordinary sense, is not the ground of liability, so contributory negligence, in its ordinary meaning, is not a defense. These terms are not used in a strictly legal sense in this class of actions, but for convenience. There is considerable reason in favor of the doctrine of absolute liability for injuries produced by a savage dog, whose propensities are known to the owner, on the ground of its being in the interest of humanity, and out of regard

to the sanctity of human life, but as these animals have different degrees of ferocity, and the rule must be a general one, I think, in view of all the authorities, that the rule of liability before indicated is a reasonable one, and that the owner can not be relieved from it by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself, with a full knowledge of its probable consequence."

Wolf v. Chalker, 31 Conn., 121 [81 Am. Dec., 175], is a leading case in which the same conclusion is reached.

The same rule is followed in Laverone v. Mangianti, 41 Cal., 188 [10 Am. Rep., 269]. In a dissenting opinion, Crockett, J., says (148): "If the earlier cases establish a different rule, the interests of society demand that it should now be abrogated, considering the various useful purposes for which such animals are now employed."

He contends for the adoption of the rule laid down in Hayes v. Smith, *supra*.

Mann v. Weiland, 81½ Pa. St., 243, also follows May v. Burdett, *supra*. See also Roehers v. Remboff, 55 N. J. L., 475 [26 Atl. Rep., 860].

There are many cases that follow the rule, and expressly hold that the liability exists even to a trespasser. Loomis v. Terry, 17 Wendell, 497; Marble v. Ross, 124 Mass., 44; Sherfey v. Bartley, 4 Sneed, 58 [67 Am. Dec., 597]. The reason is that to repel a trespasser, no more force than is necessary may be used; that one may not kill or seriously injure another merely because he is trespassing or to prevent him from so doing, and that, since one may not, do indirectly what he may not do directly, he may not knowingly permit his vicious dogs to be at large, and then say to the trespasser when he is bitten, I did not set the dog upon you, and am not therefore liable. That result is so probable that it is presumed to have been intended, and is held to be wanton.

The rule adopted in Hayes v. Smith, *supra*, is perhaps more suited to present conditions, and therefore, wiser than that prevailing elsewhere. In his work on Torts, 411, Judge Cooley says: "But admitting the *prima facie* case, may not the keeper show that the animal was kept by him with due care and for some commendable purpose, and that he escaped under circumstances free from fault in him? The keeping of wild animals for many purposes has come to be recognized as proper and useful; they are exhibited through the country with the public license and approval; governments and municipal corporations expend large sums in obtaining and providing for them; and the idea of legal wrong in keeping and exhibiting them is never indulged. It seems, therefore, safe to say that the liability of the owner or keeper, for any injury done by them to the person or property of others, must rest on the doctrine of negligence. A very high degree of care is demanded of those who have them in charge, but if, notwithstanding such care, they are enabled to commit mischief, the case should be referred to the category of accidental injuries for which a civil action will not lie."

And in a note on page 412, he says: "As to the law respecting the keeping of wild beasts we should say that the higher cultivation of the intellect of the mass of the people, as compared with two or three centuries ago, and the recognition of wants in human nature then ignored, must have worked some changes, and that we must take up the common law of that period in this as in many other particulars more to locate accurately our point of departure than to fix definitely a stake to which we must tie and adhere. When wild animals are kept for some purposes recognized as not censurable, all we can demand of

the keeper is that he should take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him."

In many of the states statutes have been passed regulating the manner of keeping dogs. In Georgia the statute provides that "A person who owns or keeps a vicious or dangerous animal of any kind, and by the careless management of the same, or by allowing the same to go at liberty, another, without fault on his part, is injured thereby, such owner or keeper shall be liable in damages for such injury."

In *Conway v. Grant*, 88 Ga., 40 [13 S. E. Rep., 803; 14 L. R. A., 196], Bleckley, C. J., said: "The ferocious character of the dogs, and the knowledge of the owner are sufficiently alleged. The only matter of controversy is touching the fault of the plaintiff in exposing himself to attack by entering the premises of the defendant where the dogs were kept. There was an open gate in the rear of the premises, and the plaintiff, according to his declaration, was on lawful business, being in search of employment as a carpenter, and seeing indications that such work was probably carried on in a certain house, he entered the premises for the purpose of making engagement or to work, having no notice or knowledge of the dogs. In this way he became exposed, and was bitten. We think a cause of action is substantially set forth." Then, after quoting the statute as above, he says: "The fault here referred to is not that of being a trespasser, but that of being in some way instrumental in provoking or bringing on the attack complained of. 'It must, at the same time be understood that the right of redress of the injured person will be defeated if the injury was caused by his own fault. A person who irritates an animal, and is bitten or kicked in turn, is deemed in law to have consented to the damage sustained, and can not recover. But if the fault of the injured party had no necessary or natural and usual connection with the injury, operating to produce the injury as cause produces effect, the owner of the animal will be liable. For example, the defendant keeps upon his premises a ferocious dog, and the plaintiff, having no notice that such dog is there, trespasses in the day time upon the premises, and the dog rushes upon him and bites him, the defendant is liable, since it is not the necessary or natural and usual consequence of a person's trespassing upon a man's premises by day that he should be attacked by a savage dog.' Bigelow, Torts, pp. 249, 250. Though the gate was open, and the plaintiff was on lawful business, it may be that he had no strict legal right to enter the premises from the rear. But this would be no justification for leaving the dangerous dogs loose on the premises to bite him or others that might so intrude. Such dangerous means of defense against mere trespassers, the law will not countenance."

This, however, seems to apply the common law rule rather than the statute.

In *Swift v. Applebone*, 23 Mich., 251, in an action under a statute where liability did not depend upon scienter, Cooley, J., says, pp. 257, 258: "But we think that in any case of such injury, the fact of knowledge, in the owner, of the vicious disposition of his dog, may very properly go to the jury, as one to be taken into account by them in estimating the damages; and that one who knowingly subjects every person who passes his house to the risk of being torn by a savage beast, can not demand, as a right, that the recklessness of his conduct shall be excluded from the jury when compensation to the injured party is being estimated.

Thomas v. Boyson.

The jury should judge of such a case in view, of all the circumstances; and as the sense of injury suffered will depend very largely upon the disposition shown by the owner of the dog to respect or disregard the rights of others, it is proper that the jury know what that disposition has been. Recklessness of conduct, or the want of due and reasonable care, is an important element in estimating the damages in most cases of tort, and we know of no reason why this case should be made an exception. It would be absurd to hold that if defendants had instigated the dog to commit the injury, the plaintiff's recovery should be measured by the same standard that it would have been had the attack been made without their knowledge, by an animal never known to be vicious before; and if malicious conduct on their part should affect the damages, reckless conduct cannot be regarded as immaterial. The true course in such cases, we think, is to place all the facts before the jury, and let their opinion of the proper compensation to be awarded be formed of them all."

In the well considered case *Meibus v. Dodge*, 88 Wis., 300 [20 Am. Rep., 6], where a boy who attempted to take a whip from a sleigh on the street was bitten, it is held that if the defendant was guilty of such negligence as evinced a wanton disregard of the safety of others, the jury might give exemplary damages, and that where the case is one for such damages, proof of defendant's pecuniary circumstances is admissible.

In *Brown v. Carpenter*, 26 Vt., 638 [62 Am. Dec., 603], the trial judge charged the jury that every dog not confined, or physically restrained, is a dog at large. This is approved and Redfield, C. J., says, page 641: "We think that a ferocious and overgrown dog, known to the owner or keeper to be accustomed to bite mankind, is to be regarded as at large, within the common import of those terms, in a plea in bar, when he is so far free from restraint, as to be liable to do mischief to man or beast; and this, such a dog is always liable to do when not physically restrained, in the language of the judge in the court below. His being in the presence of his keeper affords no safe assurance that his known propensities will not prevail over the restraints, of authority. That is the case with men often, and always liable to be with ferocious animals, and is said by one judge: 'I think sufficient caution has not been used; one who keeps a savage dog is bound to so secure it as to effectually prevent it doing mischief.'"

In *Godeau v. Blood*, 52 Vt., 251, the court holds that apprehension of hydrophobia, although there is no evidence that the dog was rabid, is proper to be taken into consideration in determining the amount of damages.

In *Sylvester v. Maag*, 155 Pa. St., 225 [28 Atl., 392], a case in which the plaintiff was bitten on premises occupied by the defendant, the defendant placed on a post in a lane leading to the house a sign, "Beware of the Dogs." The plaintiff knowing that the dogs were accustomed to bite, and the evidence tending to prove that the plaintiff was lawfully on the defendant's premises when he was bitten, and that the dog by which he was bitten, was vicious, and that the defendant had knowledge of it; the court held that the plaintiff was not as a matter of law guilty of contributory negligence, but that the question was for the jury, and in a *per curiam* say in conclusion: "Those who indulge in the luxury, or enjoy the convenience, of keeping, within the city limits, dogs which they know are ferocious and dangerous, must see that they are so secured that

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persons lawfully going upon their premises or along the highways may not be bitten, or they must expect to suffer the consequences of their neglect to do so."

The charge of the court is to the effect that the plaintiff is entitled to recover if he was without fault and the dogs were vicious and the defendant kept them with knowledge of their viciousness. This, under the rule of *Hays v. Smith*, *supra*, is erroneous; the defendant is not liable unless the injuries resulted from his negligence in the manner of keeping the dogs.

It was attempted to make a case for exemplary damages, and it was error to exclude the testimony tending to prove that the defendant in keeping the dogs in the manner he did, was not reckless or wanton, and if this evidence had been admitted, it is probable, in view of the small amount allowed as punitive damages, that no punitive damages would have been allowed; and while attorney fees are recoverable as compensatory damages, they are recoverable as such only in cases proper for the infliction of exemplary damages. *Finney v. Smith*, 81 Ohio St., 529 [27 Am. Rep., 524], and the exclusion of the testimony was therefore doubly prejudicial, as attorney fees and punitive damages were both awarded.

For these errors the judgment is reversed, and the case remanded for a new trial.

IMPRISONMENT—HABEAS CORPUS.

[Ashtabula Circuit Court, March Term, 1900.]

Frazier, Burrows and Laubie; JJ.

IN RE CARRIE MCADAMS.

1. IMPRISONMENT—INDIGENT CONVICT—SEC. 1028, REV. STAT.

Where an indigent convict is sentenced to remain in the county jail until fine and costs are paid, the refusal of the county auditor to order a discharge from imprisonment in the exercise of the power conferred upon him by Sec. 1028, Rev. Stat., does not furnish a legal ground for discharge of the convict upon *habeas corpus*. In re Calvin L. Moore, 7 Circ. Dec., 575 (14 R. 237), not followed.

2. SENTENCE—OMISSION OF "OR SECURED TO BE PAID."

Where the sentence under Sec. 7327, Rev. Stat., omits the clause "or secured to be paid," such omission does not render such sentence void. If such omission is material, it is only an irregularity or informality and furnishes no valid ground for a discharge upon *habeas corpus*.

3. PERSON LAWFULLY IMPRISONED—SUPPOSED INJUSTICE.

When a convict is lawfully imprisoned, such convict cannot be discharged on *habeas corpus* on the ground that some supposed oppression or injustice will result from said imprisonment.

Lawyer & Redmond, for relator.

Starkie, prosecuting attorney, for state.

BURROWS, J.

Carrie McAdams was upon conviction for a misdemeanor, sentenced to pay a fine and stand committed to the county jail until the fine and costs were paid.

By *habeas corpus* proceedings she asserts the illegality of her continued imprisonment under said sentence on three grounds:

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That the county auditor wrongfully refused to discharge her from jail upon proper application therefor.

That the sentence of the court was defective and void.

And that if her application is refused she may be imprisoned indefinitely or for life.

After considering the evidence, arguments of counsel and law applicable to the case we are satisfied that her application for discharge must be denied.

1. The action of the county auditor under Sec. 1028, Rev. Stat., could not render her further imprisonment under a legal sentence wrongful.

It was not in the power of a jailer or judge to let her out of jail, because the auditor might have ordered her released, but, in his discretion, declined to do so.

Counsel in their argument seem to misconceive the scope and purpose of Sec. 1028, Rev. Stat. It does make the county auditor a commissioner of insolvents, to hear applications for discharge preferred by insolvent convicts. The auditor under this section is authorized to exercise his discretion in relieving the public of the unnecessary expense of boarding insolvent convicts, when, in his judgment, the public interests will be subserved thereby. He acts upon his own ideas of propriety; and upon his own knowledge, derived from personal inquiry, common rumor or otherwise. Only one limitation is placed upon his discretion, and that is he must be clearly convinced that the public can gain nothing by prolonging the imprisonment.

The convict cannot insist upon a hearing before the auditor or compel him to investigate the question of present or prospective insolvency.

It is not claimed that the action of the auditor can be judicially reviewed, except by *habeas corpus* proceedings; and only then, by the novel argument that a lawful imprisonment under a legal sentence is rendered unlawful whenever an auditor, in the exercise of his discretion, does not discharge a convict, and the court hearing the case upon *habeas corpus* is of opinion that the auditor, had he exercised better judgment, would have ordered a discharge.

2. It is also claimed that the sentence is so indefinite and defective as to render imprisonment under it unlawful. Its supposed indefiniteness and defectiveness consist in the omission of the words "or secured to be paid."

The statute provides:

Section 7327. "When a fine is the whole or part of a sentence, the court or magistrate may order that the person sentenced shall remain confined in the county jail until the fine and costs are paid, or secured to be paid, or the offender is otherwise legally discharged."

The sentence is certainly not indefinite or uncertain, for it orders the relator confined until she pays the fine and costs or is otherwise legally discharged.

The materiality of this omission is based on the assumption that under proper sentence the relator might have had her liberty by securing the payment of the fine and costs, whereas under this sentence she must pay down or stay in jail.

We are inclined to the opinion that the omission of these words in no wise prejudiced the relator and would not be good ground for reversal of the sentence on error.

By Sec. 855, Rev. Stat., the board of county commissioners are given plenary power "to compound for or release in whole or in part any debt, judgment, fine or amercement due to the county, and for the use thereof * * * they shall enter upon their journal a statement of the facts in the case, and the reasons that governed them in making such release or composition."

That the fine and costs for which judgment was rendered in this case were "due the county" is settled by Sec. 6802, Rev. Stat. While the judgment in form was in favor of the state the law provides that when the money is collected it shall be paid "into the treasury of the county * * * to the credit of the county general fund."

Full authority is also given the board of county commissioners by Sec. 7349-4, Rev. Stat., to release on parol any indigent prisoner confined in the jail of the county "for fine and costs alone" where there is no workhouse in the county; and take the written promise of the convict to pay in installments or otherwise.

So by Sec. 1028, Rev. Stat., the power of the auditor is to "discharge from imprisonment any person" confined in jail "for the non-payment of any fine or amercement due the county."

It can scarcely be doubted that these provisions of the statute give the officers named the power to discharge or parol convicts, and to release or compromise the fine and costs in all such cases of imprisonment regardless of the form of the sentence. This must be so; or we must hold that the court by its sentence can take away the power conferred by statute upon these officers, or in other words repeal the statutes of the state.

The real question is whether the alleged defect in the sentence made the sentence absolutely void as to that part directing imprisonment. We have already shown that the defect complained of could not deprive the relator of any right she otherwise would have had; and, therefore, in its legal effect, the sentence was in conformity with the statute. This supposed defect was a mere irregularity or informality and did not render any part of the sentence void.

That the writ of *habeas corpus* cannot be used to correct errors and irregularities in a sentence is too well settled to require discussion.

The statute regulating proceedings in *habeas corpus* provides in Sec. 5729, that the relator "shall not be discharged by reason of any informality or defect in the process, judgment or order," where the relator is in custody of an officer "by virtue of the judgment or order of a court of record."

In *Ex Parte Shaw*, 7 Ohio St., 81 [70 Am. Dec., 55], the trial court sentenced the prisoner to imprisonment for the period of one year, although the statute provided that three years should be the minimum term of imprisonment. This was held to be an irregularity that did not render the sentence void, and that it could not be reviewed, annulled or impeached upon *habeas corpus*.

8. The third ground for discharge of relator is that the writ of *habeas corpus* should be used to give liberty to the citizen whenever its use is necessary to prevent patent and flagrant injustice. It is said that otherwise an indigent convict, convicted of a minor offense, involving no moral turpitude, may, at the will and pleasure, or by the malice and caprice of the county auditor and board of county commissioners, be kept in jail during his natural life.

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It is a sufficient answer to this contention to say that courts are not authorized to intervene by *habeas corpus* to prevent injustice in such case, but on the contrary are forbidden to do so.

The power of courts and judges in *habeas corpus* is clearly defined by statute. By Sections 5741 and 5729 the power to discharge is limited to cases where the imprisonment is found to be unlawful; and cannot be extended beyond that to meet cases where real or fancied oppression and injustice are inflicted in pursuance of law.

By the law of this state where a fine is imposed as part of the sentence upon conviction for a misdemeanor the payment of fine and costs may be enforced by imprisonment, by order of court or by execution duly issued to collect the same.

The validity of these laws was fully established by the decision of our Supreme Court in Beall, In re, 26 Ohio St., 195. We are therefore compelled to ignore the claim of special hardship in this case, or we must make the absurd holding that imprisonment in strict pursuance of law, is unlawful.

This writ was allowed and the case fully heard upon its merits, in deference to the decision in Moore, In re, 7 Circ. Dec., 575 (14 R., 237), where a contrary holding is made. After a careful consideration of the able opinion by which that decision is supported we are unable to assent to the conclusions reached by that court.

We ought perhaps to add that we are unable to appreciate the danger of injustice to indigent convicts under our laws, which counsel for the relator seem to apprehend. The power of discharge, parol, compromise and pardon is conferred upon disinterested officials who are more likely to exercise their discretion too leniently than too harshly in such cases.

At any rate all citizens must submit to the laws of the country where they reside, and, when they commit offenses, cannot justly complain, if upon conviction they are compelled to work out the judgment for fine and costs, or submit to imprisonment for the same until released according to law.

We might also add in justice to the county auditor, that we find no cause to criticise his conduct in this matter.

The application for discharge of relator is refused.

GAS AND OIL LEASES.**[Hancock Circuit Court, May Term, 1900.]****Price, Norris and Day, JJ.****JOHN SILER ET AL. V. GLOBE WINDOW GLASS CO. ET AL.****TENANT MAY REMOVE TUBING, CASING AND DRIVE PIPE.**

A tenant under a gas and oil lease who has drilled a well which produces neither gas nor oil in paying quantities, and which he has abandoned on that account, has the right to remove the tubing, casing and drive-pipe from such well at anytime prior to the expiration of his lease. The things referred to are trade fixtures and are not governed by the law pertaining to leases for agricultural pursuits.

HEARD ON ERROR.*Jason Blackford*, for plaintiffs.*Ross & Kinder*, for defendants.**PRICE, C. J.**

The plaintiff, John Siler, as the surviving husband of Catherine Siler, and the other plaintiffs, as her heirs at law, now own lot 2841 in Shaffer's addition to the city of Findlay, Ohio. On September 9, 1891, Catherine Siler, the then owner, executed and delivered to Henry Flater an oil and gas lease, conferring upon him the right to drill the premises for oil and gas, to operate the same for a consideration of one-eighth royalty, from all wells producing oil up to fifty barrels per day, and one-sixth of the oil from all wells producing over fifty barrels per day; and if gas should be found, the lessor should receive \$25.00 for each million cubic feet of gas produced. The terms of lease extend to the heirs and assigns of the parties.

Flater assigned the lease to the window glass company and by transfer to David B. Gratly, defendant, he is now the owner of the same and defends in this action. In October, 1892, a well was drilled on the lot under the provisions of the lease which, after being fully cased and completed, produced gas sufficient to supply fuel for two or three dwellings on or near the lot, but not in sufficient quantities to market off the premises at any profit. For supply to these dwellings the evidence shows the well would be worth \$50.00 per year to their occupants, and that plaintiffs occupy one of these residences.

The lease is for a term of fifteen years, and as much longer as gas or oil is found in paying quantities. The well never produced oil, and has no value for oil purposes, nor has it any value as a gas well except for fuel for two or three residences as before stated. The lease, by its terms, has about six years yet to run, but the defendant has wholly abandoned the well, and has removed all machinery and all fixtures except the tubing, drive-pipe and casing, which he was about to draw and remove, when enjoined from so doing in this action.

The plaintiffs claim that defendant has no right to, or title in, the tubing, drive-pipe and casing, and that to remove them would permit water to enter and destroy the well for gas purposes; but it is not alleged or claimed that he neglects or refuses to plug the well as required by Sec. 4379, Rev. Stat. It is very plain from the facts, that the production of gas is of no profit or benefit to the lessees. The lease contains

this provision: "If gas is found in sufficient quantities to utilize, the consideration in full to the party of the first part shall be \$25.00 per million, or at the rate of \$25.00 per million cubic feet per annum for each well drilled on the premises herein described and so used."

In the printed part of the lease, there was originally this clause: "And the privilege of using enough gas to heat house on said premises," but these words were cancelled by a line run through them, and there is no right in the lease for the lessor to use gas for dwelling house or any other purpose.

By another provision of this lease, "the lessee is given the right of way over across the premises to the place of operating * * * and the right to remove any machinery or fixtures placed on the premises by them" (lessees).

Has the lessee, when the well fails to produce gas that can be utilized to the benefit of the parties, the right to remove the casing, drive-pipe and tubing from the well and the premises, during the term? And are such things fixtures within the provisions of the lease and the law?

It is expressly permitted that the lessee may remove machinery and fixtures, and we need not discuss that.

But plaintiffs claim that the casing, drive-pipe and tubing, when put in a well by the tenant, became part of the real estate, and as such, are not subject of removal.

This proposition is true of some things which the tenant may attach to the realty, but there is no inflexible rule that applies to the relation of landlord and tenant. Under leases such as is now under consideration, the lessee furnishes the drive-pipe, casing and tubing. They are his personal property, and to comply with the covenants of his lease, he must drill the well and place this personal property therein as a necessary part of the apparatus to drill and operate it. The drilling and operating oil and gas wells under leases, has become a trade or business of colossal proportions, requiring the expenditure of large sums of money, and drive-pipes, casing and tubing are of the nature of trade fixtures, and they are not to be judged by the rules which apply to agricultural pursuits. This distinction is made in Wood's Landlord and Tenant, page 895. The test of physical annexation has been overturned and the intention of the tenant has, in most cases, taken its place as trade fixtures. See *Hill v. Sewald*, 53 Penn. St., 272 [91 Am. Dec., 20] *Hanrahan v. O'Reilly*, 102 Mass., 201.

We quote from Wood's Landlord and Tenant, Sec. 528:

"The old cases upon this subject lean to consider as realty whatever was annexed to the freehold by the occupier. But in many times the leaning has always been the other way—in favor of tenant—in support of the interests of trade, which has become a part of state. What tenant will lay out his money in costly improvements of the land if he must leave everything behind him which is said to be annexed to it? Shall it be said that the great garden nurserymen in the neighborhood of cities and towns, who spend thousands of pounds in the erection of green-houses, hot-houses, are obliged to leave all these things upon the premises, when it is permitted that they are even permitted to remove trees, or such as become such, by the thousands, in the necessary course of business? If it were otherwise, the very object of their holding would be destroyed."

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Van Ness v. Packard, 27 U. S. (2 Pet.), page 187, is a case where one leased premises for dairy purposes for a term of years. He erected thereon for the prosecution of his business, a frame dwelling house, with a cellar and stone or brick foundation. Prior to the expiration of his lease he tore down the building and converted the material to his own use, and the landlord sued as for waste. Justice Story delivered the opinion of the court, affirming the tenant's right to remove the buildings at any time before the expiration of his term, and adopted the doctrine of *Elvres v. Maw*, 2 Smith's Leading Cases, 158. The court further said:

"It has been suggested at the bar, that this exception in favor of trade has never been applied to cases like that before the court, where a large house has been built, and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is of one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not."

When we keep in mind the thousands of dollars which oil and gas tenants invest in the tubing, drive-pipe and casing necessary to drill and operate wells, many of which produce nothing to remunerate them, it is not difficult to apply the principles of these and many other authorities that might be cited.

We consider these articles trade fixtures and governed by rules pertaining to that class of property, and they may be removed before the lease has expired.

The plaintiffs are not entitled to an injunction, and their petition is dismissed at their costs.

OIL AND GAS LEASES.

[Hancock Circuit Court, December Term, 1909.]

Price, Norris and Day, JJ.

KENTON GAS & ELECTRIC CO. V. JACOB ORWICK.

1. OIL AND GAS LEASE IS OF PRODUCTIVE LAND ONLY.

A lease for oil and gas purposes, providing that "if gas only is found second party agrees to pay \$100 in advance each year for the product of each well while the same is being used off the premises" is a lease of productive territory only. If the first well drilled is productive, there is an implied agreement upon the part of the lessee to drill other and a sufficient number of wells to develop the whole territory, but if the first well is unproductive, the lessee is not required to drill a second well or pay rental for any well.

2. SUPPLEMENTAL CONTRACT REVIVING ORIGINAL LEASE.

Where lessee, after the lease in question had become void by failure to drill a well within the time specified, paid the rental and agreed to immediately drill a well, and within six months to drill a second one, such contract is not an independent agreement to drill the wells, but is supplemental and should be construed with the original lease. The lessee's duties and liabilities are, therefore, to be determined by the rules above stated.

HEARD ON ERROR.

*F. C. Dougherty and J. E. Betts, for plaintiff.**John F. Rankin, for defendant.*

DAY, J.

The action in the court of common pleas was by Jacob Orwick against the Kenton Gas & Electric Company to recover \$200 on two causes of action for rent of gas lands as per contract and supplemental contract between the parties. By an answer the contracts are conceded, but liability is denied, on the ground that the farm of Orwick was non-productive of gas; so much so, that no rental became or was due under the terms of the two contracts. No reply was made to this answer, so that the averment of non-productive gas land is not put in issue, but is substantially admitted. The issues joined were tried to the court, a jury trial being waived by the parties, and resulted in a finding for plaintiff on the second cause of action for \$100 and interest. A motion to set aside the finding and for a new trial was overruled by the court, which gave judgment on the finding for \$105.25. A bill of exceptions, containing all the evidence, was secured, and the Gas and Electric Company prosecutes error and seeks a reversal of the judgment because of prejudicial errors said to be apparent on the face of the record.

It is assigned as error:

First: That the court erred in the admission of evidence.

Second: The finding is not sustained by sufficient evidence and is against the weight of the evidence.

There was no objection made to any offered evidence; no ruling was made and no exception was taken to any ruling of the court as to the admissibility of evidence, and no exception was noted in the margin of the bill of exceptions, and we conclude the criticism that the court erred in its rulings on the admission of evidence, was inserted solely for quantity, and to make the petition in error look as formidable as possible.

The only error assigned, therefore, of substance, is the one that the finding and judgment is contrary to the weight of the evidence and is not sustained by sufficient evidence. There is scarcely any conflict in the evidence. None at all, in fact, as to the oral testimony, for there was but one witness put on the stand, and that was Mr. Orwick himself; and the whole case depended upon the reasonable and proper interpretation and construction of the original contract of lease and the supplemental contract made on August 2, 1898, in connection with the conceded facts stated in the answer, that Orwick's farm was non-productive gas land. It seems the lower court construed the supplemental contract to be an absolute agreement by the gas and electric company to drill a second well and pay rent therefor, without reference to the question as to whether the land was productive of gas or not, or whether gas was obtained or not, in sufficient volume to be used off the premises. If this construction of the lease is right, the finding and judgment is right; if not, it is not. So the whole case hinges and turns on the reasonable and proper construction of the original contract of lease and the supplemental thereto.

The original lease provided: "If gas only is found, second party agrees to pay \$100 in advance each year for the product of each well while the same is being used off the premises," etc. A well was to be completed in ten months from the date of the lease, and upon failure the

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grant was to become null and void, unless upon "payment of \$1.00 per acre in advance for each year thereafter such completion was delayed." The date of the lease was September 9, 1896. The number of acres leased was ninety, and the life of the lease could be extended one year by the payment of \$90.00 in lieu of the completion of a well. If the first well proved a good one and yielded gas that could be used off the premises, there was an implied contract to make a second well and a sufficient number of wells to reasonably develop the whole land, ninety acres. There is no reasonable inference of obligation to drill additional wells unless the land proved to be productive of gas that could be utilized off the premises; in short, the lease was of productive oil or gas lands, and not of unproductive lands; and if the lands in question proved not to be oil or gas land, there was nothing in the contract or lease, that would require the lessee to drill a second well or pay rent for any well. No well, so the evidence is, was completed in ten months from the date of the lease, which would be July, 1897, and at that time the term of the lease was continued, by payment of \$90.00 rent, \$1.00 per acre, to July, 1898. In July, 1898, still no well was completed, and on August 2, 1898, the supplemental contract was made as follows:

"We have this day paid to Jacob Orwick \$90.00 which is received as rental upon the lease for one year from July 9, 1898, and we have paid same \$100, which is received as rental for first well upon said land, which is to be drilled as soon as it can be done, and it is agreed that the rental shall date from this date, and we do further agree that we will put the second well down within six months from the completion of the first well or pay rental from that date for the second well."

Signed the Kenton Gas & Electric Company, per Thos. Espy, President.

To ascertain the intention of the parties to this contract it is necessary to consider the original lease and the supplemental contract together, keeping in mind the purpose of the lease, and the conceded fact that the ninety acres was not gas-producing land. The original lease was not abrogated by the supplement, but was kept alive by it and the term extended for one year from July, 1898. By the terms of the lease it became void in July, 1898, for the want of a completed gas well; or the payment of \$90.00 rent; and it appears the sole purpose of the supplement was to relieve the lease from the forfeiture that might be claimed by the lessor because of a non-completed gas well or the payment of rent; so the supplement provided that rent for a gas well was to be paid, and to date from July 9, 1898; and the well was to be completed as soon as it could be; it was treated as a completed well from July, when in fact a well was not completed. A completed well at that date was a fiction agreed upon for the purpose of saving the life of the lease, with its original terms and conditions and provisions in force. "The second well," mentioned in the supplement, was the second well impliedly required to be drilled by the terms of the original lease; and was not a new and independent contract, absolutely requiring a second well, without regard to the developments made by the first well, as to whether or not the land was gas land. It was spoken of as "the second well," and undoubtedly referred to the original lease and the implied agreement therein to make a second well on condition, clearly understood, that the first well produced gas that could be used off the premises. If this construction is reasonable and correct, then the conceded fact that the first well was a failure, and the farm non-productive gas land, would defeat the plain-

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tiff's right to claim rental for the second well. If the land was not gas-bearing and gas-producing, there was no requirement on the gas and electric company to make a second well at all, or, if made and did not yield gas to be used off the premises, there was no requirement in the lease or leases that it pay rental therefor at all.

A majority of the court holds that the construction given the leases by the lower courts was not warranted; and that the undisputed evidence was to the effect that the plaintiff, Orwick, was not entitled to a finding and judgment against the defendant company. The finding and judgment is against the evidence, and is not supported by the evidence. The motion to set aside the finding is sustained; the judgment is reversed, the finding is set aside, and this court giving the judgment the common pleas should have given, gives judgment for the plaintiff in error that it go hence without day and recover its costs.

NORRIS, J., concurs.

PRICE, C. J., dissents.

CONTRACTS—CARRIERS.

[Lucas Circuit Court, March 2, 1901.]

Haynes, Parker and Hull, JJ.

FRED O. PADDOCK ET AL. V. TOLEDO AND OHIO CENTRAL RAILWAY CO.

1. CONTRACT CONSTITUTING SURRENDER OF CONTROL OF ELEVATOR.

Under a contract between an elevator company and a firm of commission merchants, whereby the elevator company, for the purpose of obtaining a fixed income from the elevator, not dependent upon varying crop conditions, agreed to furnish, supply and provide the commission merchants, for a period of five years, at an annual rental, with the full capacity of the elevator for storage of grain, saving such parts thereof as might be required for other customers, and to account monthly to the commission merchants as to all sums received from such sources, with further provisions that the elevator company should employ and discharge operatives, except the secretary of the elevator company, as the commission merchants might direct, that the commission merchants, in addition to the stipulated rental, should pay all operating expenses, including salaries of elevator employees, including the secretary, and all taxes and assessments, the commission merchants are substantially in possession and control of the elevator and the employees are employees of the commission merchants, and the latter, so far as an employer may be bound by an employee, are bound by the action of the elevator employees.

2. SUCH CONTROL NOT ESSENTIAL TO BIND COMMISSION MERCHANTS.

It is not essential, where delivery of grain received by a railroad company is to be at an elevator, that the owners of the grain, the commission merchants, should have possession or control of the elevator in order to be bound by the action of those in charge of such elevator. Where the delivery was to be at the elevator, and the receipt of the grain was to be by whoever might be in charge, the commission merchants or owners of the grain would be bound by the conduct of the persons in charge of the elevator.

3. DUTY OF ELEVATOR AND RAILWAY COMPANIES.

Under a contract between a railroad company and an elevator company by which the former has the right to use certain spur tracks, the property of the latter, and without interfering with their owner's use, for general railway purposes, and keep the same in repair, and deliver all grain consigned to the latter at its elevator at a specified price per car, when delivered at the termini of certain

railroads having track connections, etc., the railroad company is required to promptly move all car loads of grain so received to the elevator, and the elevator company has a corresponding or correlative duty of promptly receiving the cars and relieving the railroad of its obligation of an insurer unless the railroad company has assumed the obligation of further responsibility with respect to the care of the grain.

4. TERMINATION OF LIABILITY OF RAILROAD COMPANY.

There is no liability on the part of a railroad company as a common carrier for car loads of grain delivered by it in pursuance of a contract, and standing upon spur tracks on the premises of an elevator company, laid to store grain until it could be unloaded in the elevator, notwithstanding it had the further duty of switching such cars into the elevator when demanded by those in charge and switching the empty cars away. The liability of the railroad company terminates upon delivering the cars upon such tracks.

5. EVIDENCE OF PRACTICAL CONSTRUCTION OF CONTRACT.

The fact that the elevator company or its lessees provided a watchman to see to the safety of the grain upon cars delivered by the railroad upon the premises of such company, and to close the cars that had been left open by the inspector of the board of trade, is evidence of the construction placed upon the contract to deliver such grain, as to its being in the possession of the consignee.

6. RULE AS TO CARRIER'S LIABILITY—APPLICATION.

The rule of law that stipulations varying or limiting the liability of the common carrier must be strictly construed against the carrier, has reference to the question of the extent of the liability of the carrier during the period in which he is acting in such capacity and does not have reference to the question of when the liability of a common carrier ceases by the delivery of the property to the consignee.

HEARD ON ERROR.

King & Tracy, and *Porter Paddock*, for the plaintiffs in error.

Doyle & Lewis, for defendant in error.

PARKER, J.

The plaintiffs in error were the plaintiffs below and the defendant in error was the defendant below. The petition charges that the defendant in its capacity of common carrier, and perhaps also in its capacity of warehouseman, was derelict in the discharge of a duty that it owed to the plaintiff as a shipper. The petition sets forth that on and prior to September 20, 1898, the plaintiffs were partners, doing business under the firm name and style of Paddock, Hodge & Company; that the defendant is, and on and prior to the date aforesaid was, a corporation organized and existing under the laws of the state of Ohio, and a common carrier of goods for hire from Columbus, Ohio, to Toledo, Ohio. And then follow fourteen causes of action, all identical in form and every one founded upon the loss of a carload of grain; the aggregate loss is charged to have been \$5,865.45, and judgment is asked for that amount.

I will read one of the causes of action:

"For first cause of action herein plaintiffs say, that on or about September 10, 1898, they delivered to defendant and defendant as common carrier as aforesaid received, to carry and deliver to the "Union Elevator" at East Toledo, 81,190 pounds of ear corn, being the property of plaintiffs, and contained in car No. 8646, initialed T. St. L. & K. C. R. R., said corn being received by defendant from R. B. F. Peirce, receiver of the Toledo, St. Louis & Kansas City railroad, and being of the value of one hundred twenty-four and 76-100 dollars (\$124.76); and plain-

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tiffs say, that by reason of the premises it became and was the duty of defendant to carry said goods safely, and to deliver the same to the 'Union Elevator' aforesaid.

"But defendant did not safely carry and deliver said goods, but wrongfully and negligently failed so to do, whereby said goods were wholly lost to plaintiffs, to their damage, one hundred twenty-four and 76-100 dollars, with interest thereon from the 20th day of September, 1898, for which they claim judgment."

To this petition an answer was filed by the defendant, and the substance of the answer is well epitomized in a brief of counsel for defendant in error, from which I will read:

"The first defense of the answer admits that the defendant received these several cars loaded with grain from the respective carriers who had brought the same to the city of Toledo, to be switched from the various connecting points in said city to the premises of the Union elevator; and the first defense of the answer denies every other allegation and avers that the defendant did safely carry and deliver all of said grain.

"This defense is based upon the proposition that the undertaking of the defendant was simply to switch these cars and place them on the premises of the elevator company on the sidings provided for that purpose; and that having done so the defendant's connection with the cars of grain was wholly ended unless the plaintiffs should request it to move them again from the sidings adjoining the elevator building and place them in the elevator building."

I may add that it is a little difficult to determine whether by this first defense and certain other allegations in the answer it was intended by the defendant to deny that it received and transported these goods in the capacity of common carrier, but we conclude from the evidence that there is no doubt but what the goods were received and transported at least to the premises of the elevator company, by the defendant as a common carrier.

"The second defense pleads certain exceptions from liability contained in the bills of lading under which the goods were carried to Toledo; and as to this defense the plaintiff replies averring that the switching service of defendant was not rendered under the bills of lading, and on the trial on the objection of the plaintiff, the court refused to permit the bills of lading to be introduced; so that this defense disappears in the present posture of the case.

"The third defense proceeds upon the theory that even if the goods were accepted by the defendant as common carrier to be delivered into the elevator building, that they were destroyed by fire originating without fault of the defendant while they were standing on side track awaiting the convenience of the elevator company, and not awaiting the convenience of the defendant; and that, therefore, the defendant was not liable.

"The fourth defense proceeds upon the same theory as the third with the exception that in the fourth defense it is averred that the plaintiffs themselves were in possession and management of the elevator building and property and that it was due to the unreadiness of the plaintiffs themselves to take their grain that the same was left standing on the side tracks at the time of its destruction by said fire.

"The fifth pleads that the grain was destroyed by the negligence and carelessness of the plaintiffs themselves in their management and control of the elevator. The reply of the plaintiffs admits that the

defendant received this grain from the other carriers and placed the same upon the side tracks in question which were situated on land belonging to the elevator company, but aver that those tracks were in the sole possession and control of the defendant.

"The reply further admits that the grain was destroyed while so standing on said side tracks, but denies 'that defendant used proper care and skill to prevent the destruction of said cars of grain after so placing them upon said sidings or side tracks.'

"The reply concludes with a general denial."

After the testimony was closed upon both sides, on motion or request of the defendant, the jury was directed to return a verdict in favor of defendant, which was done, and upon this judgment was entered. To this action of the court the plaintiffs excepted and now prosecute error here.

The question, therefore, for our consideration is, whether there was any evidence introduced tending to establish a liability upon the part of the railroad company as a common carrier; and, assuming that the question is presented by the pleadings, whether there was any testimony introduced tending to show a liability upon the part of the railroad company as warehouseman.

The real, crucial question, which, if determined in favor of the defendant in error, puts an end to the controversy, that is to say, settles it in their favor, is, whether the grain was delivered by the railroad company to the plaintiffs and received by the plaintiffs, or delivered to the plaintiffs in such a manner and form as required them to receive it and assume responsibility for its care. And this question depends largely, I may say entirely, upon the construction to be placed upon certain written contracts, with certain parol modifications, and the operations or transactions of the parties thereunder.

The elevator in question is situated upon the east bank of the Maumee river in the city of Toledo, between the river and the main tracks of the Ohio Central railroad and immediately north of the right of way and tracks of the Lake Shore and Michigan Southern railroad. It is situated upon higher ground than the tracks of the Lake Shore & Michigan Southern railroad which run through there in a deep cut. Upon the elevator grounds there were six tracks, two of which entered the elevator building and all of which connected with the main track of the Ohio Central Railway; they were so constructed as to be available as sidings for the storage of cars, and possibly might be used to some extent in the making up of trains, but they were not situated so that they could be used in the ordinary way of sidings, but were rather "spurs," since they were not open at their southern ends; they came up to the bank on the north side of the cut of the Lake Shore & Michigan Southern railroad. They had been laid down and constructed as a part of the elevator property and upon its lands, the full name of the elevator company being the Union Railroad Elevator & Transportation Company of Toledo, Ohio, and evidently were laid to be used by the elevator company as a matter of convenience to that company in the storage of cars loaded with grain until such time as that the grain might be unloaded into the elevator.

I will now read the contracts to which I have referred. The first is exhibit No. 9, of the bill of exceptions, and it discloses the relations of the plaintiff and the Union Railroad Elevator and Transportation Com-

pany and their respective rights and obligations with respect to this elevator, side tracks and adjoining grounds:

"Memorandum of agreement, made and entered into this 14th day of February, A. D. 1898, by and between the Union Railroad Elevator and Transportation Company of Toledo, Ohio, party of the first part, and Fred O. Paddock, and James Hodge, partners as Paddock, Hodge & Company, of the same place, parties of the second part, witnesseth:

"First: That the said party of the first part being desirous of obtaining a fixed income from its Union elevator in Toledo, Ohio, aforesaid, which shall not be dependent upon the varying conditions of crops and grain markets, and in and for the considerations hereinafter set forth to be paid and performed by said parties of the second part, does hereby agree to and with said parties of the second part and their successors, from the 15th day of February, A. D. 1898, to the 15th day of February, A. D. 1903, to furnish, supply and provide said parties of the second part with all of the capacity of said Union elevator for the elevation and storage of wheat, corn, oats, rye and flaxseed; saving and excepting therefrom such parts thereof as may be necessary within said term for the accommodation of its other customers; provided, however, that any and all amounts received by said first party from said other customers, or any of them, by the way of storage or elevation charges, or otherwise, shall be duly accounted for to said second parties in monthly installments.

"And for the purpose of enabling said parties of the second part to utilize said elevation and storage capacity of said elevation to the best advantage during the time aforesaid, said party of the first part further agrees to employ and discharge such of its operatives and employees as said party of the second part may request, exclusive, however of its secretary.

"Second. And said parties of the second part in and for the considerations aforesaid, do hereby agree to and with said party of the first part to utilize said elevator and storage capacity of said elevator as hereinbefore provided, during the term aforesaid, and to pay therefor the following sums of money, to-wit:

"For the year ending February 15, 1899, the sum of \$15,000.

"For the year ending February 15, 1900, the sum of \$14,520.

"For the year ending February 15, 1901, the sum of \$14,040.

"For the year ending February 15, 1902, the sum of \$13,560.

"For the year ending February 15, 1903, the sum of \$13,080.

"The amounts so to be paid as aforesaid, to be so paid to said party of the first part in equal installments, the first of which shall be payable on the first day of April, 1898, and the remainder quarterly thereafter, upon statements to be rendered by the secretary of said party of the first part.

"And during each of the years aforesaid said parties of the second part further agree to pay said party of the first part as additional annual compensation for said elevation and storage capacity of said elevator, 1st, such sum as shall be equal to all taxes and assessments levied and assessed annually upon said Union elevator and the lands connected therewith and appurtenant thereto, including the taxes and assessments which are payable thereon in June, 1898, and excluding those due and payable after December, 1902; 2nd, such sum as shall equal the amount of the annual premium on \$135,000.00 of fire insurance on said elevator building and its appurtenances from and after the said 15th day of February, 1898; 3d, such sum as shall be equal to the annual opera-

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ting expenses of said Union elevator, including as such the salary of the secretary of said party of the first part, and the wages of its employes, office rent, telephone, fuel, office, engine and elevator supplies, etc.; 4th, such sum as shall be equal to the amounts paid by said party of the first part for the maintenance of said elevator and for all repairs to the same, and the appurtenances thereunto belonging that may be necessary to keep the same in the condition they are now in, reasonable wear and tear and casualties by or from the elements excepted; also excepting damages resulting from defects in machinery in, upon or about said premises at the date of the execution of this contract, or from the acts of God, and riot or insurrection; 5th, such sum as shall be equal to any amounts which said party of the first part may be obliged to pay to any of its employes or others by reason of any injuries that may be sustained by them in or around said elevator or its appurtenances, including as such any attorneys' fees incurred in defending any actions brought therefor.

"In witness whereof, said party of the first part has hereunto caused its corporate name to be signed by Alexander Backus, its president, and said parties of the second part have hereunto set their hands on the day and year aforesaid."

It is signed by the parties.

It appears that at the time of the loss of this grain and for some time prior thereto, Paddock, Hodge & Company had been operating this elevator under and in pursuance of the terms of this agreement and in substantial accord therewith; that they paid all these operating expenses including salaries and wages of the men, and though they may not have assumed to exercise it to any extent, they had the right to discharge employees, or, what amounts to the same thing, to require the elevator company to discharge employees, except only the secretary; the secretary having certain duties to perform with respect to the public that would make it inconsistent, perhaps unlawful, for Paddock, Hodge & Company, as the buyers and storers of grain, to have such exclusive control over that elevator as would result from the right to control the operations of the secretary, who gives out the warehouse receipts showing the amount of grain stored.

Our conclusion upon a construction of this contract and the undisputed evidence with respect to the operations under it, is that Paddock, Hodge & Company were substantially in possession and control of this elevator at the time of the loss of this grain and that the employees there were the employees of Paddock, Hodge & Company, and that to the extent that they could be bound by the action of the employees in the line of duty, Paddock, Hodge & Company were bound by the action of such employees in the premises. That, however, we do not deem entirely essential to the determination of the question involved. It is clear to our minds that whether they had this absolute control or not the delivery was to be at the elevator and the receipt of the grain was to be by whoever might be in charge of the elevator, and that therefore the plaintiffs would be bound by the conduct of the persons in charge of the elevator whether plaintiffs were in possession of and operating the elevator or not.

I call attention not to the agreement which fixes the respective rights and responsibilities of the plaintiffs and the defendant, with respect to one another. This is an agreement entered into between the Union Railroad, Elevator & Transportation Company and the Toledo & Ohio Central Railway Company with respect to the transportation of cars

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loaded with grain from the various Toledo termini of certain railroads entering the city of Toledo, to the elevator or the elevator premises; but it appears from the evidence, we think beyond dispute, that this contract, with certain modifications as to rates, was adopted by Paddock, Hodge & Company who stepped into the shoes of the Union Railroad, Elevator & Transportation Company and occupied the same position that they did with relation to the railroad company. If there could be any doubt about this, we think it is entirely clear that the oral arrangement, if it was intended to set aside this written agreement altogether, was substantially the same and should receive the same construction:

"Articles of agreement made and entered into this 18th day of May, A. D. 1895, by and between the Union Railroad, Elevator and Transportation Company, a corporation under the laws of Ohio, party of the first part, and the Toledo and Ohio Central Railway Company, also an Ohio corporation, party of the second part.

"Witnesseth: That whereas the party of the second part owns and operates a railroad near to and adjoining the property of the party of the first part in and about the elevator building of the party of the first part, and

"Whereas, the party of the second part makes use of these spur tracks in the transaction of its general railway business,

"These spur tracks had not been theretofore described, but they are described farther along.

"Now, therefore, it is understood and agreed between the parties hereto, that all said railway tracks connected with the railroad of the party of the second part, and located upon the land of the party of the first part, or on such portions of Yondota street near to and adjoining said land, of which first party has the right of use for railway purposes, are the property of the party of the first part, and the party of the second part has no ownership therein."

In other words, the six open tracks were the property of the elevator company and the railroad company has no ownership therein.

"The party of the second part, in consideration of the right to use said tracks in the transaction of its business, agrees to keep the same in good repair, so that said tracks may be safely operated, and further agrees to promptly switch cars to the elevator of the first party from all railroads with which the second party now, or hereafter may have, direct track connections, (said railroad now having direct connections with the Lake Shore & Michigan Southern, The Pennsylvania Company, and The Toledo Belt Railway Company) at a switching rate of one dollar per loaded car. No charge to be made for switching empty cars, or cars reaching the elevator over the T. & O. C. Ry."

"It is further agreed, that in operating and using the same in the transaction of its general business, the said second party will so operate and use said tracks as not to interfere with the use of them by the party of the first part; it being understood that the use hereby granted to the second party is in no wise to interfere with the use of the same by the party of the first part in the transaction of its business in and about its elevator as aforesaid.

"It is further agreed, that this contract may be terminated by either party upon twelve months' notice in writing."

And this contract is signed by the parties. Now it appears that in operating under this contract (a fact properly to be considered in determining the obligations of the parties, since it evidences the construction

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they put upon it), the defendant company would, upon the arrival of cars loaded with grain consigned to Paddock, Hodge & Company at the Union elevator, immediately proceed with a locomotive to the Toledo termini of the different roads with which it had this track connection, hitch on to the cars and bring them to the grounds of the elevator company. If the elevator were in operation and there were no cars in the way to prevent, or if directed to do so by the person in charge of the elevator, they would at once push these cars into the elevator, from which position they might be unloaded. They could not be unloaded from any other position but from two certain tracks, numbered five and six, respectively, inside of the elevator. These tracks inside of the elevator had a capacity of ten cars. The elevator had a loading capacity, that is to say a speed, of about ten cars per hour—perhaps they could be unloaded in a little less than an hour. If the elevator were not in operation, or if they were directed to do so, or if the tracks in the elevator were full, the persons in charge of the switching engine would cause the cars to be pushed upon certain other of these storage tracks, to-wit, Nos. 1, 2, 3 and 4, and there they would be deposited and remain until such time as the persons in charge of the operation of the elevator would direct the operators of the switching engine to place them inside of the elevator in position to be unloaded. In these operations it was not customary (and it is clear that it was not expected), to give to plaintiff any notice of the arrival of these cars upon the premises of the elevator company otherwise than as notice was conveyed to the persons in charge of the elevator and in charge of the matter of the placing or the directing of the placing and the unloading of the cars. These persons, at the time of the loss of these carloads of grain, were Mr. Parks, the superintendent of the elevator and a Mr. Smith, who was a subordinate of Mr. Parks. It appears that at times the plaintiffs would have consigned to them and arriving in the city over the different lines of railroads upwards of one hundred cars per day; I think one witness says as high as two hundred cars per day, at times. The contract, as well as the law, required the railroad company to *promptly* move these cars from the termini of the different roads upon which they would arrive to the elevator, and this rule of law and provision of the contract as well, imposed upon the plaintiffs a corresponding or correlative duty of *promptly* receiving the cars and relieving the railroad company of its obligation of an insurer, it being, in the transportation of the grain a common carrier and therefore an insurer of its safety. Upon the delivery of the carloads of grain at the point agreed upon, this liability terminated, unless by express agreement the railroad company had assumed the obligation of further responsibility with respect to the care of this grain. We do not find any evidence tending to prove that the railroad company had agreed to any extension of its liability as a common carrier.

From the whole situation, the operations under this contract and as well from the terms of the contract itself, it seems to us clear that the elevator company in the first instance, and Paddock, Hodge & Company as successors to their rights in the premises, reserved the right to the use of these tracks for their convenience for the storage of cars loaded with grain until such time as it became convenient for them to have it unloaded, and that they required prompt delivery of the cars at this point and upon these tracks for the very purpose of relieving themselves of the expense of possible warehouse charges, either on the part of other railroads entering Toledo or on the part of the defendant company

—for the custody and safe keeping of those cars loaded with grain. We think that under this contract requiring the railroad company to promptly deliver these cars it could not have sustained a claim against the plaintiffs for the safe keeping of the cars or for the custody of the cars as warehouseman, so long as the plaintiffs provided sufficient capacity for the storage of cars upon their spur tracks at the elevator. It is true that as the contract was construed by the parties and as they operated under it (and that seems to have been a fair and reasonable construction of it) after the cars were brought to the premises of the elevator company and placed upon these spur tracks the railroad company had not discharged its whole duty to the plaintiffs under the contract; the further duty rested upon the railroad company of moving these cars about, when called upon to do so by the persons in charge of the elevator, and putting them in convenient position to be unloaded; and after they had been unloaded the further duty devolved upon it of pulling away the empty cars and returning them to the railroad from which they had been received; but we do not understand that, under the contract or under the law, this duty of switching cars or of moving them from place to place upon these spur tracks, was a duty devolving upon it in its capacity of common carrier; we think it was an entirely independent duty, though not arising under a distinct and independent contract, but arising under the same contract. In our opinion its responsibility as common carrier ended with the delivery of the cars to the premises of the elevator company and the placing of them in such places as may have been designated by the persons in charge of the elevator. That this is the proper construction of the contract further evidence is furnished in the fact that after the arrival of the cars at this point, a watchman was provided by the plaintiff, or the elevator company, to see to the safety of the grain upon the cars, to close the cars that had been left open in the course of inspection by the inspector, whose duty it was, he being an officer appointed by the board of trade, to inspect the grain in the cars before it was elevated into the bins of the elevator; and the performance of this act by the inspector, was not simply an inspection of the property on behalf of the consignee, to see whether it came in good order, but it was an inspection to determine whether the grain was of a character permitting it to be placed in the elevator and was simply to mark it or grade it, and this was something required to be done, not by the railroad company, but independently of the railroad company, in order that the consignee might receive the grain into the elevator.

It is urged that there is a rule of law that stipulations varying or limiting the liability of the common carrier, are to be strictly construed as against the carrier, but we do not understand that this rule of law has any application to the facts of this case, that it has any reference to the question of when the liability of a common carrier ceases by delivery of the property to the consignees; but it has reference to the question of the extent of the liability of the carrier during the time that he is acting in the capacity of a carrier. Here the railroad company is not described nor characterized in the contract as common warehouseman, or otherwise, and its true character at every stage of its progress in performing the duties devolving upon it under the contract is to be determined by the nature of these acts and duties. The contract covers no stipulation in the contract of which it may be fairly said that its purport, intent or effect, is to limit the obligations of

common carrier, and therefore nothing calling for an application of the rule of construction invoked.

The cars in question, loaded with this grain which was destroyed by the fire, were received upon different days, between the twelfth and the twentieth of the month, so that some of them had been standing upon the tracks of the elevator company for seven or eight days before they were destroyed. Some of the cars of grain were received on the very day of the fire, the fire having begun at about 8:20 o'clock in the evening. With respect to those which had been thus placed on the spur tracks it seems to be undisputed that they had been placed there as directed by the persons in charge of the elevator; and there seems to be no question but what the cars had been delivered into the elevator as rapidly as the railroad company had been called upon to deliver them there. The last cars were received between four and half-past four in the evening of September 20th, and it is declared by the persons in charge of the switching engine, and it is undisputed, that they were directed by the person in authority at the elevator to not place any more cars inside of the elevator that evening. We think there is no question but what these cars were delivered there in due season and at a proper hour to be received, and no objection was made to the time, nor to their being received upon these spur tracks. The testimony shows beyond question that the elevator had been operated during that season of the year continuously, day after day, until near the hour of midnight; but upon this particular evening, Mr. Parks declared that they were not going to run late because they were going to clean up the elevator and do some other work and were tired out, and therefore it was that at his instance these cars were placed upon the spur track.

We think that these conclusions result naturally and necessarily from the undisputed evidence in the case. That there were no disputed facts, essential to a determination of the matter that should have been submitted to a jury by the court. To be sure, in the testimony of Mr. Mills and Mr. Paddock, and perhaps others testifying on behalf of the plaintiffs, there are certain declarations of their conclusions as to the rights and obligations of the parties under these contracts, but that testimony, of course, we are bound (as was the court below) to disregard; it is only the testimony as to facts that can be considered, and we think that these written contracts and the other undisputed evidence called upon the court to give a construction to the contracts, and to declare it to the jury as the contractual rights and obligations of the parties in the premises, and that therefore the court was justified in directing this verdict. There is a great deal of learning running along these lines as to the rights and obligations of common carriers and shippers, and counsel have shown a great deal of diligence and discrimination in the bringing forward of authorities, but according to our views the well settled elementary principles of law determine the rights of the parties here and there is no close question of law involved, and for that reason we have not taken occasion to review these authorities. Holding these views, the judgment of the court of common pleas will be affirmed.

NEGLIGENCE—RAILROAD COMPANIES.

[Lucas Circuit Court, February 23, 1901.]

Haynes, Parker and Hull, JJ.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. V. FELLER.**1. FAILURE TO PROVIDE SAFE PLACE TO WORK.**

Neglecting to remove cars from a track upon which an approaching train is directed to enter railroad yards after dark constitutes a failure to discharge the duty incumbent upon a railroad company of furnishing a safe place for its employees to work.

2. NEGLIGENCE OF FELLOW SERVANT AND SUPERIOR COMBINING.

Where the negligence of a superior servant or officer and that of a fellow servant combine and the two together cause the injury, the master is liable.

3. DUTY WHICH CANNOT BE DELEGATED TO ESCAPE LIABILITY.

Where a duty that the master is required to perform in the way of furnishing a safe place to work, or safe and sufficient appliances or machinery, is delegated to a servant, such servant stands in the place of the master. The master cannot delegate such duty and thus protect himself against negligence.

4. RULES APPLIED—RAILROAD COMPANY LIABLE.

Where the assistant general yard master of a railroad company directed the division yard master to remove cars from a certain track, which would be required for an approaching train, and the latter failed to comply with such order and sought to warn the engineer of the approaching train by leaving word with a switchman, the latter is not a fellow servant of a brakeman on such train, but stands in the relation of the master; and where such switchman failed or forgot to notify the engineer, and by reason of such failure the approaching train, entering the yards after dark and under a signal that everything was all right, collided with the cars in question, the railroad company is liable for resulting injuries to a brakeman.

HEARD ON ERROR.

E. D. Potter, for plaintiff in error.

Scribner and Waite, for defendant in error, cited:

Delegation of duty: *Bailey on Master's Liability to Servants*, 129; *Northern Pacific Ry. Co. v. Herbert*, 116 U. S., 642 [6 S. Ct. Rep., 590].

Questions for jury: *L. S. & M. S. Ry. Co. v. Mau*, Admr., 4 Circ. Dec. 5 (9 R. 173).

Evidence sufficient to sustain verdict: *P. C. & St. L. R. R. Co. v. Porter*, 32 Ohio St., 328; *Mowry v. Kirk*, 19 Ohio St., 375, 384; *M. & C. R. R. Co. v. Strader*, 29 Ohio St., 448; *Baker v. Pendergast*, 32 Ohio St., 494 [30 Am. Rep., 620]; *Bacon v. Daniels*, 37 Ohio St., 279, 283; *Weybright v. Fleming*, 40 Ohio St., 52; *Little Miami Railroad Co. v. Fitzpatrick*, 42 Ohio St., 318; 1 Bates Dig., 875.

Fellow Servants: Sec. 3365-22, Rev. Stat.

HULL, J.

This is a proceeding in error. The action was brought below by Alwilda M. Feller, administratrix of the estate of Eugene M. Feller, to recover damages on account of the death of Eugene M. Feller, her husband, whose death it was claimed was due to the negligence of the railway company. The case was tried and a verdict returned for \$5,000,

upon which judgment was entered, and it is to reverse this judgment that error is prosecuted here.

The deceased, Eugene M. Feller, at the time of the injury which caused his death, in January, 1899, was employed as a brakeman on the Lake Shore & Michigan Southern railway and was killed in a collision in the Air Line junction yards, in the city of Toledo, on January 28, 1899, the collision occurring about six o'clock in the evening, when it was dark. He was on a train that was coming into the yards, composed of about fifty cars, and which was being pulled by two locomotives. They were coming from the east and as they entered the western boundary of the yard the train was switched onto track No. 1, and a short distance inside of the yard they struck a "string" of cars, being about fifteen cars, that were located on track No. 1 at the time. The engineer saw the cars when they were one or two car-lengths away. He threw on the air, operated the air-brakes, and the speed of the train was checked very suddenly and with considerable violence to the cars, but the locomotive struck the cars on the track and the cars, or some of them in the train, were thrown together, and piled up upon each other, in such a manner that Feller was thrown off and fell between two of the cars, was run over and both of his legs cut off, and he died within a few hours thereafter.

The negligence complained of was in having upon that track No. 1 the cars to which I have referred when this train was admitted into the yard.

The defense was, that if there was negligence, it was the negligence of a fellow servant of Feller's and that therefore the company was not liable. The general principle of law is, of course, well established, that an employer is not liable for the negligence of a fellow servant unless so made by statute. That is a risk one assumes in entering into the employ of another. And the question here is whether the negligence was that of a fellow servant or of a servant superior to Feller, or of a servant or servants representing the master.

Word was received at the yard about five o'clock that this train would enter the yards in a short time, and Owen, the telephone clerk, sent word down, by telephone, to Webster, the switchman at the entrance of the yards, informing him, and Merrill, the assistant general yard-master, was informed and he informed Morris the day division yard-master, that this train was coming and to prepare the tracks for it, to clear the tracks. Morris told Merrill that these cars were standing on track No. 1, and that it would be necessary to get them off before that train entered the yards, and he was ordered to clear the track and prepare for this train. He responded that he would have to have "power," would have to have a locomotive with which to do this, and he was furnished one. Instead of beginning at once to clear the track No. 1, as he had been ordered to do he began to take cars off another track, and they ran out of water for the locomotive and were thus unable to get the cars on No. 1 off that track in time. Morris testifies that he could have gotten those cars off track No. 1 in five minutes, had he commenced work at once; but running out of water and not being able to get another locomotive at that time, the time arrived when this train was to enter the yards, and Morris informed Webster, the switchman at the entrance of the yards, that the track No. 1, upon which this train was to be switched was *not clear*, and that he should notify the engineer as he came through the switch to look out for cars upon this track. Webster remained on duty at his post

until about half-past five, or five twenty-five and was then relieved by Geneman, who succeeded him. I should have said that Webster, according to his testimony, told Geneman to notify the engineer as he came through, to look out for these cars, and Webster then went off duty leaving Geneman there, the cars still remaining upon track No. 1, upon which the coal train was to run when it entered the yards. The train was let in, was signalled to come on, and the switch thrown shortly before six o'clock, five minutes to six perhaps, it being dark, and they passed through the switch and the engineer testified to seeing Geneman there, but Geneman gave him no warning or notification of the cars upon this track, the engineer testifying that he had no knowledge of what track they were going on until they passed into this switch and were switched off onto track No. 1, and he proceeded with no knowledge of any obstruction upon that track and supposing it to be clear. When within a short distance of those cars they were discovered by the engineer, the collision occurred and Feller was killed.

It was the duty of the division yard-master to clear this track, to have it in proper condition for this train to enter, and, having failed to do so, he sought to warn the engineer by directing the switchman to give him notice as the train passed through the switch. Geneman was not called as a witness, he being the switchman who was on duty when the train entered the yards. It was stated, in argument, that the reason he was not called was because as a matter of fact he forgot to give this notice to the engineer and there was no claim made that he did give the notice to the engineer, but it is said that Geneman forgot to do it, and in that respect he was guilty of negligence. It is claimed that that is the negligence and the only negligence that can be complained of here against the company, and that Geneman, the switchman, was the fellow servant of Feller, the brakeman, and that therefore the company is not liable for the injury that resulted to the brakeman, on account of the negligence of Geneman, or the negligence of Geneman and Webster combined. It is claimed by defendant in error, that Webster might have been negligent in giving the notice to Geneman, or perhaps did not give him the notice at all, Geneman not being called as a witness.

The court below instructed the jury that the company would not be liable under these circumstances for the negligence of either Geneman or Webster; that they were fellow servants of Feller's, and for that reason the company would not be liable, for their negligence, to Feller, but that if their negligence combined with that of Morris, the yard-master, that then the company would be liable, for where the negligence of a superior servant or officer and that of a fellow servant combine and the two together cause the injury, that there the employer is liable. No objection was made to that statement of the law, and, as we understand it, it is the law as applied to fellow servants and superior servants on this question of negligence, and no exception whatever was taken to the charge, and under the charge as given, the jury returned a verdict in favor of the plaintiff.

It is claimed by the defendant in error that the switchmen, Webster, and Geneman, in the performance of these duties at this time, should not be considered as fellow servants, but as the representatives of the master and that their negligence should therefore be held to be that of the master. It is undisputed that the negligence of Morris, the yard-master, would make the master liable. The proposition is established by all of the authorities, that it is the duty of the master to furnish to his

employes a reasonably safe place to do their work and reasonably safe appliances and machinery with which to do the work. It has been held by many courts that a servant who is delegated by his master to perform this duty stands in the place of the master. A leading case, is *Northern Pacific Railroad Co. v. Herbert*, 116 U. S., 642, 646 [6 S.Ct. Rep., 590]. The opinion of the majority of the court was delivered by Judge Field, and in the syllabus of the case is this:

"An employer is not liable for injuries to his servant caused by the negligence of a fellow servant but this exemption does not extend to injuries caused by the carelessness or neglect of another person in the master's service in an employment not common to that in which the person injured is engaged, and upon a subject in regard to which the person injured has a right to look for care and diligence on the part of the other person as the representative of the common master.

"If no one is appointed by a railway company to look after the condition of its cars, and see that the machinery and appliances used to move and to stop them are kept in repair and in good working order, it is liable for the injuries caused thereby. If one is appointed by it charged with that duty, and the injuries result from his negligence, in its performance, the company is liable. He is, so far as that duty is concerned, the representative of the company."

And Mr. Justice Field says, on page 647 of the opinion:

"It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means, by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skilful co-laborers, or from defective machinery or other instruments with which he is to work."

The opinion contains a rather full discussion of that question. There was a dissenting opinion in this case but this stands as the opinion of the court, and as the law. There are many cases upon this subject; I will only cite two or three of them. One in 53 N. Y., 549, where the court say in the syllabus:

"A corporation is liable to an employe for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent entrusted with their performance.

"As to such acts, the agent occupies the place of the corporation, and the latter is deemed present and consequently liable for the manner in which they are performed."

And in another case, 80 N. Y., 46, the court say, on page 52 of the opinion:

"We are of opinion that the cases" (mentioning several cases) "are decisive against this contention. We understand the principle of these cases to be, that acts which the master, as such, is bound to perform for the safety and protection of his employes, cannot be delegated so as to exonerate the former from liability to a servant, who is injured by the omission to perform the act or duty, or by its negligent performance, whether the non-feasance is that of a superior officer, agent, or

servant, of a subordinate or inferior officer or servant to whom the doing of the act, or the performance of the duty has been committed. In either case in respect to such act or duty, the servant who undertakes, or omits to perform it, is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally or whether he did or did not do all that he personally could do by selecting competent servants, or otherwise to secure the safety of his employees."

The case as submitted to the jury by the court of common pleas does not necessarily require a discussion of this question or a determination of it by the court, as the court of common pleas held that the switchmen were fellow servants under these circumstances, with Feller, and the company was therefore not liable for their negligence alone, but, it was argued here, by counsel for defendant in error that, in any event, the company was liable under these circumstances for the negligence of the switchmen, and we are asked to pass upon that question.

The claim of the plaintiff in error is, that they were fellow servants of Feller as held by the trial judge, and that the evidence is insufficient to show any negligence on the part of Morris, the yard-master; that he having instructed Webster to give this notice to the engineer, that that constituted ordinary care on his part and that therefore there was no negligence.

The rule laid down by these authorities and others that might be cited, seems to be that where a duty is delegated to a servant, that the master is required to perform in the way of furnishing a safe place to work or safe and sufficient appliances or machinery, that such a servant stands in the place of the master; that the master cannot delegate such duty and thus protect himself against negligence. Was this duty which was delegated to these men the duty of the master? It was the duty of the railroad company to furnish a safe place for the operation of this train and the men who were employed upon it; it was their duty to furnish safe tracks for the train to pass over and if the ties or rails had been weak or rotten to the knowledge of the company, the company would be liable, and defective machinery, if the company had notice of it, would make the company liable for injury resulting therefrom. Now was this act of such a character as to bring the company within the rule of furnishing safe appliances with which to work and a safe place? This train of filthy cars was ordered to enter these yards in the dark, they were given the signal that everything was all right, to go ahead. The fifteen cars on track No. 1, were liable to cause great damage and injury to both the train and the men upon it; that rendered the track upon which this train was to run as unsafe as any such obstruction could make it. The company, through its agents and officials, had knowledge that these cars were there; they had knowledge through the yard-master and others, of the danger that there was in such a situation. Track No. 1 was in as unsafe a condition as it would have been, perhaps, if a bridge had been turned, or if the rails had been torn up, or the ties out of the track; and if that had been the case, if a part of the track had been up, clearly it would come within the rule making the master liable for not furnishing employees a safe place upon which to do their work, and it would be his duty to give notice to keep off that part of the track. Now it was primarily the duty of the yard-master, Morris, to get those

cars off, to see that this track was clear, before this train came in, and if he did not have the track cleared, to give notice to the engineer and to the men upon the train that they should look out for the cars. He undertook to have that duty performed by Webster, and he in turn by Geneman and no notice was given.

After an examination of this record and consideration of the authorities as we read them, it is our opinion that under these circumstances the switchman placed at this switch to notify the engineer of danger upon this track, stood in the place of the master, and that they could not be and should not be called fellow servants with Feller. The track was in an unsafe condition, liable to cause loss of life, limb and property; the train was ordered in upon the track, and it was the duty of the master to notify the engineer of the condition of that track, and that duty could not be delegated to a fellow servant of Feller so as to protect the master against the negligence of such a servant. As I have said, this case was submitted to the jury upon the other theory; that these men were fellow servants of Feller, and the jury were instructed that unless they found that Morris the yard-master was also guilty of negligence, that Feller could not recover, and it must be presumed that they found Morris was guilty of negligence, and that his negligence, combined with the negligence of Webster and Geneman, caused this injury.

It is claimed there was no evidence of negligence on the part of Morris, but we think there was a question to be submitted to the jury as to whether Morris did exercise ordinary care, or not. When he was notified that this train of fifty cars was about to enter this yard and that these cars were in on the side-track, and was ordered to clear the track, it seems to us that whether he exercised ordinary care or not in delaying and neglecting that duty until he had cleared another track, of which there was no immediate necessity, apparently, was a fair question to be submitted to the jury. He delayed beginning the work upon track No. 1 until the water was used up in the locomotive and then was unable to get those cars off. Whether it was ordinary care on his part, after he had failed to get the cars off the side track in time, to rely upon Webster's giving notice to the engineer as he passed through the switch without taking any other precautions to notify the engineer or give him warning that these cars were upon this side-track, it seems to us was also a fair question to submit to the jury. That Geneman, the switchman, who was on duty when the train went through, was negligent, is, of course, clear. And we think that the evidence is sufficient to sustain the verdict upon the law as given to the jury by the trial court upon the theory that the two switchmen were fellow servants. We can not say from this record that the jury were not warranted in finding that Morris did not exercise ordinary care. He was only a few hundred feet away when this train came in; I think the record shows seven or eight hundred feet; he was practically upon the ground and relied upon the switchman at the entrance of the yards giving this notice to the engineer and provided no other means for notifying him or warning him of this obstruction.

We are therefore of the opinion that the verdict was not against the evidence, nor contrary to law, and that therefore the judgment of the court of common pleas must be affirmed.

MUNICIPAL CORPORATIONS—FRANCHISES.

[Hamilton Circuit Court, January Term, 1901.]

Smith, Swing and Giffen, JJ.

W. M. AMPT ETC., V. CINCINNATI ET AL.*1. PNEUMATIC CONDUCTORS NOT AUTHORIZED BY SEC. 2651-17, REV. STAT.**

An ordinance granting to a corporation the right to the use of the streets for pipes or conduits for the purpose of supplying compressed air, to transmit packages of the various individuals who may apply and pay for such service, is not within Sec. 2651-17, Rev. Stat., authorizing franchises for the transmission of heat and power. Such ordinance does not authorize the conveyance of compressed air as a power for the benefit of the inhabitants of the municipality, as required by the terms of that section.

2. SHOULD FIX MAXIMUM AND UNIFORM ALLOWANCE.

And if in other respects valid, an ordinance for purposes mentioned should fix a maximum and uniform rate to be charged the public for the service contemplated. Otherwise it would be unreasonable and against public policy.

3. SHOULD ALSO REGULATE CONSTRUCTION.

Such ordinance should also prescribe the number, size, dimensions and material of the pipes or conduits, and the manner in which they shall be laid, or the details necessary to a complete conduit system, so that the city may know beforehand exactly what is to be built and may protect itself against abuses or unreasonable construction.

4. PERPETUAL FRANCHISE IS ULTRA VIRES.

A franchise for such a length of time as "the public shall be served by the delivery of power, etc.," and as long as the company shall pay to the city a certain percentage of its gross receipts, is perpetual and the act of the city, in thus surrendering control over its streets, is *ultra vires*.

5. TAXPAYER'S ACTION AGAINST A CITY.

Upon the refusal of corporation counsel to bring suit for an injunction against the city to prevent it from allowing, and to prevent a private corporation from using, its public streets for certain purposes (laying pneumatic tubes, for carrying packages by means of compressed air and supplying compressed air) a taxpayer has, under Secs. 1777 and 1778, Rev. Stat., authority to bring such suit.

6. JOINDER OF PARTIES DEFENDANT—QUO WARRANTO NOT THE REMEDY.

Such an action, seeking to restrain the city from allowing and the corporation from using the streets, is not a joinder of separate causes of action against several defendants, or a case in which it is necessary to proceed by *quo warranto* against the private corporation. The action is to enjoin alleged misuse of streets and the defendant company and all parties against whom relief is sought may be joined as defendants.

APPEAL from the court of common pleas of Hamilton county.

W. M. Ampt, for plaintiff, cited:

1. The franchise cannot be upheld under Sec. 3471a, Rev. Stat., because granted to a person and not a company.

Because said section does not authorize an underground franchise for any purpose.

Because the elimination of Sec. 3461 from Sec. 3471a, Rev. Stat., as amended, leaves no authority under the latter section to grant the franchise in question.

*For decision of the court of common pleas, see 9 Dec., 394.

Hamilton Circuit Court.

Because the power conferred by the franchise is not automatic, and conduits to supply "compressed air" are not authorized.

2. Nor can the franchise be upheld under Sec. 2651-17, Rev. Stat., because this section only authorizes the delivery of heat and power as a commodity to the inhabitants of a municipality while the franchise is for the delivery of merchandise and compressed air is not necessarily as a public service and to "use," but not to furnish "power."

As to the restrictions governing the action of municipal councils: *Gas Co. v. Avondale*, 43 O. S., 266 [1 N. E. Rep., 527]; *Railroad Co. v. Defiance*, 52 O. S. 260, 306, 307 [40 N. E. Rep., 89]; *Davis v. N. Y.*, 14 N. Y., 506, 532, 620, 621, 622; *Williams v. Sharp*, 27 N. Y. 611; *Coleman v. Railroad Co.*, 38 N. Y., 201; *Street Railroad Co. v. Covington*, 9 Bush (Ky.), 127; *Toledo Elec. St. Ry. Co. v. Light and Power Co.*, 4 Circ. Dec., 43 [10 R. 531]; *Wellston v. Morgan*, 59 O. S., 147 [52 N. E. Rep., 127].

The franchise ordinance is unreasonable in its provisions (a) because perpetual and not forfeitable: *Flynn v. Water Co.*, 74 Minn., 180 [77 N. W. Rep., 38; 18 N. W. Rep., 106]; 9 Kulp (Pa.), 241, 256; *Goszler v. Georgetown*, 19 U. S. (6 Wheat.), 591, 595; *Lewis v. Newton*, 75 Fed. Rep., 884; *Brenham v. Brenham*, 67 Tex., 542 [4 S. W. Rep., 143]; 31 Pa. St., 182.

(b) Because not for a public purpose: *Mikesell v. Durkee*, 34 Kan., 509 [9 Pac. Rep., 278]; 36 N. J. L., 79; *State v. Murphy*, 134 Mo., 548, 562 to 567 [31 S. W. Rep., 784; 34 S. W. Rep., 51; 35 S. W. Rep., 1132; 56 Am. St., 515].

(c) Because not fixing a maximum charge for serving the public, and the public is not required to be served except upon terms fixed by the grantee, nor upon terms equal to all. *Herbert v. Benson*, 2 La. Ann., 770.

(d) Because exclusive in the sense that no other person or grantee has the right to use grantee's conduits.

(e) Because city has reserved no right of control over the conduit or underground system of construction, and has failed to prescribe what it shall be.

4. The grantee, Quill, had no right to sell and transfer, and the defendant company had no right to buy or accept the transfer of the franchise in the absence of statutory authority authorizing the transaction. *Morawetz, Corporations*, 924, 931; See 1120, 1129; *Coe v. Railroad Co.*, 10 Ohio St., 372; *Atkinson v. Railroad Co.*, 15 Ohio St., 21, 38; *State v. Telephone Co.*, 36 Ohio St., 296 [38 Am. Rep., 533].

Philip C. Swing and Charles J. Hunt, corporation counsel, and *Herbert Jenney*, and *Campbell, Bates, Glen Dening & Meyer*, for defendants.

GIFFIN, J. (announcing judgment, no opinion).

The petition alleges that on January 17, 1898, the city of Cincinnati passed an ordinance which granted to Thomas A. Quill, his heirs, associates, assigns and successors, permission to lay pipes and other necessary appliances in the streets, avenues, alleys and public places of Cincinnati for the purpose of transmission of packages, letters, telegrams and other articles, which may be transmitted therein by the use of electricity, compressed air, or any other motive power which may be applicable to such systems as are now known as "underground pneumatic systems" and also for the purpose of supplying compressed air, provided that the transmission be granted upon the express conditions named in the ordinance. The conditions were that the grantee, his associates,

heirs, assigns and successors, shall furnish to the city of Cincinnati, on its streets, alleys, lanes, avenues, commons, etc., the service contemplated and authorized to be carried on, and similar services for the public buildings used by the city or any of its departments, at a price not exceeding that charged private consumers, but the city was not obliged to make use of said service. The board of administration was to have supervision of all work of construction, and to designate what portions of the street shall be broken up at a time, and at what and how many points the work shall be carried on. A bond of \$50,000 was to be given to the city to insure the restoration of its streets and to indemnify the city against any loss or damage consequent upon laying any pipe. Work was to be begun within one year from date of grant, and four miles of pipe were to be laid within three years, otherwise the ordinance shall be void. After three years from date of grant the grantee was to pay a percentage of his gross income, of one per cent. for the first year, two per cent. for the second year, three per cent. for the third year, four per cent. for the fourth year, and thereafter, annually, five per cent. Any assignee of the grantee was required to give the same kind of a bond as a condition to his acquiring any right under the assignment. The board of administration or its successor were authorized to call upon the police department to enforce any of the provisions of the ordinance.

The Cincinnati Delivery, Power and Refrigerator Company, one of the defendants, became the assignee of the franchise from Quill.

The suit was brought by the plaintiff as a taxpayer under Sec. 1778, Rev. Stat., who claimed in his petition the franchise ordinance was void.:

First: Because for a purpose unauthorized by law.

Second: Because made for an undeterminate period of time.

Third: Because it is an exclusive grant.

Fourth: Because not for a public purpose, or for the benefit of Cincinnati or its inhabitants, but for a private purpose and private profit.

Fifth: Because unreasonable in its provisions in not reserving in the city the privilege of regulating charges thereunder from time to time.

Sixth: Because failing to fix a maximum limit of charges, and in failing to prescribe the number, size, dimensions or material of the conduits and pipes to be laid, the manner in which they shall be laid, or the depth under the surface of the street.

Injunctions allowed for the reasons stated in the opinion of the court of common pleas, 9 Dec. 394 (6 N. P., 401), except the one that the grant is exclusive.

NEGLIGENCE—MASTER AND SERVANT.

[Ashtabula Circuit Court, 1900.]

Caldwell, Marvin and Hale, JJ.

GEORGE J. RECORD V. ALLISON DEAN.**NOTICE OF ONE DEFECT IN MACHINERY—INJURY FROM ANOTHER.**

Where a servant, having full knowledge of a stamping machine, notified his foreman on the day previous to the accident that the machine did not work properly, in that the press would not revolve or come down when the lever was pressed, whereupon the latter remedied the defect, and, on the following day, being informed by the servant that the machine "made too much noise," replied that it would be all right when steam was up and it could be operated faster, whereupon the servant went forward with his work without other assurance as to the condition of the machine, such servant is not entitled to recover from the master for injuries resulting from the fact that there were two revolutions or drops of the press from one pressure of the lever, where it does not appear that employer or employee had any knowledge that the machine was liable thus to revolve or that it had ever so revolved before.

HEARD ON ERROR.**HALE, J.**

The case of Record against Dean is pending here on petition in error, in which it is sought to reverse the judgment of the court of common pleas.

One of the specifications alleged for a new trial was, that the verdict was not sustained by sufficient evidence, and one of the errors assigned in the petition in error, filed in this court is, that the court erred in overruling the motion for a new trial for that reason.

The record discloses the fact that the plaintiff in error, Record, was engaged in Conneaut, in this county, in the manufacture of tin plates at the time of this accident, which was March 15, 1892.

Dean was an employee of the plaintiff in error, and on the day of the accident was working upon a stamping machine used in that business. It consisted of a table, with a press worked by a lever with a pressure of the foot, causing the press to fall upon the table upon which the tin was placed to be stamped.

It seems that when the operator put in the tin with one hand, and pressed the lever with his foot, the press descended and then went back immediately, the plate was removed with the right hand and another placed with the left.

On the day prior to this injury, Dean claims that he made complaint to the foreman of the shop that the machine was out of order, and did not work properly; that the foreman promised that it should be repaired and directed him to continue the work; that he did, in pursuance of such promise and under such promise, continue the work until he was injured.

The negligence alleged is, that the machine was out of order, did not work well and at times did not strike at all; that the press at times could not be made to descend at all, and at other times would descend with one pressure of the lever two or three times; that the racket and brake did not operate properly.

The employee having full knowledge of the condition of this machine upon which he was working, it is clear that in the absence of

any complaint made by him to the foreman of the shop or to his employer, and a promise to repair by the foreman or employer, no recovery could be had in the case. The danger incurred in the operation of this machine, in the absence of such notice and promise, was one of the ordinary risks assumed by the employee in entering into that employment.

The right to recover then, turns upon the fact whether complaint had been made or was made to the foreman, and whether the operator, the defendant in error, continued in that employment, relying upon the promise of the foreman to make such repairs?

Looking into the evidence upon this question, we find that on the day prior to this injury Dean complained to the foreman, or a man whom he alleges was the foreman, Sanford, that the machine would not trip; as he pressed the lever the press would not come down. Mr. Sanford, to whom that complaint was made, remedied that defect, the only defect of which complaint was made, and he went on using the machine until he was injured. No further promise whatever was made.

The next morning Mr. Dean complained to the same man, Sanford, that the machine made a racket, too much noise. He was told it was due to the fact that it was running so slowly, and as quick as steam was up it would be all right. He accepted that and went forward with his work. There was no promise on the part of the alleged foreman to repair at all, no promise made whatever, that would change the ordinary situation.

Plaintiff claims to have been injured from the fact that there were two revolutions of the press with one pressure of the foot upon the lever. There is not a particle of proof in the case that this machine ever revolved twice prior to this time; not a particle of proof that the employee or the employer had any knowledge or intimation that the machine was liable thus to revolve, and no complaint made by the employee to the employer, that it was liable or ever had so revolved.

Taking the evidence as it appears from this record, we are clearly satisfied that the verdict was clearly wrong, there was no evidence whatever to sustain the finding notice had been given to and promise made by the foreman to repair, and as I have said, without that the verdict could not be sustained.

All of this is upon the supposition that Sanford was the foreman in the shop, and the proper man to apply to to remedy defects in the machine, whose promise bound the employer.

That question was really not in dispute. He was not in fact a foreman or an assistant foreman at the time. There is some evidence tending to show that he was performing the duties of an assistant foreman at the time, but he was not in fact a foreman. Independent, however, of that question, the verdict of the jury was wrong.

Again upon the question of the defect in the machine; it was left very uncertain as to whether there was any defect, or if any defect, what it was; but perhaps the verdict should not be disturbed on that ground; but for the reason that the verdict was not supported by sufficient evidence, we think the judgment should be reversed.

We find no further error in this record.

The case will be reversed for the error in overruling the motion for a new trial, for the reason that the verdict was not sustained by sufficient evidence, and cause remanded.

OIL AND GAS LEASES.

[Harrison Circuit Court, May Term, 1900.]

Frazier, Burrows and Laubie, JJ.

H. W. BROWN AND EMORY MYERS V. OHIO OIL CO. ET AL.

1. CONSIDERATION IN GAS AND OIL LEASE.

The consideration of one dollar in an oil and gas lease is sufficient to sustain the grant of the privilege to the lessee of entering on the leased land for a specified period, to drill for oil and gas.

2. MUTUALITY IN GAS AND OIL LEASE.

That in such lease the lessee did not expressly promise on his part to fulfil the terms of the contract of lease, will not avoid the lease for want of mutuality, as, if within the specified term, the lessee entered upon the lands and exercised the privileges granted and found oil or gas in paying quantities, the law will infer a promise on his part to fulfil the terms of the lease.

3. SAME—CLAUSE MODIFYING HABENDUM CLAUSE.

A provision in an oil and gas lease for the term of two years, and as long thereafter as oil or gas is found in paying quantities, not exceeding in the whole term twenty-five years, that "in case no well shall be drilled on said premises within two years from the date hereof, this lease shall become null and void unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter, until a well shall be drilled," is not void as being inconsistent with the *habendum* clause, or as being against public policy, and confers upon the lessee the right to keep the lease alive as against the lessor for a reasonable time after the expiration of the specified time of two years, by tendering the specified yearly rental.

4. SAME—EXTENSION OF TIME A NEW CONTRACT—RECORDING.

Under such lease the payment at the end of two years of the additional sum per acre and the obtaining of further time to drill for oil and gas, would constitute a new contract or license, which would be void as against a subsequent lessee without actual notice, unless recorded, or unless the first lessee was in actual possession of the land leased.

APPEAL.

LAUBIE, J.

This case involves a dispute in regard to the validity of certain leases of oil and gas territory in this county.

A petition for an injunction and to remove a cloud upon their title, was filed by the plaintiffs against the defendants, February 15, 1899.

The lease under which the plaintiffs claim was one from Daniel Minard to one Snyder, dated November 12, 1896, and embraces the privilege of developing for oil and gas, the premises in question, comprising one hundred acres. This, through intermediate assignments from Snyder, reached the hands of the plaintiffs, who bring the action.

The petition alleges that no well was drilled upon the said premises within two years from the date of the lease, but that the lessee and his assignees elected to pay the rental provided for in the lease for further delay, and tendered the same to the lessor, and thus they kept their lease alive.

The defendant, The Ohio Oil Co., Daniel Minard having died in the meanwhile, early in February, 1899, and soon after the expiration of the two years referred to in the petition of the plaintiffs in which no well was drilled on the premises by them, obtained a lease from the widow who had a life estate in the premises, and all the heirs, perhaps, but two,

and notified the plaintiffs that they should not enter upon the premises for any purpose whatever, as it had obtained a lease of the land and was in possession; and the defendants claim that the lease of the plaintiffs became and was void and of no effect, by reason of the facts hereafter stated; and the oil company filed a cross-petition in which it asks for an injunction against the plaintiffs, and removal of their lease as a cloud upon its title.

The principal and controlling question, therefore, in the case is whether the lease which the plaintiffs hold, is or was a valid and subsisting lease upon the land after the expiration of two years from its date.

The *habendum* clause in the lease is in these words: "To have and to hold the same unto the lessee, his heirs and assigns, for the term of two years from the date hereof, and as long thereafter as oil or gas is found in paying quantities thereon, not exceeding in the whole the term of twenty-five years from the date hereof."

And there is a further provision in a subsequent part of the lease, which reads: "In case no well shall be drilled on said premises within two years from the date hereof, this lease shall become null and void, unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter, until a well shall be drilled."

It is under this provision of the lease that the plaintiffs claim that their lease is still a valid and subsisting lease, for the reason that they tendered the rental for a year to the owners before the expiration of the two years, and although no well was drilled upon the premises in the two years, that by virtue of this provision and the tender of the rental therein provided for, it extended their lease and kept it alive as a valid and subsisting lease.

On the other hand, it is claimed by the defendants that such is not the effect of what the plaintiffs did, and further that the lease itself was, in fact, void for want of mutuality; and that this special provision of the lease is inconsistent with the *habendum* clause, is against public policy, and has no force or effect.

As to the contention of the defendants, that there was no mutuality in this lease, as there was no promise upon the part of the lessee to do anything, that is not well taken in our opinion. The specified term in the lease is for two years and the lease conferred upon the lessees the right or privilege of entering upon the lands to drill for oil or gas to ascertain whether or not the land contained oil or gas in paying quantities, and for that privilege the contract specified he was to pay the sum of one dollar, the receipt of which is in the contract of lease acknowledged by the lessor.

It is entirely immaterial, as no fraud or mistake is alleged what the extent of that consideration is, as it is a valuable one. In this instance one dollar was a sufficient consideration to secure such privilege to the lessee, for the specified period; and if within the period specified, the lessee entered upon the lands and exercised the privileges granted, and found oil or gas in paying quantities, then he would be bound to fulfill all the terms of the contract of lease, notwithstanding he did not expressly promise that he would do so. The object of the parties being evidently to obtain the oil and gas for their mutual benefit, the law, under such circumstances, would infer a promise and obligation on the part of the lessee to carry on the project as contemplated in the lease, which could be enforced against him,

Harrison Circuit Court.

So far as the qualification, if it may be so called, of the *habendum* clause, is concerned, we again are not able to agree with the contention of counsel that that is a void provision and can have no force or effect. I refer, of course, to the provision that "in case no well shall be drilled on said premises within two years from the date hereof, this lease shall become null and void; unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter, until a well shall be drilled."

This provision would not extend the rights and privileges specified to the lessee for the full period of twenty-five years. It could not have that effect, but it must be given some effect in the consideration of this lease or contract. It cannot be rejected *in toto* for inconsistency because it qualifies or modifies the *habendum* clause, or gives the full period of the specified term for the drilling of the well.

We are to look to the language used by the parties to see what they did intend by their contract. There is no rule of law that I know of that prevents the parties from contracting as they see fit. They may make such provisions in their contract, whether as to land or what not, as they see proper if they are not in conflict with any known law, or with public policy. On this last point counsel claim that in the state of Pennsylvania at least, it has been declared in regard to such provisions that they are void because they are against public policy. We have not taken the trouble to investigate this, because we could not agree with any such decision, and it is useless to look it up.

A man who owns a farm has a right to contract for its sale, or the sale of any part of it as he pleases. If he does not want the oil and gas developed under it for twenty-five years, it is his right and privilege, and neither man, government nor courts can interfere with that right or privilege of ownership, so that this provision must have some effect.

We need not here determine the full extent of the rights of parties under that provision. It is unnecessary for us to decide that question, or to determine how many years such privileges might be extended by the payment of such rental. It is sufficient for us to hold that this provision has some force and effect; that it conferred upon the lessee the right to keep the lease alive as against the lessor, for a reasonable time at least, after the expiration of the specified term of two years by tendering the specified yearly rental.

In this respect the lease is different from the one considered in *Northwestern Ohio Natural Gas Co. v. Tiffin*, 59 Ohio St., 420, and must receive a different construction from that put upon that lease. In that case the court well held that the right to extend the time for the completion of the well by the payment of the yearly rental was confined to the specified term, because the specified term was five years, while the time for completion of the test well was but nine months. But here, the time for the completion of the well is just the same as the specified term, to-wit, two years; and the provision in question could have no effect or meaning if confined to the period of the specified term.

Under this lease no operations towards drilling a well were begun within the two years, the specified term in the lease, and no possession was taken of the land; nor was this suit brought until after the two years had expired, and not until the lease was made to, and the possession of the land taken by, the defendant, the oil company; so that, while plaintiffs had tendered to the owners the first year's rental spoken of as payment for further delay, and upon its refusal had deposited it in bank,

Brown and Myers v. Oil Co.

the bank specified in the contract of lease, for and to the credit of the owners, they had taken no possession of the lands. The lease itself and the assignment had been recorded, but that was all. No entry was made on the record of this tender, and no question of the effect of such entry is made.

Now, the question here is not between the lessor and the plaintiffs holding the lease, but it is between the plaintiffs and a subsequent lessee of the same lands, for the same purpose, and that subsequent lessee as disclosed by the evidence, and as I have said already, had taken and was holding possession of the premises at the time this suit was commenced and before any attempt to take possession had been made by the plaintiffs, and the lease to the defendant oil company had been recorded, in pursuance of the statute. Under this state of facts, as between these lessees all rights under the lease to the plaintiffs ceased and terminated.

The lessee had paid a consideration for the privileges specified for the term of two years, but no longer, and all rights under the lease then ceased unless some new contract was made and recorded as provided in Sec. 4112a, Rev. Stat. That section provides: "That all leases and licenses, and assignments thereof or of any interest therein" of the kind involved herein, shall be recorded in the lease record in the office of the recorder of the proper county, and "no such lease or license hereafter executed or given, unless the person claiming thereunder is in actual and open possession, shall have any force or validity until the same is filed for record as aforesaid, except as between the parties thereto."

The lease, as we have seen, provided how a new contract might have been made. It gave the lessee the option of making a new contract upon a new and an increased consideration, but to obtain this new right or license, the lessee must have elected to avail himself of that provision of the lease, and pay or tender the increased or new consideration for the further time to the lessor. As between the lessor and lessee, if this were done, that would be sufficient, and would make it a binding and valid lease for such a period as they might agree upon, or the rental might be accepted for, or for such a period as a court might hold was reasonable in view of the object and intention of the parties in making the lease. But this was not sufficient under our law to make it a valid and subsisting lease as against a subsequent lessee. As to such person, the extension must be in writing and recorded, or the lessee must be in actual and open possession of the land.

Now, there is no claim that either of these things were done by the lessees; that is, they neither had a new arrangement reduced to writing and recorded, nor were they at any time in actual and open possession of the land.

The Northwestern Ohio Nat. Gas Co. v. Tiffin, *supra*, disposes of the case upon this proposition upon principle.

The lease in that case provided in the *habendum* clause: "The party of the second part, his heirs or assigns, to have and to hold the said premises for and during the term of five years from the date hereof, and as much longer as oil and gas is produced or found in paying quantities thereon;" and the lease subsequently provided that "It is further agreed that the party of the second part shall complete a well on the above described premises within nine months from the date hereof, and in case of failure to complete such well within such time, said party of the second part agrees to pay to the said party of the first part for such delay, a yearly rental of 50 cents per acre on the premises herein leased

from the time of completing such well as above specified until such well shall be completed."

There was no well drilled within the time, and it ran along, the lease having been assigned to the plaintiff, and to the lessor the assignee paid an increased consideration for further delay; instead of 50 cents an acre, \$1.50 an acre was agreed upon, and was paid.

The court held that this provision for further extension of the lease was valid for the period of five years, the specified term, and that the lessees could, by paying the rental therein provided for, extend the time to complete the well from the period of nine months to five years, from year to year, but that it was of no avail thereafter as against third persons unless some new contract was entered into, and recorded, or actual possession taken of the land.

Williams, J., delivering the opinion, upon page 443, says: "There having been no possession taken under the lease, nor effort made to develop its producing qualities as contemplated within the required time, an examination of the record, while it would have discovered the existence of the lease, would also have disclosed that it had expired and ceased to be a subsisting burden on the land. The agreements between the plaintiff and Taylor for the extension of the lease, were, in effect, new leases; and their record, or possession under them, was necessary to give them any validity whatever except as between the parties to them. And, such record or possession was also necessary with respect to the receipt given to the plaintiff by Shoupe after he became the owner of the premises, if that is to be regarded as an agreement by him to extend the terms and conditions of the original lease. As neither of these instruments was of record, nor any one claiming under either in possession of the land when the city of Tiffin took its lease from Shoupe, and as the original lease had then expired, there was no obstacle arising from either, in the way of the city then obtaining a valid lease from Shoupe, superior to the claim asserted here by the plaintiff. Such a lease the city appears to have obtained, and it cannot be deprived of its enjoyment at the suit of the plaintiff."

Under the contract here the specified term was for two years, and while there was a clause in the lease which provided that under certain conditions the lessee might obtain a license for a further time, yet that arrangement would constitute a new contract, or a new license. It was required that the lessee should not only elect to accept that provision, but should notify the lessor, and should promise to pay, and pay a new and increased consideration of one dollar per acre per year, which when done and performed would make a new agreement between the parties and binding between themselves. As between them no record was needed of such an agreement, and no possession was required to be taken by the lessees; but as against the defendant oil company, one of these two things was requisite in order to defeat its right as such subsequent lessee. The record would not show that the lease had been kept alive by the payment of the specified rental, nor was the lessees in possession.

The result is that a decree must be entered for the defendants, and a perpetual injunction is granted against the plaintiffs from interfering with the premises as prayed for.

INSURANCE—FIRE.**[Pickaway Circuit Court, November Term, 1900****Cherrington, Russell and Sibley, JJ.****IMPERIAL INSURANCE CO., LTD., v. SALEM S. WOLF ET AL.****1. FIRE INSURANCE—ASSIGNMENT—PAROL EVIDENCE MAY VARY.**

An assignment, absolute in form, of a policy of insurance against loss by fire, may be proved by parol evidence to have been given and accepted as collateral security for a debt due from the assignor to the assignee, though the fact that the assignment was intended as collateral security was not communicated to the insurer.

2. ASSIGNMENT AS SECURITY VALID, WHEN.

An assignment of a policy of fire insurance, absolute in form but intended as collateral security for a debt due from the assignor to the assignee, is valid, and does not avoid the policy, where such an assignment is not prohibited therein, and no misrepresentation of facts is made to the insurer, its assent being given without inquiry.

3. ASSURED AND MORTGAGEE MAY JOIN IN SUIT.

Where a policy of fire insurance contains a clause making loss, if any, payable to the mortgagee in case of fire, and assured afterwards, not observing such clause, transfers such policy to the mortgagee, by assignment absolute in form, but intended simply to indemnify the mortgagee in case of loss, the assured and the mortgagee may join in an action upon such policy.

HEARD ON ERROR.

J. W. Mooney, for plaintiff in error.

Abernethy & Folsom, and *Robert Swinehart*, for defendants in error.

RUSSELL, J.

The case of the Imperial Fire Insurance Company against Salem S. Wolf et al., is a petition in error filed in this court to reverse the judgment of the court below, because it is claimed the court erred in overruling the demurrer of the plaintiff in error to the petition of the defendants in error; that the court erred in overruling the motion of plaintiff for a new trial; that the court erred in the admission of evidence offered by the defendants in error against the objection of the plaintiff in error; that the court erred in ruling out evidence offered by the plaintiff in error, and that the court erred in rendering judgment for the defendants in error and against the plaintiff in error for the reason that said judgment is contrary to law, against the weight of the evidence, and is not supported by the evidence, and that said judgment was given for the defendants in error when it ought to have been given for plaintiff in error.

The action below was brought by Wolf and Orr, Brown & Price, against the Imperial Insurance Company to recover on a policy of insurance. The policy was issued on March 29, 1899, and covered the dwelling house and the furniture therein, and the contents of a drug store, and a barn and the contents of the barn, and was in the sum of \$1,900.

It appears that at the time of the issuing of the policy there was a provision in it to cover a claim of Orr, Brown & Price as their mortgage interest might appear, subject to the condition of the policy.

There are a large number of facts set up in the answer; among them is one that at the time of the destruction of this property Wolf was not

the owner, and that Orr, Brown & Price were the owners, and that there never was any notice given by them; that Wolf made a false affidavit after the loss, and that he represented at the time the insurance was taken out, that there was only \$800 of a mortgage on the property when there was \$1,240, and then denies that he has complied with the conditions of the policy entitling him to recover.

The principal question presented to the court for consideration is:

That the court erred in the admission of parol testimony showing the conditions under which Wolf assigned the policy of insurance to Orr, Brown & Price. It is admitted by the defendant in error, Wolf, that he made an assignment on the policy which is as follows:

"Assignment of interest by insured." "The interest of Salem S. Wolf as owner of property covered by this policy is hereby assigned to Orr, Brown & Price, subject to the consent of the Imperial Insurance Company, Limited."

The consent in this case by the company to the assignment is as follows: "Consent of company to assignment of interest. The Imperial Insurance Company, Limited, hereby consents that the interest of S. S. Wolf, as owner of the property covered by this policy, be assigned to Orr, Brown & Price," and then the names of the agents are signed to the policy.

Now, it presents this one question: Whether or not, where a policy is assigned, parol testimony can be introduced to show whether it was an absolute assignment, or simply an assignment to secure the creditors of the assignor.

That is the question presented to this court, and there are a large number of authorities presented by the attorney for the plaintiff in error, from which it is claimed that when an assignment is made it is absolute, and that no evidence can be introduced to vary the assignment; and therefore, that in this case, Wolf can not bring this action because he has no interest in the policy and did not have at the time of the fire. If that was true, then he could not bring the action, because he was not a party in interest, and had no claim upon the property.

Let us see how the case stands. If this was an action between Wolf, and Orr, Brown & Price, is there any doubt but what Wolf could show that this was a conditional assignment? We think not. Can it be said, because the insurance company consented to the assignment that was made by Wolf, that therefore there can be no parol evidence introduced to show the conditions upon which the assignment was made?

It is not pretended here that there was any fraud; nor that Wolf made any misrepresentations to the company when it consented to have the assignment made, nor that he represented that he was making an absolute assignment. If that was the case, then he could not recover on the policy; but he did not make an absolute assignment. He had forgotten, as he states in his pleading, that they were mentioned in the original policy, and he desired to secure them, and therefore he was willing to assign over to them the policy, so that in the case of fire they would be secure, and he did it for that purpose, and that purpose only.

After the fire he alleges that the agent of the company, whose duty it was to adjust this loss, came to him and the losses were adjusted, and the agent stated the company would pay the amount of the loss. That is alleged in the petition. It is denied in the answer that the agent had any power to do anything of that kind, and it also alleges that it was

ignorant at the time, of the conditions of the assignment, and therefore the company could not be bound by any adjustment made.

I might say further that it is admitted that, Orr, Brown & Price never gave any notice to the company, so that they could not maintain this action; and it depends entirely upon whether or not, under these circumstances, anything can be recovered by Wolf against this insurance company.

Now what was this assignment? Why, it was simply a conditional assignment to secure Orr, Brown & Price, and the authorities cited by counsel for plaintiff in error are all of them in cases where the question arose upon absolute assignments, and not upon conditional assignments.

Now, can not Wolf engraft upon this assignment the conditions upon which it was made? We think he can, though it was absolute, as suggested, in form, and that he was not estopped as against the company by any representations he had made. I know counsel dwell strenuously upon the fact that all insurance is a personal contract with parties between whom it is entered into. That is true, but the company had entered into a contract with Wolf, and Wolf desired for purposes of his own to secure Orr, Brown & Price, and he therefore assigned the policy to them. My opinion is he could have assigned it over without notifying the company, and it would have been perfectly good as collateral security and would not have been in violation of any provision of the policy because the policy provides that an assignment of the property shall avoid the policy, and not an assignment of the policy.

Counsel relies on the case in *Ellis v. Insurance Co.*, 32 Fed. Rep., 646, 649, decided by Justice Brewer, recognized as one of the ablest members of our Supreme Court of the United States.

The first proposition of the syllabus is:

"Where an assignment goes with an absolute sale of the property, there is the creation of a new contract."

There can be no question of that kind here. If Mr. Wolf, in the case at bar, had transferred the property and then had made an assignment, there is not any question that he could not recover. Why? Because he would have had no insurable interest, and would not have had anything remaining, nor would there be anything remaining here upon which to found an action in case of loss. But that is not the case at bar, and we might go on with the various authorities cited by counsel for the plaintiff in error, and all of them depend upon that one proposition, and that is, that there was an absolute transfer of the property, and then an assignment of the policy; that renders the policy void as to the insured when he transfers all his interest in the property; and when the company consents that the policy may be transferred, it makes a new contract of insurance, because the original assured is released entirely, and the company is not bound to him at all, and in order that there may be a continuance of the insurance, there must be a new contract.

There is a case in the Massachusetts reports which covers this case exactly, and we prefer to follow it because we think the reasoning is sound. The court of Massachusetts is of high respectability, and the decision is in accordance with our views of what the law ought to be in this case.

It is the case of *Merrill v. Colonial Mutual Fire Insurance Co.*, 169 Mass., 10, 47 N. E., 439, and it is admitted by counsel for plaintiff in error that this case covers the case at bar, but it is claimed that it is not good law, and that it is an exceptional case. We think it is founded on

Pickaway Circuit Court.

good reason and good sense, and it ought to be the law, and we prefer to follow it because in the case at bar it does justice. Courts are reluctant to stand upon technicalities, and will not unless they are compelled to do so by the strict letter of the law. As I said, we think this is a case like the one at bar. We think the judgment ought to be affirmed, with costs.

ERROR—NEW TRIALS.

[Cuyahoga Circuit Court, February 18, 1901.]

Caldwell, Hale and Marvin, JJ.

FIREMEN'S INSURANCE COMPANY V. SAM STERN.

1. JUDGMENT OF CIRCUIT COURT SHOULD GUIDE TRIAL COURT.

The decision of the circuit court reversing the judgment of the common pleas for error of law in refusing a new trial upon the ground that the verdict was against the weight of the evidence, is the law of the case until the facts are changed either by additional evidence material to the issue or the judgment of the circuit court reversed by the superior court. Therefore, where, upon a retrial of the case, the record shows that it was submitted upon precisely the same evidence as before, it is error for the trial court to refuse to direct the verdict in favor of the plaintiff in error in consonance with the law of the case as laid down by the circuit court, and also to refuse a motion for a new trial for insufficiency of evidence, the verdict being the same as before.

2. SECTION 5305, REV. STAT., APPLIES TO TRIAL COURT.

Section 5305, Rev. Stat., as supplemented 93 O. L., 217, providing that the same court shall not grant more than one new trial on the weight of evidence against the same party in the same case, is for the regulation of new trials in the trial court.

3. CIRCUIT COURT MAY REVERSE ON WEIGHT OF EVIDENCE A SECOND TIME.

Where the trial court has overruled a motion for a new trial upon the weight of evidence and the circuit court has reversed the judgment because of the error in overruling such motion, the circuit court is not precluded by the clause of Sec. 5305, Rev. Stat., as supplemented 93 O. L., providing that the same court shall not grant more than one new trial upon the weight of evidence, from again passing upon all errors appearing on the record, including the one that the verdict is not sustained by sufficient evidence.

HEARD ON ERROR.

C. W. Fuller and *Virgil P. Kline*, for plaintiff in error.

W. S. Kerruish and *Emil Joseph*, for defendant in error.

HALE, J.

The defendant in error prosecuted his action in the court of common pleas upon a fire insurance policy issued to him by the plaintiff in error to recover upon merchandise which the defendant in error was carrying in his business as a merchant and which were, during the lifetime of the policy, destroyed by fire. The petition is in the ordinary form.

The policy contained this clause: "This entire policy shall be void in case of any fraud or false swearing by the assured, touching any matter relating to this insurance or the subject thereof, whether before or after loss."

The answer alleged facts which would, under this clause of the policy, constitute a good defense to the plaintiff's claim.

On the first trial of the case in the court of common pleas a verdict was rendered for the plaintiff, which was set aside on motion for a new trial, not, however, on the weight of the evidence. The second trial of the case resulted in a verdict and judgment for the plaintiff. On error prosecuted in this court, that judgment was reversed on the ground that the court erred in overruling a motion for a new trial for the reason that the verdict was not supported by sufficient evidence.

On the second trial of the case, the plaintiff again obtained a verdict, upon which, after the motion for a new trial had been overruled, judgment was rendered in his favor.

Proceedings in error are now prosecuted in this court to reverse that judgment.

The evidence in the last two trials was, in all essentials, the same. On both trials the issues were the same, and submitted on substantially the same evidence.

At the close of the testimony on the last trial, counsel for plaintiff in error requested the court to direct a verdict in his favor on the ground that the circuit court had held that upon the facts then shown by the evidence, the plaintiff was not entitled to a verdict. This the court refused to do, and an exception was noted. After verdict, a motion for a new trial was interposed, and one of the grounds assigned in support of said motion was, that the verdict of the jury was not supported by sufficient evidence. This motion was overruled, and an exception taken.

It is insisted by the plaintiff in error that effect should have been given to the former judgment of the circuit court, either by directing a verdict at the close of the evidence as requested, or by sustaining the motion for a new trial.

By Sec. 5305, Rev. Stat., it is provided that a verdict shall be vacated and a new trial granted for certain specified causes, one of which is (Subdivision 6), that the verdict of the jury is not sustained by sufficient evidence.

Our judgment as recorded, was that there was error of law in refusing a new trial for the reason that the verdict was not supported by sufficient evidence. For this court, that judgment is the law of the case until the facts are changed either by additional evidence material to the issue or our judgment set aside by a higher court.

If the facts established by the evidence as shown by the record now before this court, are precisely the same as those established by the evidence on the former trial, then precisely the same question was presented to a trial court by motion for a new trial after the last verdict as after the former verdict; and, if the overruling of the first motion was an error of law, so was the overruling of the last motion. On precisely the same facts, we cannot adjudge that the ruling on the one was error, and sustain the other. We rather adhere to the law of the case as announced on the former hearing.

We are of the opinion that as the evidence was unchanged, the trial court should have directed a verdict for the plaintiff in error as requested.

Such holding is supported by many authorities and by good reasoning. *Dodge v. Gaylord*, 58 Ind., 365. It appears in this case that the judgment of the circuit court in favor of the plaintiff was reversed by the Supreme Court upon the evidence then in the record, upon the ground that upon the facts proved, the appellant was not entitled to recover;

and the case was remanded for a new trial. The case was then re-tried in the circuit court upon the same evidence contained in the record upon which the case was reversed, and at the conclusion of the evidence the trial court directed a verdict for the defendant. This, on a second appeal to the Supreme Court, was affirmed. The second paragraph of the *syllabus* reads:

"The decision of the Supreme Court, rendered upon a given state of facts, becomes the law of the case as applicable to such facts; if the cause be remanded for a new trial, the parties have the right to introduce new this evidence and establish a new state of facts; and when this is done, said decision ceases to be the law of the case, and the court, in the trial of such case, is not conclusively bound by such decision, but should apply the law applicable to the new and changed state of facts; but if such cause be submitted to the court or jury for a re-trial upon the same identical facts on which said decision was rendered, such decision remains the law of the case, and the trial court must apply the law as laid down by the appellate court to the facts so submitted to the court or jury."

McFarland v. Washburn, 26 Ill. App., 855. It is said in the opinion:

"When a cause is reversed by this court for the reason that the evidence is not sufficient to sustain the finding of the court below, and upon the new trial it is again brought up for review, we shall adhere to the former holding, unless there is a substantial difference in the evidence introduced upon the two trials. The mere fact that upon a second trial the jury may have again found as upon the first trial, cannot avail, unless we can see that they have had before them additional evidence, substantially different, and controlling in its character."

Furth v. Snell, 13 Wash. Rept., 660 [43 Pac. Rep., 935]. On page 664 it is said in this case:

"This cause was before this court on a former occasion on appeal from a judgment in favor of the present appellants, and the judgment of the trial court was then reversed, and the cause remanded for the reason that it appeared to us that the evidence was entirely insufficient to sustain the verdict of the jury. The case was re-tried in the court below and we are again called upon to determine practically the same question which was determined on the first appeal. The facts appearing in the record on the first appeal are quite fully set forth in the opinion of this court reported in 6 Wash. at page 542 [33 Pac., 830]. Now, if the facts disclosed by the record now before us are substantially the same as those presented by the record on the first appeal, the former decision of this court established the law governing this case, and was a final adjudication and determination of the question now under consideration." Citing a large number of authorities.

Brusie v. Gates, 96 Cal., 265 [31 Pac. Rep., 111]. The third paragraph of the *syllabus* is as follows:

"Where the testimony of a constable as to what he did to effect an alleged attachment of real estate is substantially the same upon a second trial as upon a former, and upon a former appeal was held insufficient to prove notice to the occupant of the land, the decision as to the effect of such testimony is the law of the case, and it is conclusively insufficient upon the second trial."

Chaffin v. Taylor, 116 U. S. 567 [6 S. Ct. Rep., 518]. The head note reads:

"This court having held that, under the facts of this case, the plaintiff was not entitled to recover, such ruling being made on another trial, granted."

We are of the opinion that, having refused a new trial, the verdict, the motion for a new trial should have been denied. By reason of the former adjudication of this case, the case.

We are of the opinion that that statute (Se
upon by counsel for defendants in error has
now before the court. As appears from that s
re-examination, in the same court, of an issue
a jury, a report of a referee or master, or a d
the former verdict, report, or decision, shall b
granted, on the application of the party aggr
ing causes affecting materially the substantial

Recently there was added to this, Sec. 1 clause :

We think it was the plain intention of this act to regulate new trials in the trial court. If the trial court had rendered a verdict for the reason that it was not sustained on a first trial, and, on a second trial, had either sustained or reversed the verdict, a new trial asked for the reason that the verdict was not sustained on sufficient evidence, and we were asked to reverse such a verdict, it would be a common pleas, a different question would arise, and it would be necessary to decide.

The judgment of the court of common pleas in the above cause remanded for a new trial.

JOINT JUDGMENTS.

[Hamilton Circuit Court, 1901.]

JOHN DUNPHY ET AL. V. GILLIAM MANUFACTURING CO. ET AL.**1. APPEARANCE PRESUMED TO BE GENERAL.**

An appearance will be taken to be general unless the contrary appears.

2. JOINT LIABILITY.

L was in the possession of a fund, the proceeds of property sold on commission, in which property G and D claimed interests, to the knowledge of L; D had admitted to L that the money could not safely be paid to D or G without the consent of the other. L paid the money to D without G's knowledge or consent, G having established his interest in the property and claim on the fund, he is held entitled to judgment against L and D.

3. JOINT JUDGMENT.

Where the defendants are both liable for acts done in connection with the same transaction and to the same extent and amount, a joint judgment is proper.

Herron, Gatch & Herron and W. W. Ramsey, for plaintiffs in error.

Lynch & Day and Kittredge & Wilby, for defendants in error.

PER CURIAM.

There is no difficulty in understanding the figures in this case and how the court below arrived at the amount of its judgment if one consults the original petition, the amended petition and the subsequent corrections made to the amended petition in the judgment entry to conform the pleadings to the facts. This amount having been ascertained, there seems to be no contention that it is against the weight of the evidence, and if there were, we have no disposition to disturb the finding of the court below in this regard.

This then is the amount which the court would make payable by its decree if it ordered its payment out of a fund within its jurisdiction, or would be the amount of the court's judgment against either or both defendants, severally or jointly, dependent upon the court's conclusions on the other questions in the case.

There is no doubt about the court's jurisdiction over the American Oak Leather Company and that said leather company was interested in the issue which was tried between the plaintiff below and Dunphy & Sons, inasmuch as that within the limits of the prayer and the fund in its hands fixed the amount of the leather company's liability to plaintiff, if any.

As to the court's jurisdiction over Dunphy & Sons, said Dunphy & Sons voluntarily entered their appearance and submitted themselves to the jurisdiction of the court without reservation or limitation and by their two answers tendered the very issue which was tried.

"An appearance will be taken to be general unless the contrary appears." 1 Am. & Eng. Ency. Law, (1 ed.), p. 183.

On the eve of the beginning of the action in the court below, the leather company being fully informed of the claim which the Gilliam Manufacturing Company made against the fund in its hands, said fund being ample to cover said claim, and being in possession of the admission on the part of Dunphy & Sons that the Gilliam Manufacturing Company had a claim upon the fund, and that the leather company could not safely pay the money to one without the consent of the other, said

Dunphy v. Gilliam Manufacturing Co.

leather company at its peril and either denying or ignoring the rights of the Gilliam Manufacturing Company, at the solicitation of Dunphy & Sons, paid the whole of said fund over to them. *Swan's Treatise*, p. 418, Sec. 4, and cases cited.

In this transaction the leather company and Dunphy & Sons joined, and in violation of the asserted rights of the Gilliam Manufacturing Company.

Everything which transpired was connected with the same subject matter and were acts and circumstances involved in one general transaction, and which by the united action of the two defendants below resulted in the plaintiff being deprived of the present payment of a sum which the court found due.

By their conduct in regard to this fund the defendants rendered themselves equally and jointly liable. There is no difference in the amount of defendants' liability, the same amount being due from each and both of them, of course being payable but once. These conditions therefore seem to present a proper case for the entry of a joint judgment. *Black on Judgments*, par. 210.

"The defendants must each be shown to be liable to the extent of the verdict in order that a joint judgment should be rendered against them."

And it would seem that where the defendants are liable to the same extent and amount, although their liability rested on distinct items of damages, a joint judgment would be proper. *Chambers v. Upton*, 84 Fed. Rep., 473-4.

We do not find a variance between the case set out against the leather company in the pleadings and that made by the evidence. The aspects of the case changed, but counsel by amendment kept the pleadings up to the developments of the case. These amendments did not substantially change the plaintiff's claim which always went to the fund, the proceeds of property to which it claimed title, to the knowledge of the leather company before it paid the same to Dunphy & Sons. It is plain from the correspondence of Dunphy & Sons that they at no time considered their title to the property clear.

The fact that the prayer of the amended petition asks for judgment against Dunphy & Sons does not indicate an abandonment of the prayer in the original petition for judgment against the leather company.

We are of opinion that this case was correctly decided below.

Judgment affirmed.

DOWER.

[Hamilton Circuit Court, 1901.]

Swing, Giffen and Jelke, JJ.

HALBERT B. CASE, TRUSTEE V. CHARLES H. HEWITT ET AL.

RELEASE OF DOWER IN FAVOR OF CREDITORS.

Where a wife in consideration of the scaling down of the claims of certain of her husband's creditors and an extension of time on the amounts so reduced, has joined in a trust deed, releasing her dower and said trust deed had been construed by the court under Sec. 6343 Rev. Stat., 56 O. L., 231, to inure to the equal benefit of all creditors as a general assignment, to the extent of the amounts of the claims intended to be covered by said trust deed, the wife's release of dower is operative; as to the other general creditors, it is not.

W. C. Cochran; C. W. Baker; Boyce & Boyd; Pogue & Pogue; Albert Bettinger; Arthur Espey and Judson Harmon, attorneys.

JELKE, J.:

Having heretofore approved the findings and conclusions of the court of common pleas (Smith, J.), 10 Dec., 365 (7 N. P., 609), herein, this case now comes on for further consideration as to whether or not Mrs. Hewitt's joining in the Case deed, undertaking thereby to convey her claimed estate of \$30,000 (\$20,000 and \$10,000), and releasing her dower interest in all the property described in said deed, is still to be held operative, said Case deed having been construed by us to have a different effect from that in contemplation of the parties at the time of signing, and under the statute to inure to the benefit of all creditors. [See Sec. 6343, Rev. Stat.]

Having found that she took nothing in the attempt to give her a thirty thousand dollar estate, the question of release of dower only remains.

This is not a case of setting aside a deed made to defraud creditors, as in *Woodworth v. Paige*, 5 Ohio St., 70, and *Ridgeway v. Masting*, 23 Ohio St., 294 [13 Am. Rep., 251], but the case of a deed still being treated as a conveyance, but by virtue of the statute given a certain effect.

It is only as to Charles Hewitt's property that this deed is treated as a general assignment to inure to the benefit of Charles Hewitt's creditors.

So far as Mrs. Hewitt's dower interest is concerned the statute does not apply. There was ample consideration in the scaling down of their claims and in the extension of time to Hewitt moving from the creditors of Hewitt to sustain Mrs. Hewitt's release of dower. As to the amounts of the claims of the creditors intended to be covered by the Case deed, Mrs. Hewitt's release of dower will be held operative and given full force and effect; as to all other creditors, otherwise.

CORPORATIONS—STOCKHOLDERS' LIABILITY.

[Clinton Circuit Court, 1892.]

Cox, Smith and Swing, JJ.

LEMAR ET AL. V. STEPHENS ET AL.

SECTION 3260, REV. STAT.—DEFECT OF PARTIES.

In an action to enforce stockholders' statutory liability, under Sec. 3260, Rev Stat., it is error for the court to proceed to judgment until all of the stockholders within the jurisdiction of the court have been made parties.

The stockholders in this case were quite numerous, some residing in and some out of the state. The case proceeded to trial before a master, over the objection of the creditors, and a large amount of testimony was taken, fixing the liability of the stockholders, and assessing the several stockholders their *pro rata* share of the debts of the corporation. Several months were occupied in taking the testimony before the master, and his report was confirmed and judgment entered thereon. The cir-

Lemar v. Stephens.

cuit court held, however, that it was error for the common pleas court to proceed until all of the stockholders, at least those within the jurisdiction of the court, were brought in.

By THE COURT (Journal entry):

"This day this cause came on for hearing upon the several petitions in error, transcript, bill of exceptions and original pleading and papers from the court of common pleas of Clinton county, Ohio, and was argued by counsel, and submitted to the court; on consideration whereof the court find that there is error therein apparent upon the face of the record to the prejudice of the several plaintiffs in error, in this, to-wit:

"That the referee appointed by said court, and said court erred in proceeding to hear and determine said cause without all the owners and holders of the capital stock of said defendant railroad company within the jurisdiction of said common pleas court, being before said court and parties to said cause, as required by Sec. 8260, Rev. Stat., of this state, against the motion of said plaintiffs in error, to have them made parties to such action and served with process therein, and against the protest of said plaintiffs in error to further proceed until this was done, when it appeared that such stockholders were within the jurisdiction of the court and could be so served.

"After finding such defect of parties defendant, none of the other errors assigned in the several petitions in error herein are considered by the court, and the reversing and remanding of said cause to said court of common pleas for further proceedings, as hereinafter ordered, is without prejudice to the right of the parties plaintiff and defendant, to relitigate the various questions involved in the other assignment of errors in said several petitions in error.

"It is, therefore, ordered, adjudged and decreed that each and all of the findings, judgments and decrees of said referee and said court of common pleas against each and all of the several plaintiffs in error herein and all the findings, judgments and decrees of said referee and said court, relieving from liability the several defendants in error to the cross-petition in error herein filed by John H. Gard, and in favor of the creditors of said defendant railroad corporation, so far as the same may effect said several plaintiffs in error, be and the same are hereby reversed, vacated, set aside, and held for naught, and that the plaintiffs in error recover from the defendants in error their costs herein expended, taxed at \$——.

"It is further ordered that a special mandate issue from this court to the court of common pleas to carry said judgment of reversal and for costs into execution, and for further proceedings in said court.

"To which finding, judgment and decree of said circuit court, in reversing said judgment and decree of said referee and said common pleas court as to said plaintiffs in error, and in remanding said cause, said defendants in error except."

Cuyahoga Circuit Court.

[Cuyahoga Circuit Court.]

Hale, Marvin and Caldwell, JJ.

NORTH BRITISH & M. INS. CO. V. COHN.

The decision rendered in this case, and which was among the advance sheets of volume 9, Circuit Decisions, in the Ohio Legal News of June 15, 1899, volume 6, number 21, was suppressed by order of the judges. We have since received some inquiries concerning the case and we are now authorized by the court to say that upon further consideration they came to a different conclusion from the one announced in the opinion and that it is not authority and should not have been published. —ED. OHIO DECISIONS.

JUDGMENTS.

[Jefferson Circuit Court, December 7, 1896.]

RAUGH BROS. & CO. V. ACKNOVITCH.

TRANSCRIPTS FROM JUSTICE COURT EQUAL IN PRIORITY TO COMMON PLEAS JUDGMENTS.

A transcript of a judgment of a justice of the peace, which is filed in the court of common pleas, has the same effect as a judgment rendered in that court at the same term, and executions issued on such judgments are equal in priority.

HEARD ON ERROR.

Cook, for plaintiffs.*P. P. Lewis*, for I. Levi & Co.

LAUBIE, J. (Memorandum.)

A transcript from a justice's court filed in the common pleas court, during the term, has the same effect as a judgment rendered in that court during the same term, and executions issued upon such judgments are equal in priority.

The plaintiffs and A. B. Acknovitch and Moses Esakovitch, creditors of Jos. Acknovitch, took *cognovit* judgments to about \$3,000 in the court of common pleas at its January term, 1895. I. Levi & Co., Philadelphia creditors, took judgment before a justice of the peace for \$200, filed transcript with clerk of court, and issued execution therefrom to the sheriff, who levied on the same stock of goods as on the execution on the judgment in the common pleas rendered at the same term of court. And Levi & Co. claimed, by reason thereof, that they were entitled to their *pro rata* share of the proceeds of sale of stock sold, the same not being sufficient to pay all the judgments in full. The contention was that the judgments did not stand on equal footing, being taken in different courts. See Secs. 5377, 5379, 5382, Rev. Stat.

Judgment affirmed.

INDEX.

ACTIONS—

Where land in fact is taken for a turnpike, in case the owner and county commissioners fail to agree as to the compensation and damages to be paid, the same may be adjusted by proceedings had in the "name" of the "commissioners" in the probate court. Sec. 4761, Rev. Stat. Jackson Co. v. McGhee. 106

An action to enforce stockholders' statutory liability, being for the benefit of all creditors, is not within the rule that an action brought by a trustee need not be prosecuted but may be dismissed by such trustee at any time before judgment. Johnson v. Carpenter. 457

See also Parties.

ADMINISTRATORS—See Executors and Administrators.

ADVERSE POSSESSION—

Where it appears that a way has been traveled continuously and by the public generally, whenever they saw fit, for more than twenty-one years, a prescriptive right is obtained which cannot be defeated by an interruption for less than the statutory period. Madden v. Railway Co. 571

The interruption to the use of a footway across seven or eight railroad tracks, incident to the moving of many trains, is not such an interruption as will defeat a prescriptive right. Ib.

Where the city in making street and sidewalk improvements clearly located such improvements and in such a way as to exclude, and indicate an intention to exclude, the property referred to, the fact that persons may have driven outside the lines of the street and upon the property in question, or that pedestrians, under similar conditions, have gone over said property, for a number of years, does not constitute adverse use and occupation such as will defeat the title of the owners or constitute acceptance if a common law dedication was intended. Toledo v. Converse. 468

AMENDMENT—See Pleadings; New Trials.

ANNEXATION—

Upon the passage and legal publication of an ordinance accepting an application for the annexation of territory, such territory at once becomes part of the corporation. The fact that the transcript, map and other papers were not filed for record until a later date does not affect the question. State v. Craig. 348

ANNUITIES—

Where a widow surrenders her dower interest in, and distributive share of, her husband's estate in consideration of an annuity, she thereby becomes an "investor" in such annuity within the meaning of the statute relating to the taxation of that class of property. She is a purchaser, and the annuity is in no sense a gift by way of a legacy. Chisholm v. Shields. 361

Under the foregoing rules, where the legislature in a revision of the statutes omitted annuities from the definition of the word "credits" it cannot be held that it was thereby intended to exempt that class of property from taxation if they are referred to as subjects of taxation in other sections of the statute. Ib.

The purpose of the legislature in omitting annuities from the definition of the word "credits" in Sec. 2730, Rev. Stat., was evidently to prevent that class of property from being made subject to the offset of legal claims or debts, as such property should not be subject to sur deductions.

The taxation of such annuities does not require the annuitant pay a tax upon the property she gave to produce the annuity is not double taxation.

Taxation of such annuity upon government bonds, involve the question of that class of property is not, under the provision, an owner of the

Annuities—Appeal.

ANNUITIES—Continued—

An annuity must be a personal obligation and not payable out of any specific fund; and, *prima facie*, it is held to be such unless the instrument creating it plainly indicate a different intent. *Ib.*

Under a will bequeathing to testator's wife, "in lieu of all dower, the sum of \$8,000 annually for and during the term of her natural life," with directions to pay the legacy in quarterly installments, with the further provision "for the payment of my wife's legacy I desire that a sufficient amount of my personal estate, either of stocks, bonds or money, shall be used to purchase government bonds, or equally good bonds, of such amount that the interest thereon shall be sufficient to pay the quarterly installments of \$2,000," if accepted by the widow, creates a pure annuity. *Ib.*

ANIMALS—

In an action to recover for personal injuries sustained by being bitten by vicious dogs kept by the defendant with knowledge of their viciousness it is error to instruct the jury that the plaintiff, if without fault, is entitled to recover. *Thomas v. Boyson.* 773

In such an action, exemplary damages being sought, it is error to exclude testimony tending to prove that the defendant was not wanton or reckless in his manner of keeping the dogs. *Ib.*

APPEAL—

The bond of a trustee in bankruptcy is not sufficient to exempt such trustee, under Sec. 5228 Rev. Stat., relating to appeals by parties in a trust capacity, from giving the bond required by Sec. 5227 Rev. Stat. *Kuhn v. Haley.* 105

Under Sec. 6408 Rev. Stat., an administrator who has given bond within the state, for the faithful discharge of his duties, is not required to give bond for appeal in a cause or matter in which he has no interest and appeals in good faith for the proper administration of the trust. *Hance v. Chappell.* 139

The dismissal of an action without prejudice which has been appealed to the circuit court does not leave the judgment of the court of common pleas existing and in full force. *Irwin v. Lloyd.* 212

A judgment of a justice of the peace, in an action against two de-

fendants, dismissing one defendant as not properly before the court, is not vacated by an appeal by the other defendant, against whom the suit proceeded from a judgment subsequently rendered against him, nor is the defendant so dismissed brought into the appellate court by such appeal, particularly where there was not that necessary connection between defendants but that the rights of one could be determined without affecting the rights of the other. *Mulrooney v. Lederer.* 278

Where the evidence showed that the person offered as surety on an appeal bond was the owner of a house and lot valued at \$2,300, upon which there was a mortgage of \$1,160; that he was forty years of age and his wife thirty-four years of age and that they resided on the premises, without evidence indicating whether the wife executed the mortgage or evidence as to the state of the husband's health, it cannot be determined whether the husband had property liable to execution or not. *Winkler v. State.* 123

Where the exemption and dower will, together, if claimed, consume the entire property, the person has not "property liable to execution" within the meaning of Sec. 4953, Rev. Stat. *Ib.*

Under Sec. 4953, Rev. Stat., it should be made to appear, in the qualification of a surety on an appeal bond, that the person so offered is a resident of Ohio. An allegation to that effect, or that the surety offered "is a resident" of the county in a subsequent application for a writ of mandamus to compel the judge to show cause why he should not be compelled to accept said surety, does not supply the qualification nor render the order refusing to accept the surety improper. *State v. Speigel.* 313

A court being called upon to exercise a judicial discretion as to whether the appeal and surety are sufficient, having heard testimony and having exercised such discretion, cannot be interfered with by a writ of mandamus. Section 6742, Rev. Stat. If the court erred in the exercise of its discretion, the remedy is by proceedings in error. *Ib.*

The proper practice in offering an appeal bond is to tender it to the clerk with proof of the sufficiency. And this should be followed though the surety offered is the same as the one once rejected. Merely requesting

Appeal—Appropriation.

the court to accept such surety is not sufficient. *Ib.*
See also RECEIVERS.

APPEARANCE—

An appearance will be taken to be general unless the contrary appears. *Dunphy v. Manufacturing Co.* 522

APPROPRIATION—

The general rule in appropriation cases is to confine the testimony to the market value of the land in issue, it being, in most cases, the best criterion of its value to the owner, but in getting at the value of the land it is always proper to ascertain the value of the land itself separate and apart from improvements made thereon, and the value that the improvements add to the land, and if there is no market value for the latter, a well for instance, it is proper, as one element of value, to show the cost of the article. *Foot v. Railway Co.* 695

In determining the value of land on which a well is situated, it is proper to show the nature of the well, its depth, the manner in which it was walled, the supply of water that it affords, and its utility and necessity, not only to the strip taken for a right of way, but to the land as a whole; also, its cost, not as a basis upon which to determine the value of it to the land alone, but as tending to show the value of the land. *Ib.*

In proceedings to compel appropriation, the owner of land is entitled to the full value of all the land for any purpose for which it might be used, including prospective value, which is certain to be realized. *Ib.*

Where a railroad company became owner of one-half of land owned by tenants in common, and has put its half and the half belonging to its co-tenant to a permanent use, where the latter cannot sell, or where the railroad company can force him to sell or go into court and compel appropriation, the land of such co-tenant no longer has a market value and in a proceeding to compel the railroad company to appropriate, such co-tenant is entitled to one-half the market value of the whole property, as of the time when the railroad company took possession, and including improvements, well, fruit trees, fences, and

damages to the balance of the property. *Ib.*

A refusal to allow an expert witness to testify to the value of land, both real and prospective, as to the purposes for which it might be used, is prejudicial to the party calling him without her fault, and notwithstanding the cross-examination of the witness was such that the objection to his testimony was no longer available, and other witnesses were allowed to testify to such facts. *Ib.*

Evidence of added value to land by reason of fruit trees growing thereon at time possession was taken by a railroad company is competent in ascertaining damages therefor. And while the better form might be to ask witnesses as to such added value, yet the difference between such questions and questions as to the value of the trees, is more in form than real meaning, and exclusion of evidence offered in that way constitutes prejudicial error. *Ib.*

Where a witness is expert not only as to the value of land, but as to the purposes for which it may be used, he may testify as to both and give the intrinsic characteristics of the property that make it of special value. *Ib.*

A person claiming ownership, where railroad companies are in possession, can maintain an action to recover the land or compel its appropriation only upon the strength of his own title. As grantees of the original owners plaintiff could not maintain such action unless the transfer from one railway company to another worked an abandonment. *Pittsburg & W. Ry. v. Garlick.* 337

Under Secs. 3239 3281. 3282, 6416, 6420, 6433, 6443 and 6344, Rev. Stat., permitting a railroad company to appropriate a fee, and requiring full compensation therefor, the title acquired by such appropriation is absolute for railroad purposes and the railway company may lawfully sell a part of such land to another company for like purposes, without working an abandonment. *Ib.*

Whether a fee absolute or conditional, or a mere easement, was appropriated by the railroad company, under the statutes referred to, the original owner could not claim abandonment by reason of sale to another company, and could not compel the second company to commence appropriation proceeding, unless, as adjoining owner, he still held lands that might be injured by the addi-

Appropriation—Attachment and Garnishment.

APPROPRIATION—Continued.

tional use, which he owned at the time of the appropriation. *Ib.*

The fact that part of a strip of land acquired by one railway company for its railroad is sold to another company and another track is constructed thereon, running between two tracks already constructed, is not an additional use requiring appropriating or compensation to adjoining land owners. *Ib.* See also EVIDENCE.

ASSAULT—See RAPE.

ASSESSMENTS—See SEWERS.

ASSIGNMENTS—See also CHATTEL MORTGAGES; INSURANCE.

ASSIGNMENTS FOR CREDITORS—

The thirty days provided by Sec. 6352, Rev. Stat., within which to bring suit on a claim rejected by an assignee, is not a period of limitation, but a period after which distribution may be made. A creditor may come in at any time for his equitable share of the assets unadministered or not lawfully disposed of at the time he presents or prosecutes his claim for allowance in the mode prescribed by statute. *Irwin v. Lloyd.* 212

ATTACHMENT AND GARNISHMENT.

A defendant in attachment has a right of action against a plaintiff in attachment, who has been required to give bond, that he will pay all damages, if it turns out that the attachment was wrongfully or improperly granted, although the plaintiff in attachment did not sign the bond and although the suing out of the writ was not malicious. *Botfuhr v. Leffingwell.* 650

An action against a garnishee to receive the amount due from defendant in the attachment suit at the time of the service of process, is collateral to the attachment suit. *Cleveland Stove Co. v. Mehling.* 400

While, in an attachment proceeding, in the absence of a showing that the court, by virtue of its writ of attachment or garnishment, has reached property of defendant, or that the court made any order finding it had jurisdiction to proceed to judgment, a stay of proceedings until plaintiff brings suit against the garnishee and it is made to appear that he is indebted, seems to be in

harmony with the statute, it may well be doubted whether that is the only method the court may pursue. The statute is not so specific as to the mode of procedure as to include one mode and exclude all others. *Ib.*

Where it appears that the court issued process of garnishment in a case in which it had jurisdiction, obtained service by publication, and seized property, and, after seizing such property, proceeded to judgment, the mere failure to spread upon the record a finding that the garnishee was indebted to the attachment debtor, if essential or proper, would amount to nothing more than an error, which could only be raised by proceedings in error, and is not a matter upon which a judgment can be collaterally attacked. *Ib.*

The affidavit for attachment and proceedings under it form no part of the pleadings, and where the court, in such a case, renders judgment, it is upon the pleadings. Therefore, in attachment where service was by publication, a judgment, personal in form, for the full amount of plaintiff's claim, is proper, although the facts in the case render such judgment valid only to the amount of the property attached. *Ib.*

Where the record is silent as to whether the garnishee was ordered to pay money into court, which would imply that the court had found that it had reached property of the defendant and had entered that upon record, it will, in a collateral proceeding, be presumed, where judgment was entered against the attachment debtor, that the court made such a finding. *Ib.*

ATTORNEYS—

The circuit court has power, upon motion of a disbarred attorney, acknowledging his wrong, and regretting it, accompanied by a petition signed by a large number of attorneys, signifying that they would be satisfied with a modification of the order, to review and modify its former judgment, without further evidence and in the absence of a report by a committee appointed to act on behalf of the court in producing anything which might be produced as to why action should not be taken. *Burke. In re.* 397

It is within the discretion of the trial judge, in a criminal case, where an attorney has been appointed by the court to defend the prisoner, to recognize or refuse to recognize an

attorney as counsel for the defendant who has not been thus appointed. And where it appeared that, upon request of accused that two attorneys, naming them, be appointed to defend him, the court appointed only one of them, and later, and after the jury had been impaneled, the other also appeared for the defense, the judge's refusal to so recognize him, was not an abuse of discretion, justifying reversal, although such attorney stated that he was not attorney for nor related to any of the jurors. *Carr v. State.* 353

See also **WRIT AND PROCESS; CREDITORS' BILLS.**

BANKS AND BANKING—

Where the evidence shows that money disappeared from the vaults of a bank on a certain date, and it appears that the combinations and time locks were not broken or disturbed, and it is also shown that if said locks and combinations had been set, as it was the duty of the officers to set them, it would have been a physical impossibility to have secured the money without destroying or breaking the lock, as against the mere assertion of the officers that the doors were closed and the locks adjusted, a verdict based upon the conclusion that the officers negligently failed to perform that duty, can not be said to be against the weight of the evidence. *Kalb v. Bank.* 437

Reasonable care, upon the part of officers having the care of the funds of a bank, in the matter of attending to the vault doors, is to lock them, and to see that they were locked. And to instruct the jury, in such case, that if the officers "acted in good faith about the affairs of the bank, and used reasonable diligence and care in and about the closing and locking of the door" that they would be relieved from liability, would have been improper. *Ib.*

A petition in an action by a banking corporation against its officers states a cause of action against such officers. *Ib.*

A resolution passed by the board of directors of a banking corporation exonerating an officer of the bank from any liability for the loss of money which was stolen or which disappeared from the bank, does not amount to a relinquishment of the claim or estop the corporation

from subsequently bringing suit to recover the money on the ground that it was lost through the negligence of the officials. *Ib.*

BILLS OF EXCEPTIONS—

An entry by the probate court: "This day came the said * * * petitioners and presented their bill of exceptions taken upon the hearing of this cause, and thereupon the same was examined, allowed and signed and ordered to be filed with the papers in said cause which is accordingly done," is not a proper entry making the bill of exceptions a part of the record, and in the absence of an order providing that the bill be a part of the record or ordering that the bill be made a part of the record, such bill of exceptions cannot be considered on error. *Bacon v. Noble.* 49

A reviewing court is not, therefore, at liberty to consider a case on error upon the question of the weight of evidence where it appears that a photograph of certain premises, used for the purpose of describing such premises, and introduced in evidence as an exhibit, is not attached to the bill of exceptions, although the bill contains the usual certificate that it contains all the evidence submitted to the jury. *Hohly v. Sheely.* 678

In some cases, where it has been made fairly to appear from the bill of exceptions that certain evidence has been lost and such fact is certified by the trial court before whom the bill of exceptions was made up, it has been held that the reviewing court may consider the record in determining the weight of evidence notwithstanding the omission of such evidence. *Ib.*

Where a diagram of railroad grounds, showing the place where an accident occurred, and the location and movement of cars, such evidence being material and used in the trial court, is omitted from the bill of exceptions, and from the papers in the case, though it was formally introduced in evidence and is referred to in the bill as an exhibit, the reviewing court is precluded from considering the case or weight of the evidence. The rule applies where an act affecting the testimony of a or other material evidence or are omitted. *Michigan Cerr Waterworth.*

Bills and Notes—Board of Equalization.

BILLS AND NOTES—

The defenses which may be made, by virtue of the provisions of Sec. 3178, Rev. Stat., to a negotiable instrument, having written across its face "given for a patent right," are limited to such matters of defense as grow out of the transaction in which the instrument originated. *Aller v. Johnson.* 42

In an action by an endorsee upon a negotiable note, obtained before due, against the maker, an answer averring only that the note had been paid and taken up and then lost or stolen is demurrable, it being essential to a good defense to aver also that the endorsee had knowledge of the facts thus pleaded, or that he gave no value. *Ib.*

It is the duty of the maker of a negotiable instrument when he pays it before maturity to cancel or destroy it. If he neglects to do so, and it is payable to bearer, or bears a genuine endorsement in blank or to bearer and is transferred to a party who takes it before maturity, for a valuable consideration, in the usual course of trade, without knowledge that it had been paid, such payment is no defense in a suit upon it by the transferee. *Ib.*

A judgment in an action against the company as maker of the draft in question, of "settled, no record; the defendant to pay the costs and judgment for costs entered upon the suit," which would bar another action between the same parties, is not a bar to a subsequent action against the officer individually, as acceptor. Therefore, where such judgment is called in question collaterally, in a suit against such officer individually, it is competent to show the agreement involved in such settlement. *Bells v. Shea.* 304

Under the circumstances stated, and where it appeared that the officer in question had funds of the company in his possession which he should have used to pay the draft, and that he failed to do so, and the company then became insolvent, the court held that a delay of two years in bringing suit against such officer individually, after settlement of the suit against the company, created no estoppel on the ground of laches. *Ib.*

One who endorses a draft, drawn by a corporation, as agent or treasurer (no distinction exists between the two terms or between "Treasurer" and "Treas.") without naming his principal or the company for

whom he acts, binds himself individually and cannot show, in a suit upon the draft, the relation existing between himself and his principal or himself and the company, or obtain a reformation of the instrument to show such relation. *Ib.*

Unless it conclusively appears that an action against the company was upon the endorsement or acceptance by such officer, who signed the draft as "Treas.," and not against the company as maker, the rule that plaintiff, having elected to sue the company upon the acceptance cannot afterwards sue the officer individually, does not apply; and plaintiff, having failed to recover of the company as maker has a right to sue the officer who endorsed the draft, in the manner stated, as acceptor. *Ib.*

Days of grace enter into the contract, and a note entitled to days of grace, made after the passage of an act abolishing days of grace, but before it went into effect though payable after the act takes effect, is not affected by the act. *Evans v. Lumber Co.* 543

For the purpose of fixing the liability of endorsers of commercial paper payable at a bank, demand of payment may be made at the bank on the last day of grace at any time within banking hours, and it is not necessary that such demand be made at the close of banking hours. *Ib.*

BILL OF SALE --

A bill of sale absolute upon its face may be shown by parol evidence in an action at law for damages to have been intended as a mortgage and given as security for a debt, without showing fraud on the part of the creditor obtaining it. *McLlenkops v. Bumgardner.* 655

BOARD OF EQUALIZATION--

The services performed on the decennial county board of equalization, under the Hendley-Royer law, by the auditor, county surveyor and county commissioners are without the scope of their official duties as such, and are not so "incident" or "germane" to the regular duties of the offices to which they have been respectively elected, as to make the provision for compensation contained in the Hendley law, in contravention of the act of the legislature, 94 O. L., 396, or of the constitution, Art. 2, Sec. 20. *Lewis v. State.* 647

BONDS—

Sureties stand upon the words of the bond and if the words do not make them liable, nothing can. There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail. Rule applied. *Gerke v. Brewington Co.* 206

See also **APPEAL; ATTACHMENT; CORPORATIONS.**

BOUNDARIES—

The act of April 12, 1887, 86 O. L., 270, to amend the act of March 28, 1888, providing a commission to establish boundaries and lines of canals, etc., of the state, by accurate survey, cannot under the rule that laws have prospective, not retroactive, operation be applied to causes of action existing at the time of the passage of the act. *State v. Japan Co.* 587

If the act of April 12, 1887, 86 O. L., 270, above referred, should be held to apply to a cause of action existing at the time of its passage, the law would be in contravention of Sec. 28, Art. 2 of the constitution, providing that the general assembly shall not pass retroactive laws, and Sec. 19, Art. 1 of the bill of rights providing that private property shall ever be held inviolate. *Ib.*

BRIDGES—

The words "having a navigable river passing into or through the same," in the act referred to, do not constitute a new or additional classification, but are simply a provision for a condition that may or may not exist in cities of the grade and class referred to. *State v. Jones.* 496

In determining whether the act in question, which relates to "cities of the third grade of the first class having a navigable river passing into or through the same" is invalid, as limited in operation to one city in the state, the court may take judicial notice that other smaller, growing cities have navigable streams within their limits and may in time come within the statute. *Ib.*

There are sufficient apparent natural reasons suggested by necessity for a difference based upon the navigability of streams, and the necessity of different laws with respect to the bridging of navigable

streams, to justify the placing of cities of that character in a class by themselves for the purpose of bridge legislation. *Ib.*

Nor is it a valid objection to the law in question that it might have been framed so as to have been equally suitable for and applicable to cities of other grades and classes. *Ib.*

The omission of the word "hundred" from a bill, relating to bridges within municipalities, providing that "persons desiring a bridge at any other location may also file their petition and that the petition shall be considered and the location voted upon if they file a petition containing not less than twenty-five hundred signatures," constitutes a material difference. *Ib.*

The matter of building bridges within and to be paid for by municipalities, is a proper subject of municipal control and may be provided for by a law applicable to cities of a certain grade and class. *Ib.*

The act of April 14, 1900, 94 O. L., 175, to supplement Sec. 2835, Rev. Stat., and providing for proceedings to be had in "cities of the third grade of the first class to accomplish the location and construction of bridges across navigable rivers," is not invalid for the reason that there is but one city in the state of the class to which the law applies. *Ib.*

The fact that all municipalities of or that may come into the class may not be in a similar natural situation, that is, may not have navigable streams to bridge and therefore not in a situation to avail themselves of the law, is not a valid objection to the law. *Ib.*

A law relating to the matter of building bridges, within municipalities, which is made applicable to all cities of a certain grade and class, is a law of a general nature and having a uniform operation throughout the state within the meaning of Sec. 26, Art. 2, of the constitution. *I*

Under the provision of the in question that "each registered elector of such municipality shall be entitled to vote upon the question of construction, re-construction, enlargement or repair of bridge to vote for only one location," each voter may cast a vote that shall cover each location, but an affirmative

Bridges—Carriers.

BRIDGES—Continued.

ited to the general proposition and to one location. *Ib.*

An elector, under the statute in question, cannot vote against all bridges, or against the general proposition, and at the same time vote his choice of locations to be counted if the general proposition carries. *Ib.*

Where a voter, under said law, with respect to any proposition or location votes "Yes," this amounts to an affirmative vote as to the particular location and an affirmative vote as to the general proposition. *Ib.*

If a voter, under the law in question, marks his ballot "No," as to any proposition, and does not mark "Yes," to any proposition, this is a negative vote as to the general proposition and as to every bridge, the same as if he marked it "No" to each and every proposition. *Ib.*

For an election under said act the form of the tally sheet should show, first, the number of persons voting; second, the tally of ballots counted; third, the vote on the various propositions or locations, "Yes," or "No." *Ib.*

From the number of ballots counted deduct the number of votes in favor of all locations. The remainder will be the number of negative votes. If this number is less than one-half of the whole number of ballots cast, the general proposition to build a bridge has carried; if more, the proposition is lost. If proposition carries, the location receiving the largest number of affirmative votes is the location selected. *Ib.*

BUILDING AND LOAN COMPANIES—

Under an agreement to mature stock in a building and loan company in a certain time, where no fraud was practiced by the company, but in so agreeing, the company was simply too hopeful of the future and did not sufficiently consider the chances of financial depression and disaster, and where borrowers knew the circumstances under which the agreement was made, and the resources of the company, a failure does not operate as a fraud upon their rights. *Demland v. Loan Co.* 249

And such a promise to a member and borrower in a mutual loan

and building association cannot be specifically enforced where the failure is not chargeable to the laches of the company, but was due to financial and business depression. *Ib.*

Members of a mutual building and loan association, whether as investors or borrowers, must share pro rata the losses of the concern. *Ib.*

Where the Minnesota law permitted the reception of five per cent. interest and five per cent. penalty, the contract, though executed in Ohio, is not usurious. *Ib.*

Where the business, when done, was not unlawful, the mere changing of the form of a certificate, as under the Ohio law requiring a deposit and certificate from foreign companies, does not invalidate the transaction. *Ib.*

CANALS—

In building and maintaining the state canal, the commissioners had the right to enter upon adjoining land to protect the canal from being washed away by a river by driving piles, etc., along such river, but possession of adjoining land for that purpose does not give the state title thereto. *Edwards & Co. v. Schlund.* 697

CARRIERS—

In such case, unless special damages are alleged and proved, the measure of damages is the amount of money which the passenger actually loses and is compelled to expend on account of the failure of the railroad company to furnish him the return transportation upon his ticket as it had agreed to do. *Wilt v. Railroad Co.* 589

A passenger who has purchased transportation between two places, and received a contract entitling him to a return ticket upon demand at the place of destination, which was refused when demanded, cannot recover, upon attempting to return without a ticket, for being ejected from the company's train. He can only recover for breach of contract to furnish the return ticket. *Ib.*

It is not the duty of a common carrier of passengers to exercise the highest degree of care in the matter of station accommodations for the safety of its passengers, but only to provide such as are reasonably safe for persons exercising ordinary care, and when it is not so obviously dangerous to permit passengers to pass from a train to an unlighted station

Carriers—Charge Jury.

platform that the court can say it was negligence to do so, it is error for the court in its charge to assume that it was the duty of the carrier to furnish light. *Railroad Co. v. Anderson*. 765

In an action to recover damages from a common carrier of passengers, for injuries received in alighting from a train at a station, on the ground of negligence in not providing reasonably safe accommodations it is error, where the danger was not obvious, to exclude testimony that in the use for a long time in the same condition no similar accident had happened. *Ib.*

In the absence of stipulations on the subject, the acceptance of goods by a carrier for shipment beyond its own line, and receipt of freight charges for the whole distance may involve an undertaking on the part of the carrier to transport them the whole distance and deliver them to the consignee; but when the bill of lading contains explicit provisions on the subject, they must be given effect, in the absence of averments and evidence which would authorize a court to ignore or set them aside. *Stevens v. Railway Co.* 168

In the absence of fraud or mistake, a bill of lading, signed by the receiving agent of a common carrier, containing no restrictions upon its common law liability, delivered to a consignor contemporaneously with the receipt of the goods for shipment, and acquiesced in by him, becomes the contract of shipment, and its terms cannot be contradicted by parol evidence. *C. C. C. & I. R. R. Co. v. LaTourette*, 1 Circ. Dec., 486, approved and followed. *Ib.*

It is competent for the parties to a contract of carriage to stipulate that the initial carrier shall be bound for the safe carriage of the goods beyond its own line, and for delivery to the consignee, and it is also competent for the parties, by their contract, to limit the liability of the initial carrier to the safe carriage of the goods over its own line only; and, in the latter case, the receipt of the freight charges for the whole distance by the initial carrier does not alter its liability further than to make it the agent of the shipper for the purpose of paying the connecting carrier its share of such charges. *Ib.*

Where stipulations in a bill of lading are consistent with common law liability, as where it limits the liability of the carrier to its own line, and the shipper seeks to impose greater liability upon the carrier, the fact that the shipper may not have noticed the terms of the printed bill of lading, is not enough to warrant a departure from such terms, and the imposition of a greater obligation on the carrier, because of an implied undertaking arising out of the circumstances of the acceptance of the goods by the carrier marked for shipment beyond its line and the receipt of freight charges for the whole distance; and especially is this so where, as in case at bar, the shipper is aware at the time of shipment, that the destination is beyond the carrier's line, in which case the shipper is bound to know that if any obligation is imposed upon the carrier beyond its own line it must be by contract extending or enlarging its common law liability. *Ib.*

The rule of law that stipulations varying or limiting the liability of the common carrier must be strictly construed against the carrier has reference to the question of the extent of the liability of the carrier during the period in which he is acting in such capacity and does not have reference to the question of when the liability of a common carrier ceases by the delivery of the property to the consignee. *Paddock v. Railway Co.* 789

There is no liability on the part of a railroad company as a common carrier for car loads of grain delivered by it in pursuance of a contract, and standing upon spur tracks on the premises of an elevator company, laid to store grain until it could be unloaded in the elevator, notwithstanding it had the further duty of switching such cars into the elevator when demanded by those in charge and switching the empty cars away. The liability of the railroad company terminates upon delivering the cars upon such tracks. *Ib.* See also *CONTRACTS*.

CHARGE TO JURY—

In a suit for personal injuries, resulting from negligence, the defendant is entitled to have the jury instructed that if the negligence of both parties contributed "directly," which is equivalent to "proximately," to the injury complained

Charge to Jury—Chattel Mortgages.

CHARGE TO JURY—Continued—

of, the plaintiff is not entitled to recover. *Cincinnati St. Ry. v. Jenkins.* 139

Where a charge as given be unexceptionable, the fact that the court failed to give other instructions which might properly have been given, does not constitute error unless such instructions were specifically requested and refused. Thus, in an action by a minor under nine years of age, for injuries sustained while the act 82 O. L., 161, Sec. 6986, Rev. Stat., prohibiting the employment of minors in manufactories, was in force, a failure to charge that the violation of said statute constituted *prima facie* negligence, if proper (a question not decided), in the absence of a special request and refusal, was not erroneous. *Hoppe v. Parmelee.* 24

The improper admission of evidence in such action to the effect that money had been received from defendant for the benefit and education of plaintiff, cannot be regarded as constituting prejudicial error where the court subsequently directed the jury to wholly disregard all such testimony. *Ib.*

It is not necessary, where special requests are presented which are proper, to give such requests *verbatim*; it is sufficient if the propositions contained therein are covered by instructions which embody, in different language, the same instructions. *Ashtabula Transit Co. v. Dagenbach.* 307

An oral explanation by the court, in giving a special request, unless prejudicial, is not reversible error. *Johnson v. Cincinnati.* 318

CHARGE TO JURY—

It cannot be assumed, where the trial judge gives more than one rule for determining the rights of the accused, that the jury followed the right one. *Carr v. State.* 353

The true objects in charging a jury are (1) to bring into view the issues in a case, and (2) by a pertinent statement of the law, show how a jury should apply the evidence in the various aspects which the trial may develop; and if that be done, in legal view a charge is complete. Hence, when a proposition once has been clearly given, it is the right of the court not to repeat it in varied form of expression, though equally correct; and to avoid possible confusion in the minds of the jury, it

generally is wise to refuse to do so. *Donald v. State.* 483

Where a charge correctly states the general rule of damages applicable to the case, if any particular part is objectionable, a special exception should be reserved. *Sec. 5298, Rev. Stat. Wolf Co. v. Storage Co.* 582

It is not error for the court to omit to instruct the jury on a question of law arising in the case, unless instructions are asked by counsel. *Mitchell v. State.* 446

Negligence must be alleged—cannot be for the first time introduced by charge to jury—See NEGLIGENCE; ANIMALS; NEGLIGENCE.

CHATTEL MORTGAGES—

A chattel mortgage which contains a provision allowing the mortgagor to retain possession of the property, with power of sale, although good between the parties, is invalid as against creditors, though the latter live on the property, who assert their rights against such property. *Griefenkamp v. Beal.* 377

A provision in a chattel mortgage, under which the mortgagor retains possession, that "in case of the exchange of any of the above articles of personal property for other articles of the same kind in the course of said business, this mortgage is to operate as a lien upon the articles that may be acquired to take the place of such as may be exchanged or sold," while it conveys no express power to sell or exchange, clearly implies that such power is to be exercised and is within the rule above stated. *Ib.*

The mere fact that the power of sale or exchange, under a provision in a chattel mortgage by which the mortgagor was allowed to retain possession of the property and sell or exchange, does not change the rule or render the mortgage valid against creditors. *Ib.*

In an action to try the right of property replevied by the assignee of a chattel mortgage after the same had been sold to a *bona fide* purchaser without notice, at a sale by the receiver of the mortgagor, evidence of the proceedings taken by the receiver in selling the property was properly refused, it not appearing that the holder of the mortgage was a party to the action of the receiver, and therefore was not bound by anything that was done therein. *Gates v. Storage Co.* 721

A chattel mortgage is a chose in action and is not negotiable paper, and does not so adhere to the notes which it secures, as to become transferred with them so as to cut off equities of the mortgagor. Therefore the mortgagor has the right to set up usury against the assignee of a chattel mortgage, the notes not being sued upon, notwithstanding the mortgage was transferred before due and without notice of usury. *Ib.*

An assignee of a chattel mortgage is not compelled to present his claim to and be paid out of funds in the hands of the receiver of the mortgagor, arising from the sale of the mortgaged property; he may replevin the mortgaged property though the same is in the possession of a *bona fide* purchaser at such sale, who is without notice of his claim. *Ib.*

The doctrine that any one who takes a chattel mortgage as assignee during the first year and before it is due, and before it is time to renew it upon the records, may be cut off from rights he has under that mortgage, by the actions of the mortgagee, his assignor (consenting to receivership in case at bar), is a dangerous one and does not exist in law. Where an owner has parted with his property, and given title to another, he can make no admissions that will bind his vendee. *Ib.*

CLASSIFICATION OF CITIES—See BRIDGES.

COLLATERAL ATTACK—See JUDGMENTS.

COLLEGES—

Whether the student, when he pays tuition for instruction in the university, thereby enters into a contract or obtains a mere license, is not material; in either case, there are numerous obligations which he agrees to perform and his failure to perform such obligations may be of such a nature that the university may be justified in dismissing him from the institution. *Koblitz v. University.* 515

The student agrees to be disciplined by the faculty according to the custom of such institutions and, in administering such discipline, the authorities should afford him a fair opportunity of presenting evidence of his innocence, but are not under obligation to afford him all the formalities of a trial in a court of justice. *Ib.*

The faculty of a university, under the custom of the land which has been uniform for so long a time that it has become law, are justified in disciplining students in the institution, and the student who enters such institution agrees to conform to that rule of law and to be tried for his demeanors by such rule. *Ib.*

A university of learning that has received its charter from the state and is exempt from paying taxes by legislation of the state, but has received no other benefit from the state, and has an endowment from private donors, and charges tuition fees to students, is a private corporation. The charity it administers may be public, but the corporation is private. *Ib.*

Where the corporation is private and is not administering funds contributed to its aid by the state, the state will not exercise visitatorial power over its domestic affairs, and will not interfere with its government unless there has been unjust, unfair and oppressive treatment of its students, nor will the state interfere with the management of the trust funds of the university unless there has been a breach of trust on the part of the officers of the university. *Ib.*

Where a student has been guilty of various breaches of duty, of such a nature that it is injurious to the institution to allow him longer to remain as a student, and where opportunity has been afforded him to make full explanation before the faculty, and present evidence of his innocence, and where the faculty have made a careful examination of his conduct and have found his acts to be such that he is a very undesirable student and his presence is injurious to the benefits of the university, they are justified in removing him from the institution. *Ib.*

COMITY—

Statutes of other states—See **WRONGFUL DEATH.**

Under Sec. 1, Art. 4, of the constitution of the United States, requiring that full faith and credit be given in each state to the public and judicial proceedings of other state, the courts of Ohio bound to recognize the judgment of the courts of Michigan upon counts of executors whose courts have jurisdiction in cases, as conclusive upon

COMITY—Continued—

volved therein, and as foreclosing any collateral inquiry into the same matters. *Crawford, In re.* 605

CONSIDERATION—See GAS AND OIL LEASES.

CONSTITUTIONAL LAW—

The act 94 O. L., 725, authorizing the county commissioners in a county containing a city of the first grade, first class, to issue bonds, not exceeding \$10,000, in amount, and to levy a tax to pay the interest and to provide for payment of the principal within a period of ten years, for the purpose of paying the cost of the improvement and repair of any levee or bridge approach used as a highway in such county, the subject matter being of a general nature, is unconstitutional, as lacking uniform operation. *State v. Hamilton Co.* 317

The fact that the law in question does not specifically point out what levee, used as a road or bridge approach, is to be improved or repaired by the money realized from a sale of the bonds is not material; the act still remains local. *Ib.*

Teachers' pension fund law unconstitutional—See SCHOOLS; BOARDS OF EQUALIZATION; BOUNDARIES; BRIDGES.

CONTEMPT—

A judgment in a proceeding in contempt imposing fine and costs and imprisonment until both are paid will, on error, be modified so as to provide for the imprisonment for the non-payment of the fine and reversed as to the costs, and requiring the costs on the error proceeding to be paid one-half by each party. *Miller & Diehl v. Milling Co.* 629

A person cannot be punished as in contempt for violation of an order issued in a case to which he is a stranger and of which he has no knowledge. *Cassidy v. Church Co.* 461

An action to test the regularity of proceedings under which property is seized by an order of court and held by the sheriff is no longer regarded as an infringement of the prerogative of the court, but is favored as a ready and convenient method to test the legality of the first seizure. *Ib.*

The inherent power of courts to enforce their orders by summary proceedings in contempt is not

abridged by Secs. 6906, 6907, Rev. Stat., which provide for securing attendance of witnesses, and this power is equally applicable to cases under Sec. 5290, Rev. Stat., relating to production of documentary evidence. *Arbuckle v. Spice Co.* 726

The Supreme Court having held in *Hale v. State*, 55 Ohio St., 210 [45 N. E. Rep., 199; 60 Am. Sts., 691; 36 L. R. A., 254], that the general assembly has no power to and that Secs. 6906, 6907, Rev. Stat., do not abridge the power of courts to secure the attendance of witnesses, the circuit court has the right, independent of statute, to proceed as for contempt for disobedience of an order on a corporation to produce certain books and papers or documentary evidence for inspection. *Ib.*

CONTRACTS—

A parol agreement, succeeding the expiration of a five years' written lease, for use and possession of a strip of land, for private railway purposes, connecting lessee's stone quarry with a railroad, "so long as lessee pays the agreed rental" under which possession was yielded and held for more than six years, or until the death of lessor, and the expenditure of \$600 in acquiring adjoining land for the same purpose, and which, without the original tract, would be worthless to lessee, may be specifically enforced against a purchaser from the heirs of lessor, who (the purchaser) took with full knowledge of the facts and who, during such occupancy of the original tract, sold the second to lessee for the purposes mentioned; such purchaser must be held to have made himself a party to the contract in parol, with the rights and liabilities of lessor. *France v. McKenzie.* 245

Payment of an agreed consideration is not alone sufficient to remove such a contract from the operation of the statute, but payment and possession yielded and taken under the contract, with use and expenditure of money in betterment or improvement, is available to relieve the contract from the imputation of the fraud statute and make it enforceable as a matter in equity, on the lines of equitable estoppel. *Ib.*

While a parol contract for land or interest in land, by virtue of Sec. 4198, Rev. Stat., the statute of frauds and perjuries, cannot be enforced at law, yet such part performance of such a contract as would make its

Contracts.

rescission inequitable, will remove such parol contract from the operation of the strict letter of the law and permit it to be enforced in equity. **Ib.**

Citizens of different states may contract with reference to the laws of either state. Thus, a contract, executed in Ohio, with a Minnesota building and loan company, may be governed, if the parties so elect, by the laws of Minnesota. *Demland v. Loan Co.* **249**

But where the contracting parties, residents of different states, make no choice, in express terms, then it becomes the duty of the court to ascertain from the evidence and circumstances, surrounding the transaction, which code of laws was selected, or intended by the parties to govern. **Ib.**

Under an agreement between a lumber firm and the owner of a sailing vessel, whereby the former agreed to keep a tug in readiness to move the vessel from point to point, to be loaded with lumber, "and in case of storm to move her to a point of safety," a failure, upon the approach of a storm, to comply with the captain's request to be towed from the dock to an anchorage, with the result that the boat, without negligence, was injured and sunk, but not a total loss, or so badly injured that repairs were wholly impracticable, renders such company liable for the cost of necessary repairs, judiciously done, and for demurrage for the time the boat was laid up for repairs, and unfit for use, without regard to the value of the boat at the time the accident occurred and without deduction for the benefit occurring to the owner by reason of the increased value of the vessel after repairs. *Loud & Sons Lumber Co. v. Peter.* **155**

A bid, in response to an advertisement for the sale of a natural gas plant, setting forth that the bidder will pay a certain sum for the property outside the city, and another offer to pay a certain sum for the property inside the city, and still another distinct offer to pay a certain sum for the property inside and outside the city, although in one sense submitted as a single bid, in reality amounts to three separate bids, and particularly where a condition attached to the last bid relates to the operation of the whole plant. *Kerlin Bros. Co. v. Toledo.* **56**

The mere fact that a contract was made by a corporation with an individual who was at the time a director of the corporation, and who participated as such in the making of the contract, is not sufficient to render the contract invalid. Its unfairness to the corporation must also appear. *Browne v. Paper Co.* **102**

Where goods were purchased by a firm in Cincinnati of a manufacturer in Dayton, to be shipped to Indiana, and the contract of sale is silent as to the place of delivery or as to who is to pay the freight, evidence of a general custom among the trade in Cincinnati is incompetent to vary the rule of law that in the absence of express agreement vendor is not required to carry the goods to vendee, unless it appears that vendor was chargeable with notice of such custom or usage. *Mathias Planing Mill Co. v. Hazen.* **54**

The fact that the manufacturer in Dayton maintained an agency in Cincinnati and that one of the officers of the manufacturer made weekly trips to that city for the purpose of selling goods, is not sufficient to charge such manufacturer with knowledge of a usage of the trade prevailing only in Cincinnati. **Ib.**

Neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing the promisor is already bound to do, either by the general law or by a subsisting contract with the other party. *Ward v. Board of Ed.* **671**

Where bids were received by a board of education in response to an advertisement calling for bids for three systems for the fire-proofing of a school building, and it appears that anybody could bid on the work, it is not unlawful for the board to select a certain system though the bid for that system was not the lowest bid received. The fact that the systems were patented and owned by a single company, to render the transaction unlawful, must be proved. *Polhamus v. Board of Ed.* **366**

In such action the different items of damage need not be alleged, but may be lumped and pleaded in gross. *Wolf Co. v. Storage Co.* **582**

The test and acceptance of an ice plant by the purchaser is not a waiver of defects therein, when the contract of sale guaranteed, in case of its acceptance, that it would ac-

CONTRACTS—Continued—

compish the results specified therein for one year. Ib.

In an action for damages for breach of guaranty in a contract of sale, it is not sufficient to allege that the article sold and guaranteed was broken or refused to act, without plaintiff's fault, but it must also be alleged that such occurred through the fault of defendants or of defects in manufacture. Ib.

The exception to the operation of the statute of frauds requiring a contract for the lease or sale of real estate to be in writing, if the case where the purchaser enters into possession under the parol contract, does not dispense with a conveyance, but such possession may be used as the basis to enforce a proper conveyance. *Mather v. Wright*. 578

Subdivision 7 of Sec. 3988, Rev. Stat., relating to school-houses, providing that "any part of a bid which is lower than the same part of any other bid shall be accepted, whether the residue of the bid is higher or not; and if it is higher, such residue shall be rejected," is apparently in conflict with subdivision 6 of said section, which provides that "none but the lowest responsible bid shall be accepted; but the board may, in its discretion, reject all the bids, or accept any bid for both labor and material, which is the lowest in the aggregate for such improvement or repairs," but if possible said subdivisions should be reconciled. Therefore, where the discretion vested in the board by subdivision 6 is not exercised, then in the consideration of bids containing two separate items or more, any part of a bid which is lower than the same part of any other bid should be accepted. *Gilbert v. Board of Ed.* 552

A contract between an elevator company and a firm of commission merchants, whereby the commission merchants are substantially in possession and control of the elevator and the employees are employees of the commission merchants, and the latter, so far as an employer may be bound by an employee, are bound by the action of the elevator employees. *Paddock v. Railway Co.* 789

It is not essential, where delivery of grain received by a railroad company is to be put at an elevator, that the owners of the grain, the commission merchants, should have possession or control of the elevator in order to be bound by the ac-

tion of those in charge of such elevator. Where the delivery was to be at the elevator, and the receipt of the grain was to be by whoever might be in charge, the commission merchants or owners of the grain would be bound by the conduct of the persons in charge of the elevator. Ib.

Under a contract between a railroad company and an elevator company by which the former has the right to use certain spur tracks, the property of the latter, and without interfering with their owner's use, for general railway purposes, and keep the same in repair, and deliver all grain consigned to the latter at its elevator at a specified price per car, when delivered at the termini of certain railroads having track connections, etc., the railroad company is required to promptly move all car loads of grain so received to the elevator, and the elevator company has a corresponding or correlative duty of promptly receiving the cars and relieving the railroad of its obligation of an insurer unless the railroad company has assumed the obligation of further responsibility with respect to the care of the grain. Ib.

The fact that the elevator company or its lessees provided a watchman to see to the safety of the grain upon cars delivered by the railroad upon the premises of such company, and to close the cars that had been left open by the inspector of the board of trade, is evidence of the construction placed upon the contract to deliver such grain, as to its being in the possession of the consignee. Ib.

See also *HUSBAND AND WIFE; PRINCIPAL AND AGENT; SCHOOLS.*

CORPORATIONS—

In as much as every corporation is effected after one or more preliminary meetings have been held for the consideration of the subject in the interests of which it is desired to organize a corporation, it cannot be held that the preliminary organization thus formed continues after the articles of incorporation have been returned by the secretary of state and adopted, and that the perfected corporation is necessarily a separate and distinct organization. *Mulhauser v. Hospital*. 391

A person elected treasurer of a preliminary organization, formed for the purpose of incorporating a

hospital association, and who is subsequently, after articles of incorporation have been forwarded to and returned by the secretary of state and adopted, elected treasurer of the perfected corporation, becomes the treasurer of that organization, which succeeds the preliminary organization, and, as such treasurer, may be required, at the suit of the corporation, to account for all moneys at any time received as such treasurer.

Ib.

A director of a corporation performing services for the corporation under a contract with it, is an operative and his claim for wages is preferred where the validity of his claim has been established by finding of court. *Armleder Plumb. Co. In re.*

320

A stipulation in a bond of a corporation that "no holder of this bond shall have recourse for its payment upon any stockholder of said company under or in pursuance of any law imposing liability upon stockholders of incorporated companies, whether such law be now in force or shall hereafter be enacted," is not void or against public policy, and constitutes a defense in favor of a stockholder in a suit to enforce the statutory liability in favor of bondholders or the owners of judgments on the bonds. *Hull v. Iron Co.*

331

In an action to enforce stockholders' statutory liability, under Sec. 3260, Rev. Stat., it is error for the court to proceed to judgment until all of the stockholders within the jurisdiction of the court have been made parties. *Lemar v. Stevens.*

824

A corporation, by having gone into liquidation, having wound up its affairs and disposed of its stock and assets, is not thereby deprived of the right to sue to recover funds which it is claimed were negligently lost by its officers or servants. *Kalb v. Bank.*

437

An action being litigated and pursued by a corporation from one court to another, in itself refutes a claim that it was not the purpose of the board of directors to institute and maintain it, and amounts to an adoption of the act of that board in that regard, and ratifies it by conduct. Ib.

When the condition arrives which drives an incorporated company into liquidation, when it must marshal and collect its assets, and pay its debts, and wind up its busi-

ness and adjust its affairs, its power to assert and defend its rights, is most strong, because the necessity is then most imperative. The last sign of vitality of an incorporated company is the power to maintain and defend an action; and the nature and purpose of the action is the test of whether or not the company has sufficient life to maintain it. Ib.

When an incorporated company goes into liquidation, it becomes the special function of its president, for the purpose of winding up its affairs, to see that actions to that end are maintained and defended; and he may do this without specific authority of the board of directors.

Ib.

An officer of an incorporated company, entitled, as against everybody, to the care and control of its assets, and who accepts that service and employment, while he may not be an insurer, yet, when his duties are fixed and determined for him, in the accomplishment of that service, and the manner prescribed, and the place fixed, and the wherewithal provided by which he may safely perform that engagement, is held to the exercise of such care to effect it as an ordinarily prudent man, under the same or similar circumstances, would exercise; and if he fails in this, and loss directly results, he must make good such loss. Ib.

Under the foregoing rule, a preference, preceding an assignment for creditors, made by a corporation organized under the law of Ohio, but having subsequently removed its property and business to Pennsylvania where it became insolvent, to secure *bona fide* debts, to creditors non-resident of Ohio, through the medium of judgment notes, whereof judgments were taken in Pennsylvania and property seized and so in accordance with the laws of that state, is not invalid under the laws. *Carter Cattle Co. v. McG.*

The rule of *Rouse, Trusts Merchants National Bank*, 4 St., 493, has reference to the existing between the corporation and its creditors, and a remedy of the creditors, a procedure. It is a consequence of the general laws of Ohio powers of corporations is not a limitation upon powers which the courts state, by the laws of

Corporations.

CORPORATIONS—Continued—

recognize against creditors of that state. *Ib.*

A stockholder in a corporation, having been granted leave to inspect the books of the corporation for the purpose of ascertaining its financial condition, has the right to proceed at any time thereafter to make his demand on its secretary and acting manager, and if the request is refused, to make an application to the court for proceedings as for contempt, and the filing of a petition in error or other pleadings in the Supreme Court should not delay proceedings under such order unless delayed by regular order from the proper court as in *supersedeas*. *Arbuckle v. Spice Co.* 726

The secretary and general manager of a corporation, of which the principal directors are non-residents and not within the state, is deemed in possession of its books and papers, and his refusal to obey an order of court directing an examination thereof is contempt of court for which he may be imprisoned notwithstanding he may be acting under the orders of his superiors. *Ib.*

The object and purpose of a corporation for profit is to make money. Therefore, it is the duty of its directors, as trustees for the stockholders and for each of them, to use the capital of the corporation, for the purpose of producing profits, and their failure so to do may be inquired into by a court of chancery. *Ib.*

While the law permits a board of directors of a corporation in their discretion to keep money on hand for specific or certain purposes, the general rule is that stockholders are entitled to a dividend from the profits. Therefore, a stockholder has the right to demand that if profits are made by the company that they shall be awarded to him, that dividends shall be declared, and if no dividends are declared to ascertain the reason why. *Ib.*

It is a *prima facie* rule of law that purchasers of stock in a corporation have the right to invoke the aid of a court of equity to compel the transfer of such stock upon the books of the company, to be permitted to examine its books and to make inquiry into the affairs of the corporation, to the end that their rights be protected, especially where it appears that the corporation was a successful, dividend paying company

at the time of such purchase, but since, and for several years, has paid no dividends, and it is alleged that it is being managed in the interests of a rival company. *Ib.*

Where, under an order of court granting an examination of the books and papers of a corporation, a dispute arises as to the right of the parties to inspect any books or paper, that matter should be brought before the court by the party making the objection to the examination. *Ib.*

The fact that parties may compel the production of books by a subpoena *duces tecum* is no defense to an application under Sec. 5290, Rev. Stat., for an order for the inspection of the books of corporation. *Arbuckle v. Spice Co.* 743

In an action by minority stockholder against the corporation, claiming mismanagement of the corporation by its officers and a failure to pay earned dividends on stock, or management in the interests of a rival corporation of which such stockholders were members, and asking for an order allowing plaintiffs to examine the books of the corporation, under Sec. 5290, Rev. Stat., an order may be granted on motion allowing an examination and inspection of such books before the trial, for the purpose of enabling plaintiffs to obtain evidence therefrom as to the profits made by the concern. *Ib.*

The mere fact that the demand for an inspection of books of the corporation is general in its nature, or that the demand includes all of a certain class of books, papers or documents, does not make it necessary for the court to either reject or allow the inspection in accordance therewith. The court has power, in such cases, to modify or make such an order as will be compatible with the purpose for which the evidence is sought. *Ib.*

Such order may be made notwithstanding plaintiffs may be members of a rival firm, but will be so framed as to confine such examination to the matters relevant to the issue. *Ib.*

The real object and purpose of a corporation for profit is to make a profit and to make dividends for the stockholders, and a person who holds the stock of such a corporation has a right to have the business of the company conducted, so far as prac-

licable at least, so that it will make profits and pay dividends. Ib.

Section 5290, Rev. Stat., providing that either party or his attorney may demand inspection of books, etc., is not limited to cases triable to a jury, notwithstanding the clause providing that on failure of the party to comply with the order, the court may direct the jury to presume such facts as the party seeking the examination alleges. Ib.

Actions to enforce stockholders' statutory liability—See ACTIONS.

Acts of officers in signing petition for improvements—See MUNICIPAL CORPORATIONS.

See also COLLEGES; CONTRACTS.

COSTS—

Where a fund in controversy is claimed in another suit by a person not a party to the suit at bar, and the parties to the suit at bar are remitted to the other case to settle their rights to the fund, the costs of the suit at bar should not be ordered paid out of the fund. *Buser v. Burckhardt*. 19

See also DOWER.

COUNTY COMMISSIONERS — See HIGHWAYS.

COURTS—

The decision of the circuit court reversing the judgment of the common pleas for error of law in refusing a new trial upon the ground that the verdict was against the weight of the evidence, is the law of the case until the facts are changed either by additional evidence material to the issue or the judgment of the circuit court reversed by the superior court. *Firemen's Ins. Co. v. Stern*. 818

If the legislature has so enlarged the jurisdiction of the probate court (a question not decided) that it may determine questions of the character of those involved in preceding paragraphs, it has not withdrawn jurisdiction in such cases from the court of common pleas; the jurisdiction of the probate court is, therefore, simply concurrent with that of the court of common pleas, which has general equity jurisdiction; the remedy in one is cumulative with the right to the remedy in the other. *Deering Harvester Co. v. Keifer*. 270

Probate courts can take jurisdiction of no matter or proceeding unless authorized by provision of con-

stitution or statute. *Jackson Co. v. McGhee*. 106

CREDITORS BILLS—

The commencement of an action in the nature of a creditor's bill gives the plaintiff priority over mere judgment creditors, who acquire no lien where judgment debtor's interest in property consists only of an equity; and an assignment of debtor's interest in property to his attorneys in payment of fees, takes precedence over claims of mere judgment creditors and is second to claim first above referred to. *Tischler v. Tischler*. 370

CRIMINAL LAW—

An affidavit charging a person with unlawfully and falsely pretending that she was collecting money and funds for the relief of certain children, by means of which false pretenses she obtained money from complainant, "whereas in truth and in fact she was not collecting money and funds for said children or their benefit, all of which the accused then and there well knew," charges the accused with a present purpose and object in collecting the funds or thing of value obtained by such false pretense, and states an offense against the state of Ohio within the jurisdiction of the justice before whom the affidavit was made. *Fitzpatrick, Ex parte*. 695

A person is not prejudiced by being tried and convicted for larceny when he might have been tried and convicted of robbery, an aggravated larceny, for the same offense. *Brennan v. State*. 316

CURTESY—

See PARENT AND CHILD.

DAMAGES—

In an action against the president of a corporation involving false statements or bare fraud concerning the financial condition of the corporation, without a showing of gross or malicious fraud, or a very rupt condition, punitive damages any form cannot be recovered. *v. Bowlus*.

A person is not entitled to cover damages for injuries to feelings and for his disparagement or his disgrace in the as a result of having been to buy worthless mine; false representations,

Damages—Deeds.

DAMAGES—Continued—

ingly or recklessly, that the property was unencumbered. *Ib.*

A verdict of \$1,000, in an action for the wrongful death of a boy five years of age, does not clearly indicate passion or prejudice, and is not manifestly excessive within the meaning of the law, especially where evidence tending to prove probable pecuniary loss was erroneously excluded. *Ashtabula Transit Co. v. Dagenbach.* 307

A verdict of \$4,000 in favor of a man forty-two years of age, in good health and sound in body, who was earning \$65.00 per month as a railroad employee at the time of his injury, is not excessive for the loss of a hand, even when consideration is restricted to his diminished earning capacity and no account is taken of his suffering, physical and mental. *Michigan Cent. Rd. v. Waterworth.* 621

In such case damages sustained on account of time lost cannot be recovered unless specially pleaded, and a general statement of plaintiff in his testimony as to value of time lost is insufficient. *Wilt v. Railroad Co.* 589

See also **CONTRACTS; ANIMALS; PRINCIPAL AND AGENT.**

DAYS OF GRACE—

See **BILLS AND NOTES.**

DEATH—

See **WRONGFUL DEATH.**

DEBTORS AND CREDITORS—

FOREIGN ASSIGNMENTS—See **CORPORATIONS; See also DOWER; CREDITOR'S BILL.**

DEDICATION—

In order to constitute a complete and valid common law dedication of land to the public, on the part of the owner, it must appear that he clearly and unequivocally indicated by his words or acts an intention to dedicate. The making of a plat showing a triangular piece of land, at the intersection of streets, and coloring it the same as the streets are colored, and which is without lot number but which is not within the dimensions of streets as shown by said plat, and the fact that for many years no taxes or assessments were paid (none being demanded) on said triangular piece of land, are not suffi-

cient to indicate conclusively or unequivocally an intention to dedicate. *Toledo v. Converse.* 468

And where the city, having taken no formal action in accepting the property above referred to, subsequently accepts dedication of streets and alleys shown on said plat, and in the improvement of streets excludes the triangle from the improvement, and subsequently, for improvement of a street upon which it abuts (said property having been omitted inadvertently from taxation or assessment for many years) makes an assessment for such improvement, this is evidence not only of a purpose not to accept, but of a purpose to reject such property if a dedication was intended. *Ib.*

If it were possible to engraft the condition in an accompanying plat, of the character above stated upon a grant to a municipal corporation, a condition that the land should be kept in "good condition for the purposes for which the grant was made" would be void for uncertainty, where no standard is established for determining the meaning of "good condition." *Armstrong v. St. Marys.* 453

A condition recited in a plat accompanying a dedication to a municipal corporation of land for park purposes, that "the land shall be kept in good condition for the purpose for which the grant was made, or the same to revert to donor" is not engrafted upon or a part of the dedication. The grant is independent of such condition and a violation thereof does not terminate the trust or carry the fee back to the original proprietor. In other words, a condition not arising from the dedication itself cannot be engrafted so as to bind the corporation. *Ib.*

A dedication, legal in form, of property to a municipal corporation for park purposes, and its acceptance by the city, vests the fee of the property in the municipality for the purposes for which it was dedicated. *Sec. 2601, Rev. Stat.* *Ib.*

DEEDS—

The exception in said deed was not void for uncertainty. The quantities or boundaries of the land excepted could be shown by evidence, and the assignment of the dower. *Manley v. Carl.* 218

S. M., tenant in common with R. M., conveyed to said R. M., by deed of release or quitclaim certain

Depositions—Dower.

tracts of land described in the deed, which were subject to an unassigned dower. S. M. and his wife, in the deed, remised, released and forever quitclaimed unto the said R. M. and his heirs and assigns forever, all their title, interest and estate, legal and equitable, except their right and title in the widow's dower in the premises described. Afterwards the widow's dower was assigned in 120 acres, a part of the lands described in the deed. Held, that S. M.'s grant to R. M. excepted the fee in that part or portion of the premises described in the deed, to-wit: in the 120 acres, in which said dower was assigned, and R. M. did not get title thereto under his quitclaim deed. *Ib.*

Under a quitclaim deed by a railroad company as lessee in perpetuity of another company's railroad, conveying a strip of the right of way, parallel with the track, granting "all title that it has or ought to have" to said land, and covenanting that "neither it nor its successors or assigns, or any one claiming title by, through or from it shall ever assert any title" thereto, where neither lessor nor lessee had any title at the time of the conveyance, but afterwards, being compelled to appropriate, lessor acquired title and conveyed by deed to lessee, the title thus acquired inures to the benefit of the grantees of such lessee, and their assigns; and grantors and all claiming under them are estopped by such quitclaim deed from asserting title to the land in question. *Pittsburg & W. Ry. v. Garlick.* 337

DEPOSITIONS—

A deposition taken before a notary public in Arizona, containing copies of instruments recorded in the office of a county recorder, containing certificates of the notary and county recorder, but without the certificate of a presiding judge or the governor, are inadmissible in evidence. Sec. 906, U. S. Rev. Stat. *Cable v. Bowlus.* 526

DESCENT AND DISTRIBUTION—

The children of a deceased widow, who are under the age of fifteen years at the time of her death, are not entitled to have set-off and allowed to them under Title 2; Chapter 2, Rev. Stat., the property exempted from administration in Sec. 6038, Rev. Stat., and an allowance for their support for twelve months from her decease. *Hance v. Chappel.* 139

DESCENT AND DISTRIBUTION—

See also *WILLS.*

DIVORCE AND ALIMONY—

Custody of children—nature of order as to—see *PARENT AND CHILD.*

DOGS—

See *ANIMALS.*

DOWER—

Where a wife in consideration of the scaling down of the claims of certain of her husband's creditors and an extension of time on the amount so reduced, has joined in a trust deed, releasing her dower and said trust deed had been construed by the court under Sec. 6343, Rev. Stat., 56 O. L., 231, to inure to the equal benefit of all creditors as a general assignment, to the extent of the amounts of the claims intended to be covered by said trust deed, the wife's release of dower is operative; as to the other general creditors, it is not. *Case v. Hewitt.* 823

The word "costs," as used in Sec. 5718, Rev. Stat., providing that if resistance is made to the petition of the person claiming dower, and the court find that such person is entitled to dower, the defendant shall be required to pay all costs, otherwise that plaintiff shall pay one-third of the costs, does not include attorney fees. *Watson v. Watson.* 463

An answer in a suit for assignment of dower, setting up an agreement claimed to have been made by plaintiff with defendants whereby the latter should hold the premises without assignment of dower for a certain length of time, unexpired at the time suit was brought, constitutes a resistance to plaintiff's right to assignment of dower within Sec. 5718, Rev. Stat., providing that if resistance is made to the petition of the person claiming dower, and the court find that such person is entitled to dower, the defendant shall be required to pay all costs of suit; otherwise that plaintiff shall pay one-third of the costs. *Ib.*

Nor does Sec. 5711, Rev. Stat., relating to actions for dower revived in the name of plaintiff's executor or administrator, authorizing, if dower is adjudged, the assignment thereof "after deducting one-third of the necessary expenses," author-

Dower—Embezzlement.

DOWER—Continued—

ize the recovery of counsel fees in ordinary actions for the assignment of dower. The expenses referred to in this section are expenses attending the assignment of dower by commissioners under Sec. 5715, Rev. Stat. **Ib.**

Section 5778, Rev. Stat., providing that "the court, having regard to the interests of the parties, and the benefit each may derive from a petition, and according to equity, shall tax the costs and expenses which accrue in the action, including reasonable counsel fees which shall be paid to plaintiff's counsel * * *," can not, by analogy, be construed to authorize payment of counsel fees to plaintiff in an ordinary action, contested, for assignment of dower. **Ib.**

See also DEEDS; ANNUITIES.

EASEMENTS—

Where two persons own land on opposite sides of a creek each tract extending to the center of the creek, and one give the other verbal permission, without consideration, to erect a dam across the creek, one side of the dam extending on his land, and after the erection of such dam, the party granting the permission dies, after which the second party without any other license erects a new dam in place of and fifty feet below the old one, the purchasers at judicial sale of the land of the licensee cannot maintain such dam against the wishes of the grantees of the licensor. *Mather v. Wright.* **578**

EJECTMENT—

A suit in ejectment, cannot be maintained where there is an outstanding title (property had been leased for an unexpired term), for the reason that under such circumstances the right to immediate possession cannot be claimed. *State v. Japan Co.* **587**

ELECTIONS—

In so far as the act of April 8, 1896, 92 O. L., 123, known as the Garfield Law, and entitled "an act to prevent corrupt practices at elections," declaring that the election of a person who does not comply with the provisions of the act shall be void, applies to congressmen, it is unconstitutional. *State v. Russell.* **299**

While the state may make wholesome laws for the purity of elections, and for that purpose curtail the amount of money which may be paid out by and for persons who run for office, and attach a penalty, in the nature of a fine, for the violation thereof, it has no power to say that a congressman shall not, on account of the violation of such a law, enter congress or forfeit his election. **Ib.**

Inasmuch as the law in question, in subdivision 7, clearly exempts any right on the part of the state to interfere with congressmen after they have received certificates and entered upon their duties, and inasmuch as so far as the statute extends to fines it is constitutional, the whole law is not rendered invalid by the unconstitutionality of portions referred to in preceding paragraphs. **Ib.**

A failure to file the statements of expenses of nomination and election, required by the Garfield law, Sec. 3022-5, Rev. Stat., though a penalty is attached, is not within the provisions of Sec. 7 of said act, which provides, among other things, that when it shall be made to appear in an action instituted against an officer to deprive him of his office that he has committed one of certain specified offenses, "or that any other acts declared unlawful or made punishable by law of this state, were committed by such officer, his agent or agents, or with his or their consent or connivance * * * to secure or promote his nomination or election" such person may be deprived of his office: The act complained of must not only be unlawful but it must be done with intent to secure or promote his nomination or election, and a failure to file the certificate referred to is not within that class of offenses. *State v. Jaquis.* **91**

See also OFFICES AND OFFICERS.

EMBEZZLEMENT—

An indictment, charging that defendant, being an agent and employee, did unlawfully and fraudulently embezzle and convert to his own use, etc., charges but a single offense, as agent and employee are terms not inconsistent with one another, and it is not bad for duplicity. *Mitchell v. State.* **446**

Section 6842, Rev. Stat., does not in terms make criminal intent an

element of the crime of embezzlement. It provides punishment for an agent, etc., who embezzles or converts to his own use, or fraudulently takes or makes away with or secretes with intent to embezzle, etc. It is not necessary, in an indictment for embezzlement under this section, to allege the act was done with intent to embezzle and fraudulently convert, etc. The intent therein referred to has reference only to the taking and secreting of the property, and it is necessary to allege such intent only where the indictment is for such fraudulent taking and secreting, etc. *Ib.*

Under Sec. 6842, Rev. Stat., an indictment charging that the defendant did unlawfully and fraudulently embezzle and convert to his own use certain personal property of value, without the consent of the owner, is sufficient without alleging that the same was done with intent to embezzle. *Ib.*

EMINENT DOMAIN—

See **STREETS; APPROPRIATION.**

EQUITY—

See **CORPORATIONS.**

ERROR—

Where the trial judge, in passing upon a motion for a new trial, made an entry that "the damages awarded by the jury in excess of * * * are excessive, appearing to have been given under the influence of passion or prejudice" and ordered a remittitur, or, if refused, a new trial, the reviewing court is authorized to look into the record and determine for itself whether the verdict was excessive, and if so, whether the excess was produced by passion or prejudice; and, having so determined that the verdict was not excessive, the judgment of the trial court thereon may be affirmed, irrespective of the fact that it may have been the duty of the trial judge, in view of his finding as to passion and prejudice, to have set aside the verdict instead of ordering a remittitur. *Wabash Ry. v. Fox.* 148

A motion to quash service of summons cannot be reviewed where the finding of the court was based upon facts and no motion for a new trial was made. *Whitman v. Sheets.* 179

When a cause is submitted to the court of common pleas upon an

agreed statement, no action is to be taken to declare the judgment of the trial in the case to be authorment on the case. *Hance v.*

A verdict being agreed, and the defendant, upon the review, being wrong in the review, might have a reversal of the verdict. *Parmalee.*

An objection to a proceeding on the part of an administrator, common pleader, the circuit court, or other parties to the ground, were parties to the counts in the action in another parties who were not, and would be reversed. parties would others, is not particularly urged are upon courts were the ancillary if true, would void as to In re.

Exception to disallowance of counts of an probate and are available to les who, in case allowed to be recognized as exceptions. Such parties to prosecute exceptions.

Proceeding allowance of of executors, personam, but lar, are binding equally, whether present to controversy, or in and this rule in an ancillary another state

Error—Evidence.

ERROR—Continued—

ments in the domiciliary administration in Ohio. *Ib.*

Ordinarily, a reviewing court will consider all exceptions not presented by oral argument or brief as not well taken; and a request by counsel that the court examine the record, and pass upon all exceptions to the admission and rejection of testimony will be ignored, especially, where plaintiff in error is represented by experienced counsel. *Lake Shore & M. S. Ry. v. Reynolds*. 701

The question as to settlement of a claim for personal injuries having been submitted to the jury upon evidence of the defendant that the complainant accepted in settlement thereof the payment of full wages while he was laid up and his subsequent employment, the receipt of wages and employment being admitted by plaintiff, but denied as having been received in settlement of his claim, and employe having refused to sign a written agreement to that effect, a reviewing court will not disturb the verdict of the jury, finding against the employer. *Frolich v. Cranker*. 592

When objections are sustained to questions asked a witness on the trial, and exceptions are reserved to the ruling, the record on the reviewing court should show what the answers to such questions would have been. *Jakowenko v. Life Ass'n*. 576

In determining whether a verdict for defendant in an action against a railroad company for wrongful death, is against the weight of the evidence, when questions of negligence of the company and contributory negligence of deceased are both involved, a reviewing court must, if it is determined that the verdict is against the weight of the evidence on the question of negligence of the company, also determine whether the verdict is against the weight of the evidence on the question of contributory negligence of deceased. *Wainright v. Railway Co.* 530

See also PLEADINGS; VERDICTS; WILLS.

ESTOPPEL—

Property owners are not estopped from claiming ownership of such land by having omitted to pay taxes or assessments thereon for a long period of time where no taxes

or assessments were demanded. Property owners are not required to hunt up city authorities and seek to pay or tender payment of taxes or assessments in order to escape estoppel against ownership. *Toledo v. Converse*. 468

See BILLS AND NOTES; DEEDS; GAS AND OIL LEASES.

EVIDENCE—

Where the question for the jury to determine was whether the plaintiff's injury was caused solely by the negligence of the defendant, or whether she was guilty of contributory negligence which caused her injury, and the plaintiff having been asked a proper question, answered: "I was using all due caution," it was error for the court to refuse to strike out said answer upon defendant's motion for that purpose. *Circleville v. Sohn*. 193

Where a witness is asked a question which is proper and competent, and the answer of the witness to it is partly competent and partly incompetent, and a motion is made to strike out the answer, it is not error to refuse to sustain such motion. *Ib.*

In an action against a municipal corporation to recover damages for an injury alleged to have been caused by slipping and falling on an alley crossing, evidence having been offered tending to show that the alley crossing had been substantially in the same condition for a number of years, and that during that time divers persons had slipped or fallen at that point, the court should at the time of receiving said testimony, then instruct the jury that it can only be used by them for two purposes: First, as tending to show the defective condition of the alley crossing, at the point where the plaintiff claimed to have received her injury; and second, as tending to show that the city authorities had knowledge or should be charged with knowledge of such defective condition. *Ib.*

A party excepting to the ruling of the court upon a question asked of a witness in chief must state what he expected to prove by the witness, in order to enable the court to determine whether there was error in the refusal of the court to receive the evidence; and if such party fails to do so, he cannot avail himself of the alleged error in the

appellate court. *Loud & Sons Lumber Co. v. Peter.* 155

The stubs in a book of promissory notes are not competent as book account, or otherwise, to prove the purpose or effect of the notes given. *Mathias Planing Mill Co. v. Hazen.* 54

In an action for personal injuries, in which it is alleged that the defendants, in the operation of a manufactory, were negligent in employing plaintiff because of his tender years, it is proper to show that at other factories children of the age of plaintiff were employed for the same purpose, in order to show that the defendant exercised such care and prudence as was ordinarily exercised by others, under similar circumstances. *Hoppe v. Parmalee.* 24

Under the rule which, to show defendant's knowledge that accidents were likely to occur at a certain machine, permits plaintiff to prove that other accidents have occurred under like circumstances, it is competent for a defendant to prove, that, during the operation of a machine for many years, no accidents have occurred. *Ib.*

A photograph of premises where an accident occurred which appears to be substantially correct and which is used by witnesses on both sides in describing such premises in the presence of the jury, and introduced in evidence and submitted to the jury as an exhibit, must be regarded as evidence, and not merely upon the footing of a view of premises by a jury. *Hohly v. Sheely.* 678

In the absence of evidence to the contrary, it must be presumed that evidence admitted was competent and material and it is necessary that the immateriality of the evidence omitted must be disclosed or the omission thereof will be fatal. *Ib.*

The effect of testimony of a witness that cars were sometimes moved and switched off while the process of inspection was going on, which would lead to the conclusion that a dangerous method was employed, is cured by subsequent explanation by evidence indicating that the cars actually being inspected were not moved, and cannot be regarded as having been prejudicial. *Michigan Cent. Rd. v. Waterworth.* 621

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the suit for pers wages ov sions, int showing though m competen present, c dicial to t there was ter, and the same

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Evidence.

EVIDENCE—Continued—

road employee as to whether or not, at the time of (before daylight in the morning), and under the circumstances of the accident, it would have been possible for plaintiff's decedent to have determined whether the frog was blocked, is within the rule that, where it is not practicable to place before the jury all the primary facts upon which they are founded, witnesses may state their opinions from such facts, where such opinions involve conclusions material to the subject of the inquiry. *Cleveland, C. C. & St. L. Ry. v. Ulom*. 321

Reports made up, by employees or agents of a railway company, from statements of parties who witnessed the circumstances of an accident and injury, are incompetent and objectionable, in an action against the company growing out of such accident or injury, as not part of the *res gestae*, and on the ground that they are not within the scope of the agent's or employee's employment; and the fact that the law (Sec. 251, Rev. Stat.), requires such reports to be made to the commissioner of railways does not render them competent as evidence in such actions. *Ib.*

Where a railroad company, in defense to an action for wrongful death, introduces in evidence rules which forbid employees to couple cars while in motion, it is competent to show that such rules have not been observed by the employees of the railroad company for a long time, with the knowledge of the representatives of the company; and in such case, the jury should be directed to find, first, what the practice was; to discover the rule; second, was that practice known to the superior servants of the decedent employec. Merely instructing the jury to simply determine whether the rule was abrogated by practice is not sufficient. *Ib.*

To make a case of error in refusing evidence, the competency of which depends upon proof of a conspiracy, that fact must appear with reasonable clearness, inasmuch as whether or not it has been established, is a matter peculiarly for the trial court. On that point, under the general rule stated, nothing is shown by the record here, to the prejudice of the defendant below. *Donald v. State*. 483

Where the testimony of a deceased person, or a party in a former trial, is sought to be reproduced by the evidence of one who heard it, but only as to a particular portion, it is a sufficient qualification to testify to this, that the witness can recollect and state the substance of the part offered. *Ib.*

Much latitude is left to a trial court in determining the *prima facie* proof necessary to admit evidence of the acts or declarations of a party as a co-conspirator with one who is being tried for an alleged crime; and if on that question, there is no failure of proof at any material point, the admission of such evidence, otherwise competent, will not be regarded as error. *Price v. Junkin*, 4 Watts, 85; *Nudd v. Burrows*, 91 U. S., 426. *Ib.*

By the law of evidence, testimony competent in chief, by that fact is rendered incompetent in reply. The rule, however, is subject to the discretionary authority of a trial court to reopen a case in chief at any time before it is finally closed, and let such evidence in. But this should not be done when, without fault on his part, by reason of discharge of witnesses, or otherwise, a party would be cut off from an answer to the new testimony which he might have made if it had been regularly given. Yet, as in this case, if the record fails to show that a party over whose objection evidence in chief has been admitted, out of the usual order, was deprived of the right or cut off from the means of answer to it, such action is not in legal view prejudicial, even if technically irregular. *Ib.*

Evidence, in the nature of tables of a life insurance company, derived from experience of about fifty years, showing probable duration of life is not restricted to use in actions involving death: such evidence is competent in an action for personal injuries, as bearing upon plaintiff's financial loss and pecuniary damages by diminution of earning capacity. *Pennsylvania Co. v. Hickley*. 379

In an action against a railway company for personal injuries, the admission of evidence of repairs to or changes in cars made after the accident is incompetent, and if admitted constitutes prejudicial error. *Toledo & O. C. Ry. v. Beard*. 406

Evidence—Executors and Administrators.

Evidence, in such an action, of prior knowledge of the accumulation of ice at a point where a spout discharged water on the sidewalk, bears on the question whether plaintiff knew of the dangerous condition of the sidewalk at the time of the accident, but is not conclusive evidence of contributory negligence. *Leber v. Transportation Co.* 568

Where it appears in an action against a railroad company for injuries to a brakeman, that the accident complained of might just as well or probably have been caused in some way other than that claimed, and which would relieve the railroad company from the charge of negligence, as where an accident claimed to have been the result of the use of a brake with too long an eye-bolt might just as probably have resulted from the winding of a chain upon itself, a jury is not warranted in finding that the accident was caused in the manner alleged. *Hunt v. Caldwell.* 562

A court may take judicial notice of the map of a city in order to determine the distance between certain points on a railroad track within its limits. *Wainright v. Railway Co.* 560

And if such brakeman was actually looking ahead, and did see, or might by ordinary care have seen the danger in time to avert it by changing his position, so that his failure to do so would constitute negligence, these facts must be established by proof; since a brakeman is not required to be faced and looking toward the front end of the train, the jury would have no right to assume or guess that he was in that position, and that he saw or might have seen and avoided the danger. *Ib.*

Where, in such an action, evidence is given that the plaintiff was present at a meeting of the directors of the corporation on a certain occasion and was then told that the company owed a large sum for the mines; that the debt was serious and outstanding; and that at that time that he expressed no surprise, that he kept quiet, plaintiff in rebuttal should be permitted to give the reasons why he did not make a statement. *Cable v. Bowlus.* 526

In an action for damages for the sale of the stock of a mining company upon the false representation that the property was unencumbered, it is doubtful whether

evidence, in support of the claim that the defendant or his agent had knowledge that the property was heavily encumbered, that the matter was talked about in the city, on the produce exchange and on the oil market and in offices generally, but where no witness is able to testify that it was ever mentioned in the presence of defendant or his agent, and the same may be said in regard to a custom of putting such stock on the market. *Ib.*

Where a person disappears, there is no presumption either way, that he is alive or that he is dead, until seven years have elapsed, when, if he remains unheard of, the law presumes that he is dead. *Knights v. Everding.* 419

There is no presumption from the fact that divorce was granted to the abandoned wife three years after her husband disappeared, that the husband was then living or that he was dead. Therefore the record of the divorce proceeding is incompetent as evidence in an action under a certificate of insurance. *Ib.*

Improper admission cured by charge to jury. See CHARGE TO JURY.

See also CHATTEL MORTGAGES; CORPORATIONS; MORTGAGES; STATUTES; WITNESSES; WRONGFUL DEATH.

EXCEPTIONS—

In such an action, where the evidence shows that the plaintiff's injury was caused by some negligent act of the plaintiff, not alleged in the petition, and no objection is made to the introduction of such testimony, the objection cannot be saved by asking the court to charge the jury that they cannot consider such testimony. *Circleville v. Sohn.* 193

EXECUTORS AND ADMINISTRATORS—

Section 6077, Rev. Stat., confers no jurisdiction on the probate court to order the sale of such an asset as a desperate claim. And a sale thus made carries to the purchaser no liability that subsisted between the estate and the executor and the sureties on the executor's bond. *Cheney v. Powell.* 279

Such a claim, being transmuted into money in the executor's hands, cannot be classed as an uncollectible or desperate claim, by reason of the insolvency of the executor. *Ib.*

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Executors and Administrators.

EXECUTORS AND ADMINISTRATORS—Continued.

ing to the purchaser by a sale so made, no action will lie against such executor and sureties on his bond. Ib.

A demand existing in favor of testator against one who becomes the executor of his last will, if undischarged is transmuted into money in the hands of such executor by virtue of Sec. 6069, Rev. Stat. And no action of the executor, or of the debtor, can turn it again into a mere demand or obligation. Ib.

The estate of a deceased person is not liable for the torts of an executor. If a cause of action arises through the negligence of an executor in managing an estate, as for injuries received in the operation of a passenger elevator in an office building owned by the estate, the suit must be against such executor personally and not in his representative capacity. *Deschler v. Franklin*. 188

Where an executor has accounted, as he may be required to do, for so much of the estate as was located in another state, under ancillary administration there, the requirements of a general accounting in the court of domiciliary or principal administration, is fully met by reporting to such court the fact of the accounting in the court of such other state, together with the judgment of the proper court of such state approving the accounts, and by accounting to the domiciliary court for the balance due to the estate according to the judgment of the court of the state of ancillary jurisdiction. *Crawford, In re*. 605

Under the will in question the executors may proceed to sell the property, real and personal, without any special order or license of any court other than that contained in ordinary letters of administration, but the titles and powers being vested by virtue of executorship, they must take out letters of administration. Ib.

The general rule that where there is a devise or bequest to an executor in trust, the executor receives the property or fund at once as trustee, and the same never becomes assets, is subject to the qualifications, first, that if needed as assets the title of executor is superior to that of trustee so that the former may take, use and account

for the same as assets; and, second, if the property is not reduced to the form or condition in which it is to be distributed as trust property, the duty of thus transforming it may devolve upon and be exercised by the executor as such; and this will be the case unless the will distinctly provides that this duty shall devolve upon the trustee as such. In such cases, the same person being both executor and trustee, he will not take in the latter capacity until he has fully discharged his duties in the former capacity and not until the fund or property has been distinctly set apart as trust property. Ib.

Though it may not be strictly necessary and though its property or expediency may be doubtful or open to criticism, yet if authorized, the action of the court in granting letters of administration cannot be regarded as void or erroneous. Ib.

Where an executor is to be held, as acting in both capacities, as executor and as trustee, it must plainly appear that such was the intention of the testator. The executorship itself is a trust, and every provision in the will regarding the management of the assets, before they pass out of the executor's hands into those of the beneficiaries, will *prima facie* be held as coming within that trust; and the contrary intention must be made plainly to appear. Ib.

Where the provisions of a will are so close to the border line that separates the office of trustee from that of the executor that it is difficult to determine to which class the office belongs, the general rule, above stated, resolves the question in favor of the view that the duty, or trust, devolves upon the executor or the trustee as executor, by virtue of his office as executor. Ib.

To constitute the person named in a will as executor a special trustee, separate and apart from his office of executor, it must appear that the intention was to withdraw the particular trust from the management and control of the executor as such, and to create a separate office for its management; and this must appear in the face of the presumption that every provision made in the will for the management of the estate, and every part thereof before it passes into the hands of the beneficiary, was intended as a direction to the executor in his official capacity. Ib.

Under a will, devising an estate consisting of both real and personal property, which, after directing payment of debts and funeral expenses, makes bequests of personal effects to relatives and friends, and certain sums of money to executors in trust, and then devises, "all my real and personal property of every kind and nature, save as specifically devised, to said above named executors, in trust for the execution of my will," with full power of sale, etc. in which case the property could not be at once applied to the purposes named in the will, the title which such executors take devolves upon them as executors, and their relations to the estate as trustees do not arise until the estate has been reduced to money and everything has been brought to a pass where nothing remains but to distribute and invest the funds as provided by the will. Ib.

A statement made by an executor in an application for letters of ancillary administration in Michigan, that an appeal had been taken from the order of probate in Ohio, which resulted in a delay in the appointment of himself and his colleague, based upon an erroneous assumption as to the effect of the laws of Ohio upon an appeal from such an order, where it does not appear to have been made knowingly or willfully, does not constitute a false statement or one which will render the appointment invalid. Ib.

The probate court is not expressly vested with the jurisdiction to order an administrator, against his objection, specifically to perform an agreement alleged to have been made by his intestate; and such an order so made merely on motion of a party to the agreement and not necessary to effectuate some power expressly conferred, is *coram non judice* and void. Jones v. Green.

548

Questions involved in the appointment and qualification of an administrator are conclusively determined by the order of the probate court and cannot be collaterally attacked. Toledo & O. C. Ry. v. Beard.

406

While the judgment in an action is conclusive as to the title of real and personal property of the testator it does not deal with or relate to the possession of any specific property of which the decedent died seized; and the plaintiff cannot, un-

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EXEMPTI

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Exemptions—Gas and Oil Leases.

EXEMPTIONS—Continued—

prevent payment under the original order in aid of execution; and if he neglects to do so until after the money has been paid upon such judgment he cannot subsequently claim it. Ib.

Defeating qualification of surety on appeal bond—See **APPEAL**.

FEES—

No allowance other than his *per diem*, for attendance at meetings, can be lawfully made to an infirmiry director, clerk of the board, for keeping a record of the proceedings and transactions of meetings. *State v. Brown*. 163

An allegation in a suit to recover money claimed to have been paid illegally to a county official, that such official "unlawfully received on an account duly presented to and allowed by the commissioners of Perry county, Ohio, the sum of thirteen dollars for expenses, in addition to his *per diem*," without averring facts, as to the services rendered, from which a court can say that the compensation was unlawfully made, fails to state a cause of action. Ib.

An allegation in such suit, that at a specified time an infirmiry director, naming him, unlawfully received on an account duly presented and allowed by the commissioners of his county, for alleged services rendered to the county as such director in keeping up the journal of the board of infirmiry directors, a certain sum, states, as against demurrer, a cause of action for the illegal receipt of public money. Ib.

FORECLOSURE—See **JUDGMENTS**.FRANCHISES—See **MUNICIPAL CORPORATIONS**.

GAS AND OIL LEASES.

In an action by the grantee of the land in question for rent and royalty, evidence that there was a reservation in fact of the oil, is competent notwithstanding the deed contained no such reservation, particularly where it appears that the grantor and her husband at the time of the conveyance expected that the mortgage of the oil interests would be paid off and that the rights would revert to them. *Simmons v. Supply Co.* 690

The fact that as between the owner on the one part and her hus-

band and his partner on the other part, there was an understanding that she was to receive a rental, affords foundation for a claim against them, but does not in any way affect the rights of mortgagees of the partners without notice or their successors in interest, or the title acquired by estoppel. Ib.

Where the owner of lands permitted her husband and his partner to enter into possession of the premises, without written lease, reservation of rent or royalty, and operate the same for oil, being permitted to receive the entire product, such firm was not merely a tenant at will, but acquired a right in equity to compel the owner of such property to execute a lease or grant, conveying the usual rights and interest which are conveyed by such instruments and a mortgagee of such firm succeeds to the rights thus acquired. Ib.

Where the owner of land permitted her husband and his partner to enter upon the premises and operate the same for oil, without a written lease, and without reservation of interest, rent or royalty, the firm being permitted to receive the entire production, and to hold themselves out to the world as owners thereof, and being in absolute possession of the premises at the time of a sale thereof by the wife, her grantee is charged with notice, not only of rights which a mortgagee of the oil business may have acquired, but of rights which were acquired against grantor by estoppel; and grantee takes the premises subject to such rights. Ib.

A provision in an oil and gas lease for the term of two years, and as long thereafter as oil or gas is found in paying quantities, not exceeding in the whole term twenty-five years, that "in case no well shall be drilled on said premises within two years from the date hereof, this lease shall become null and void unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter, until a well shall be drilled," is not void as being inconsistent with the *habendum* clause, or as being against public policy, and confers upon the lessee the right to keep the lease alive as against the lessor for a reasonable time after the expiration of the specified time of two years, by tendering the specified yearly rental. *Brown v. Oil Co.* 810

Gas and Oil Leases—Health.

That in such lease the lessee did not expressly promise on his part to fulfil the terms of the contract of lease, will not avoid the lease for want of mutuality, as, if within the specified term, the lessee entered upon the lands and exercised the privileges granted and found oil or gas in paying quantities, the law will infer a promise on his part to fulfil the terms of the lease. *Ib.*

The consideration of one dollar in an oil and gas lease is sufficient to sustain the grant of the privilege to the lessee of entering on the leased land for a specified period, to drill for oil and gas. *Ib.*

Under such lease the payment at the end of two years of the additional sum per acre and the obtaining of further time to drill for oil and gas, would constitute a new contract or license, which would be void as against a subsequent lessee without actual notice, unless recorded, or unless the first lessee was in actual possession of the land leased. *Ib.*

Where lessee, after the lease in question had become void by failure to drill a well within the time specified, paid the rental and agreed to immediately drill a well, and within six months to drill a second one, such contract is not an independent agreement to drill the wells, but is supplemental and should be construed with the original lease. The lessee's duties and liabilities are, therefore, to be determined by the rules above stated. *Kenton Gas & Elec. Co. v. Orwick.* 786

A lease for oil and gas purposes, providing that "if gas only is found second party agrees to pay \$100 in advance each year for the product of each well while the same is being used off the premises" is a lease of productive territory only. If the first well drilled is productive, there is an implied agreement upon the part of the lessee to drill other and a sufficient number of wells to develop the whole territory, but if the first well is unproductive, the lessee is not required to drill a second well or pay rental for any well. *Ib.*

A tenant under a gas and oil lease who has drilled a well which produces neither gas nor oil in paying quantities, and which he has abandoned on that account, has the right to remove the tubing, casing and drive pipe from such well at any time prior to the expiration of his

lease. The things referred to are trade fixtures and are not governed by the law pertaining to leases for agricultural pursuits. *Siler v. Glass Co.* 784

GIFTS—

While, in a proper proceeding, a fund, claimed to have been received as a gift, but which the court holds to have been a loan, and afterwards invested in a corporation, may be followed and property in the hands of the corporation subjected to payment of the claim, the facts stated do not authorize a judgment against the corporation as a party, with the person receiving the money, to an action at law. *Ringemann v. Broxtermann.* 368

GUARANTY—See CONTRACTS.

HABEAS CORPUS—

When a convict is lawfully imprisoned, such convict cannot be discharged on *habeas corpus* on the ground that some supposed oppression or injustice will result from said imprisonment. *McAdams, In re.* 780

Where an indigent convict is sentenced to remain in the county jail until fine and costs are paid, the refusal of the county auditor to order a discharge from imprisonment in the exercise of the power conferred upon him by Sec. 1028, Rev. Stat., does not furnish a legal ground for discharge of the convict upon *habeas corpus*. *In re Calvin L. Moore, 7 Circ. Dec., 575 (14 R. 237),* not followed. *Ib.*

Where the sentence under Sec. 7327, Rev. Stat., omits the clause "or secured to be paid," such omission does not render such sentence void. If such omission is material, it is only an irregularity or informality and furnishes no valid ground for a discharge upon *habeas corpus*. *Ib.* See also PARENT AND CHILD.

HEALTH.

Inasmuch as the duty devolves upon health officers to make some examination of premises from which it is proposed to remove the contents of privy vaults, and afterwards to see that the work has been properly done and then to see that the premises are properly disinfected, an ordinance providing a reasonable charge for such supervision, to be paid by persons engaged in the work of cleansing privy vaults, in addi-

Health—Homicide.

HEALTH—Continued—

tion to the regular license fee, together with a charge for collecting and the service of issuing the permit, would be legal. *Toledo v. Buechele*. 479

The payment of such fees is involuntary, and the same may be recovered back, where the party objects and protests generally against such exaction, and is threatened at different times by the president of the board of health with arrest and revocation of his license unless he pays for the permits; and it is not necessary, to make payments involuntary, that the objection and protest be made before the payment of each fee. *Toledo v. Buechele*, 10 Circ. Dec., 280, approved and followed. *Ib.*

But a charge for permits issued by the board of health to persons licensed and engaged in the work of cleaning privy vaults, which is made to cover the expense of disinfecting the premises, which should fall upon the owner or occupant, or the municipal corporation, is illegal. *Ib.*

HIGHWAYS—

The fact of such disagreement, however, does not authorize an action by the owner in his own name against the board of commissioners, in that court, to recover compensation and damages. Such a proceeding is *coram non judge*. And this also is true of a claim for damages consequent upon a change of grade in a public highway, or for obstructing access thereto. *Jackson Co. v. McGhee*. 106

By its own terms, chapter eight Rev. Stat., (Secs. 6414-6453), does not apply in proceedings by county or township authorities to appropriate private property for roads. *Ib.*

The alteration of a county road and the vacation of that part of the old road rendered useless thereby, cannot be obtained under a single petition asking for both when such alteration will effect such a radical change in the route of the road as practically to amount to a new road. *Bacon v. Noble*. 49

HOMICIDE—

Where defendant and his son were jointly indicted for murder by shooting, on the trial of the former, evidence of the son's statements, made at his home soon after the killing occurred, tending to show

who fired the fatal shot, is incompetent, as what was said was not part of the *res gestae*, and was properly refused. *Donald v. State*. 483

As showing a person's state of mind when killing another with whom he was in conflict, it is not competent to prove the acts or declarations of a third party at enmity with him, in no wise connected with the homicide, notwithstanding they manifest most vicious feeling and are by one who sometime prior thereto had joined in a violent assault upon him. *Ib.*

After evidence of a conspiracy between the defendant and his son to kill the deceased, against objection the state was allowed to put in the son's declarations to a third party, in the father's absence, as follows: "Are you going to town today? There is going to be some shooting; if father don't kill a man I will." At another time: "I would as soon shoot Snyder as I would a rabbit." Held, error, as the statements were not in furtherance of a common purpose of the two to kill. *Ib.*

It is error to charge without qualification that upon the requisite measure of proof by the state, of an unlawful killing by the defendant the burden is thrust on him to show, by the greater weight of evidence that it "was done, not of malice, but in the necessary defense of his person from death or enormous bodily harm;" inasmuch as the apparent effect of such an instruction is to preclude him from the right to take life to protect against the reasonably grounded apprehension of such consequences. *Ib.*

To submit to a jury in a trial of one for murder, by a charge to that effect, a question as to the defendant's guilt, upon the theory of "his aiding and abetting" another who may have done the killing, when there was no evidence upon that point, is misleading and erroneous. *Ib.*

Charge is misleading and erroneous in putting before the jury as a test of the right to kill in defense against apprehended danger, not what in good faith and the careful use of his faculties reasonably was the appearance to the defendant, but what an "honest man of ordinary firmness," and "ordinary courage" might be supposed "honestly" to think of the situation in which the life was taken. *Ib.*

Homicide—Infants

In view of the holding in *State v. Elliott*, 11 Dec. Re., 332, affirmed by the Supreme Court, unreported, the circuit court, in case at bar, declines to hold that a statement, in a charge to a jury, that "where self-defense is claimed and the homicide is sought to be excused on the ground of self-defense, it implies, it presupposes, that the deceased was intentionally killed" constitutes reversible error. *Carr v. State*, 353

A charge that "If appearances were such as would have alarmed a man of ordinary firmness and would have impressed him that such danger was imminent, and if the assailed party honestly believed such to be the case, it is not material whether the danger was real or not; the condition of the assailant must be such as to render it necessary on the part of the killer to do the act in self defense. The attack must have been such as in the belief of the defendant rendered the taking of the life of the deceased in his defense necessary. The slayer cannot urge in justification the necessity produced by his own fault," is a correct statement of the law on that subject. *Ib.*

A charge that "The law presumes that a rational man, being free to choose and capable of choosing between right and wrong, intends the natural consequences of his act. The purpose or intent to kill in general is proved by circumstances, by what the party does and says, the manner of inflicting the wound, the instrument used and its tendency to destroy life; if palpably calculated to take life it may be presumed he so intended" is a correct statement of the law in Ohio. *Ib.*

It is not the law that the jury must be satisfied that the killing, to be in self defense, was the only way that accused could escape the threatened danger, and a charge to that effect, without the qualification that if deceased honestly believed, and had proper grounds for that belief, that the only means of escaping was to kill his assailant, it would be sufficient, constitutes reversible error. *Ib.*

There is a distinction between "justifiable" and "excusable" homicide and, technically, the use of the word "excuse" instead of "justify" would be preferable in a charge that "accused must act honestly and that the appearance and nature of the

assault must be such as to 'justify' him in the belief that he was in danger of great bodily harm, etc." The use of the word "justify," in such case, is not, however, calculated to mislead and does not constitute reversible error. *Ib.*

It is not competent, in a homicide case, where self defense is set up, for the accused for the state, in the first instance, where nothing has been shown, or attempted to be shown, as to the character or reputation of deceased for peaceableness or the contrary, to introduce evidence that deceased was a quiet and peaceable man; and such evidence is not competent or proper in rebuttal of proof by the defense that the deceased was a "large and strong man." *Ib.*

The presumption in such cases, is that the character of the person killed was good without any evidence on that subject; and to undertake to strengthen it by evidence when such character has not been attacked, is to the prejudice of the party against whom it is introduced. *Ib.*

A charge that "on the trial of an indictment for murder the burden of proof that the homicide was excusable on the ground of self defense rests on the defendant, and must be established by a preponderance of the evidence" correctly states the law in Ohio. *Ib.*

HOSPITAL ASSOCIATIONS — See CORPORATIONS.

HUSBAND AND WIFE—

Where a wife, there being no children, on the death of her husband, takes all of his property, which is liable for his contractual obligations, and assuming and agreeing to carry out such contracts, her agreements to that effect are based on a good consideration, and she is liable thereon. *Stewart v. Duerr*, 310

IMPRISONMENT—See INJUNCTIONS.

INFANTS—

Employment of in factories—Charge to jury as to act §2 O. L., 161—See CHARGE TO JURY.

A mortgage executed by a minor to secure a debt for which she was in no way liable, is voidable, and may be repudiated, in some way sanctioned by law, by such minor upon becoming of age. *Hetterick v. Porter*, 145

Infants—Insurance, Fire.

INFANTS—Continued—

A conveyance by quitclaim deed of the property so mortgaged, after such minor becomes of age, without any other act affirming or repudiating the mortgage, and without reference to the mortgage in the conveyance, the consideration being the full value of the property free from the mortgage, though to a person having knowledge thereof, amounts to a repudiation of the mortgage.

Ib.

After having so conveyed the property after becoming of age, grantee is estopped from subsequently ratifying and validating the mortgage referred to.

Ib.

INJUNCTION—

A person having actual notice of an injunction is amenable thereto, although not a party to the suit in which it was issued. Therefore, where an injunction was granted restraining a manufacturer of flour from dressing and labelling his goods by certain ornamental designs and labels in imitation or similar to certain others, it is a violation thereof for persons who were agents of such manufacturer and had knowledge of the injunction, to sell flour upon their own responsibility under a design made by themselves which violates such injunction; and they are liable in contempt without an original proceeding for an injunction. *Miller & Diehl v. Milling Co.* 629

A court has power, under Sec. 5581, Rev. Stat., providing for the enforcement of injunctions, to impose imprisonment for failure to pay a fine, adjudged in a proceeding in contempt, but a judgment imposing imprisonment until both fine and costs are paid is illegal, inasmuch as the order to pay costs amounts simply to a judgment for money and the constitution provides that there shall be no imprisonment for debt in civil actions, except for fraud. Ib.

Section 5581, Rev. Stat., providing for the enforcement of injunctions, and imposing a fine for its violation payable to the county, and imprisonment until the fine is paid, is penal in its nature and should be construed strictly, against the party bringing the proceeding to enforce it. Ib.

The mere fact that a proceeding *in quo warranto* can only be brought by a designated public officer, and that if such officer should decline to

bring such proceeding, a taxpayer is without remedy, is not sufficient to authorize an action under Secs. 1277 and 1278, Rev. Stat. Taxpayers are left in many cases without remedy except by the faithful performance of duty by public officers, the law presuming that such officers will properly perform the duties incumbent upon them. *State v. Craig*, 553

Injunction cannot be made to take, directly or indirectly, the place of *quo warranto*. Therefore, an action, under Secs. 1277 and 1278, Rev. Stat., authorizing taxpayers to sue when the prosecuting attorney, upon request, fails to do so will not lie to restrain a county auditor from paying salaries to deputy supervisors of elections on the ground that the law (Sec. 2966-3, Rev. Stat.), under which they assume to act, is unconstitutional. Ib.

INSURANCE, FIRE—

Where notice was served upon the underwriters, in an action upon a policy of insurance, to produce the original proofs of loss at the trial, and they fail to do so, secondary evidence of the contents thereof is not incompetent. *Gilchrist v. Transportation Co.* 350

In an action, on a Lloyds policy of insurance, to recover for a boat destroyed by fire, evidence that the price asked for the boat when negotiations were first commenced for her purchase was \$10,000, it having been shown that the boat was sold for \$4,500, is incompetent. Ib.

Where, in an action on a Lloyds policy, the court directs the jury to disregard all evidence bearing upon the authority of an attorney-in-fact, whether he had resigned, or absconded, or whether service of summons could be made upon him, etc., the rulings upon the admission of such testimony become immaterial and may be disregarded by the reviewing court. Ib.

Where it appears that the insurance company has ceased to do business and that it has no assets of any kind, that the person who was the attorney-in-fact at the inception of the policy has resigned or absconded and his place of residence is unknown, the assured, notwithstanding the clause referred to in the preceding paragraph, may maintain an action against any one of the underwriters. Ib.

A clause in a Lloyds policy of insurance to the effect that "no ac-

Insurance, Fire—Insurance, Life.

tion shall be brought to enforce the provisions of this policy except against the general manager as attorney-in-fact and representing all the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought, as fixing his individual responsibility thereunder," where the attorney-in-fact is also an underwriter and so named in the policy, is not contrary to public policy and is valid; and where the attorney-in-fact so continues and remains a resident of the place named for service of summons, suit upon such policy should first be brought in accordance with the clause referred to. Ib.

Where a policy of fire insurance contains a clause making loss, if any, payable to the mortgagee in case of fire, and assured afterwards, not observing such clause, transfers such policy to the mortgagee, by assignment absolute in form, but intended simply to indemnify the mortgagee in case of loss, the assured and the mortgagee may join in an action upon such policy. Imperial Ins. Co. v. Wolf. 815

An assignment, absolute in form, of a policy of insurance against loss by fire may be proved by parol evidence to have been given and accepted as collateral security for a debt due from the assignor to the assignee, though the fact that the assignment was intended as collateral security was not communicated to the insurer. Ib.

An assignment of a policy of fire insurance, absolute in form but intended as collateral security for a debt due from the assignor to the assignee, is valid, and does not avoid the policy, where such an assignment is not prohibited therein, and no misrepresentation of facts is made to the insurer, its assent being given without inquiry. Ib.

Where an insurance policy contained the provision that it should be void if the subject should be real property and be or become encumbered by mortgage, trust deed, judgment or otherwise, unless such incumbrance should be placed on the property by the written consent of the company, and the property is encumbered by mortgage at the time of the issue and acceptance of the policy, which was unknown to the company, the insured cannot recover for a loss even though he made no representations to the company

as to incumbrances. Hickey v. Insurance Co. 135

INSURANCE, LIFE—

Where it appears that a member of a mutual benefit society had paid all dues and assessments up to the date of his disappearance, the officers of such association have no right to refuse to receive an assessment, made after his disappearance, from his beneficiary (his wife in case at bar), on the ground that, insured having disappeared, they wished to get further news concerning him, what had become of him, etc., and also wanted further orders from the superior officers. Knights v. Everding. 419

It is sufficient in life insurance if there is such a relation at the time the policy is issued that the party would be entitled to be a beneficiary then; and such relation having existed then, no matter what occurs afterwards, such relation is not terminated. Thus the right of a wife as beneficiary in an insurance certificate is not terminated by a subsequent divorce and a marriage to another man. Ib.

Where a person insured has disappeared and as a defense to the tender of an assessment by his beneficiary it is claimed that insured was dead at the time the tender was made, the burden of establishing that fact is upon the insurance association. Ib.

Where, in an action against a mutual benefit association, the petition alleged that the plaintiff received the certificate, etc., and that the defendant association had become bound to pay \$2,000, under a condition in the certificate to pay that amount if the class to which the insurance belonged was full, otherwise to pay \$1.00 for each member of the class and the defendant admitted that plaintiff received the certificates and that it would have been bound to pay, providing insured had not made certain representations and had not failed to pay certain assessments, and denied that there were two thousand members of the class at the time, without stating how many there were, the burden of proving that there were not two thousand members is upon the defendant. Ib.

Where a member of a mutual benefit association had paid all dues and assessments levied up to the time of his disappearance, and his

Insurance, Life—Judgments.

INSURANCE, LIFE—Continued—

beneficiary tenders, in proper time, payment of assessments made subsequently, such beneficiary, in action brought after seven years, during which time time assured has not been heard of, and when the law presumes that he is dead, is entitled to recover the insurance. *Ib.*

INTERROGATORIES—See VERDICT.**JOINDER—See PARTIES.****JUDICIAL NOTICE—**

As to classification of cities—
See BRIDGES.

JUDGMENTS—

Where the defendants are both liable for acts done in connection with the same transaction and to the same extent and amount, a joint judgment is proper. *Dunphy v. Manufacturing Co.* 822

L was in the possession of a fund, the proceeds of property sold on commission, in which property G and D claimed interests, to the knowledge of L; D had admitted to L that the money could not safely be paid to D or G without the consent of the other. L paid the money to D without G's knowledge or consent, G having established his interest in the property and claim on the fund, he is held entitled to judgment against L and D. *Ib.*

Where the circuit court of another circuit sitting in Hamilton county had heard a case there, and after the return of the judges of such circuit court to their homes, the presiding judge thereof sent a judgment entry to the clerk of Hamilton county to be entered, which was done, such judgment entry will not be vacated as erroneously or improperly made on the affidavit of the attorney of the unsuccessful party, averring that the judgment entry was only the individual act of the presiding judge of that court, not approved by his associates, which appears to be a mere conclusion, based on the fact that the papers were sent to the presiding judge and that the other judges did not live in the same city, without stating facts sustaining averment. *Ryan v. Roth.* 297

Section 907b, Rev. Stat., providing that no judgment, the record whereof has been destroyed by fire, etc., shall be held binding and in force against the judgment debtor, or be executed "unless the action or

proceeding to establish the existence of such judgment prior to the destruction of the record thereof, shall begin within five years from the passage of this act," does not apply to a judgment recovered before a justice of the peace, a transcript of which was filed with the clerk of the court of common pleas for execution against real estate of the debtor, and part of the judgment collected by the sale of such real estate under the execution issued from the court of common pleas, where the records of the latter court were afterwards destroyed by fire; such judgment was not recovered in the court of common pleas but before a justice of the peace. *Hicks v. Archer.* 296

C and B commenced an action against Y and his wife to foreclose a chattel mortgage on a saw mill and appurtenances and prayed for an order of sale, but not for a personal judgment. Summons for Y and his wife was issued on the plaintiff's petition, which was duly served. B was made defendant to the action and after answer day had passed, he filed a cross-petition against Y and his wife, setting up a chattel mortgage in his favor executed by them on the same property, and asked an order of sale and a personal judgment against Y and his wife; no summons was issued on this cross-petition and the wife of Y did not answer or in any manner waive process or enter her appearance; B took a personal judgment against her which he now seeks to enforce against real estate which she conveyed after the date of said judgment. *Held:* The judgment is absolutely void and not merely voidable and it did not become a lien on the real estate owned by Mrs. Y. *Bailey v. Young.* 257

The answer and the proofs showing that the court had no jurisdiction over the person of Mrs. Y in order to render a valid judgment, are sufficient without disclosing that there is any defense to the claim upon which such judgment was rendered. *Ib.*

Where at the close of the plaintiff's evidence the defendant moved to take a case from the jury, and the court found the motion to be well taken, but before arresting the case, allowed the plaintiff leave to withdraw a juror, and discharged the jury; and thereupon also permitted the plaintiff to dismiss his action without prejudice, at his costs, after

Judgments—Landlord and Tenant.

ward entering judgment "that said action be dismissed without prejudice to a new action" and for defendant's costs, this is no bar to a later suit between the same parties on the same cause of action. *Calvert v. Newberger*, 184

The decree in a foreclosure suit against a mortgagor and a corporation, upon averments that the latter had purchased the mortgaged property and assumed and promised to pay the indebtedness, the corporation being in default for answer, finding that the "statements of plaintiff's petition are true" and that there is due from the mortgagor and the corporation "the amount claimed in the petition," is conclusive against the stockholders of the corporation as to the assumption of the indebtedness. In a subsequent action to recover an unsatisfied balance, the mortgaged property having failed to satisfy the indebtedness, and such stockholders are thereby precluded from interposing any defense or counterclaim that might have been interposed in the foreclosure suit. *Gaw v. Glass Co.* 32

While it does not appear that a trustee for mortgage bondholders, by virtue of the mortgage, had authority to do more than subject the mortgaged premises to the payment of the indebtedness, a judgment upon default in a foreclosure suit, brought by such trustee, upon proper allegations, against a corporation purchasing the property and assuming and agreeing to pay the indebtedness, is not void or subject to collateral attack in a subsequent action to enforce the judgment against stockholders. *Ib.*

Where a third party intervenes in a suit *inter alias*, to have a debt owing by the defendant to the plaintiff paid to him, a decree for such relief, without summons issued on such cross-bill to the defendant, and without his knowledge, is irregular, and upon motion will be set aside, the defendant stating a good defense to the cross-petition. *Lapp v. Hildreth*, 628

A provision in the decree in a foreclosure suit for the payment of taxes and ground rents is void where no statement of any claim in favor of the treasurer or landlord appears in the pleadings; and the fact that the decree was entered by consent of the parties does not render it valid. *Miller Sons' Carriage Co. v. Miller*, 455

JUDGMENTS—

A transcript of a judgment of a justice of the peace which is filed in the court of common pleas has the same effect as a judgment rendered in that court at the same term and executions issued on such judgments are equal in priority. *Raugh v. Acknovitch*, 826

Dismissal of appeal without prejudice does not leave judgment in force—See *APPEAL*.

Effect of appeal in action against two defendants—See *APPEAL*.

Of other states—See *COMITY*.

Res judicata—See *BILLS AND NOTES*.

JURISDICTION—

Defendant in an action for wrongful death may question the jurisdiction of the court over his person, and, if the court decides adversely to him, may defend on the merits of the case without waiving the question of jurisdiction. *Baltimore & O. Rd. v. Collins*, 334

Justice of the peace in attachment—See *JUSTICES OF THE PEACE*.

JURY—

It is a matter of doubt whether it is improper for jurors to make notes of the testimony. On questions of fact, judges make memoranda as to evidence before them and it would seem that if proper for judges it would be proper for jurors to do so. *Cleveland, C. C. & St. L. Ry. v. Ullom*, 321

JUSTICES OF THE PEACE—

Where in a civil action before a justice of the peace, brought in the county but not in the township of the defendant's residence, the summons is accompanied by an order of attachment sued out and issued in good faith upon any ground authorizing an attachment against a resident of the county, and the summons is duly served, such justice thereby obtains jurisdiction over the person of the defendant, and may proceed to personal judgment against him, though no property is seized or held under the attachment. *Kelly v. Flanagan*, 111

LANDLORD AND TENANT—

In an action for personal injuries brought by the tenant of a building against the owner thereof and her agent, for negligence in failing to keep a cellar door closed,

LANDLORD AND TENANT—Con.—

the liability of the owner rests upon her ownership, and the liability of the agent upon actual participation in the wrong. *Hohly v. Sheely*. 678

A landlord or the owner of a building, of which his tenant has exclusive possession, is not liable to third persons for injuries resulting from defects in the property unless there is some contract or arrangement varying this liability. *Frolich v. Cranker*. 592

See also **GAS AND OIL LEASES; CONTRACTS.**

LIBEL AND SLANDER—

In an action for libel and slander, the wealth of the defendant, at the time of the alleged libel or slander, may be shown for the purpose of increasing the compensatory damages and as bearing upon exemplary or punitive damages. *Steen v. Friend*. 235

Failure to instruct the jury, in an action for libel and slander, upon the question of punitive and exemplary damages, allowance of attorney fees, character of plaintiff and some other things which might properly have been discussed in the charge, is not reversible error where no requests for further instructions were made and no exceptions were taken except to the charge as a whole. *Ib.*

In an action for libel and slander, based upon words spoken and a letter written, charging plaintiff with improper relations with defendant's husband, a petition for divorce, filed within a week after the domestic difficulties involving the action for libel and slander, brought by defendant in the libel and slander suit, and based upon charges of cruelty, and in which no charge is made concerning the intimacy alleged in answer to the suit for libel and slander, is admissible as tending to impeach defendant's statements charging such intimacy. *Ib.*

While evidence of defendant's wealth, in an action for libel and slander, to be in proper order, should be given as part of plaintiff's testimony, it is not error, after plaintiff has rested without introducing any such evidence, to permit cross-examination of the defendant on that subject. *Ib.*

The bad character of plaintiff, in an action for libel and slander, while it might have a bearing in mitigation of damages, is not a com-

plete defense and is not sufficient ground upon which to disturb a verdict for the plaintiff returned by a jury after due consideration of all the facts. *Ib.*

To make the defense that a writing, libelous on its face, is privileged, that defense must be pleaded and the facts constituting the privilege set forth in the answer, issue joined and submitted to the jury. *Ib.*

In an action for libel and slander, in which evidence was permitted concerning defendant's application for divorce, growing out of the same domestic difficulties involved in the libel and slander suit, a statement by counsel for plaintiff to the jury after having asked defendant "how many hundred dollars did he pay you the last time you filed a case against him?" to which objection was interposed, that, "he paid her \$2,800," where the record does not disclose any evidence in support of such statement, should have been ruled from the jury and a refusal, upon defendant's motion, to take such action constitutes prejudicial error. *Ib.*

A letter to a young woman's father, stating: "I will write you concerning L. I wish you would come out here and take her home as she has caused me a great deal of trouble, so much so that she has separated me and my husband and she is still staying with him alone. Please come at once. My husband has treated me shamefully through her and driven me and my children away from home for her sake. * * * I have caught them in a room together talking about me and now she has got him so far gone on her that I and the children are driven out and she has taken my place." if false and unless a privileged communication, is libelous. (The question of privilege not decided, but the court held that the communication could not, in any event, be subject to more than a qualified privilege.) *Ib.*

LICENSE—

The fact that boys of immature age have been accustomed to ride on a hand car of a railway company, for their own pleasure, by the consent and invitation of the section foreman, although continuing at irregular periods, for over a year, is not sufficient to constitute a license upon the part of the company to so

use the hand car, when the rule of the company prohibits such use to the knowledge of the foreman, in the absence of a showing that some one of the managing officers of the company had actual or constructive knowledge of such permission and use. *Lake Shore & M. S. Ry. v. Duer.* 761

Where a boy, fifteen years of age, requested the section foreman to permit him to accompany the section men upon a hand car, which was about to go down the track to bring in a signal, which request the section foreman granted, and the boy was injured by falling from the car, while assisting in propelling it, no recovery can be had on the ground that the section men permitted the boy to assist in propelling the hand car, and in so doing, to stand in a dangerous place, without at least a showing that the section men willfully and intentionally caused the injury. *Ib.*

Whether the company owed any duty, or was responsible at all in such a case. *Ib.*

See also GAS AND OIL LEASES; REAL PROPERTY.

LIMITATION OF ACTIONS—

The dismissal of an action on motion of the plaintiff without trial does not bring it within the provisions of Sec. 4991, Rev. Stat., permitting of the bringing of a new action within one year from that date. *Irwin v. Lloyd.* 212

While the exaction of such fees by the board of health is an exercise of power in the nature of taxation, the cause of action is not governed by Sec. 5848, Rev. Stat., which is the statute of limitations (one year) relating to the recovery of illegal taxes and assessments; that statute relates to taxes and assessments levied by the authorities in the ordinary way, and not to such an unlawful exaction of fees. *Toledo v. Buechele*, 10 Circ. Dec., 280, approved and followed. *Toledo v. Buechele.* 479

See also PRINCIPAL AND AGENT.

MANDAMUS—

Mandamus will lie to compel the treasurer of the board of education of Cleveland to pay, one who is employed as a teacher in its public schools the full amount of salary due him, without deducting any part thereof for the pension fund authorized by act 94 O. L., 539, the law be-

ing uncor-

See also

MASTER A

A man to his servant safe machinery cases where defective machinery where he is injured and where there is thereof.

The dangers of the nature of the work formed. If one not a workman, point out danger is not to know, as to the servant master is not or does not of the master. It is not that the servant does not under no the danger the servant

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Master and Servant.

MASTER AND SERVANT—Con.—

juries to one servant through the negligence of another to whom control is given, the mere working together, where the advice of one is accepted by another, and where, by superior knowledge, one gives all the advice and direction for the work, is not sufficient to charge the master with the servant's negligence; to have that effect, the direction and authority must be by authority of the master or some one standing in his place. *Ib.*

And if the servant knew that the removal of the boards was likely to render the scaffold insecure, he had a right to assume that the master had performed his duty in again securing it, and in the absence of knowledge on the part of the servant that the foreman had not done so, the servant's right to recover is not defeated. *Stabler v. Bridge Co.*

87

A person who agrees to put floor in a building for another, and fails to do so, whereby another is injured, is liable only to the person with whom he contracted. Therefore, a servant of the master for whom the structure was built, not being a party to the contract, acquires no right of action against the contractor. This rule is not affected by the act of February 23, 1893, 90 O. L., 52. *Ib.*

Where a scaffold was firmly constructed in the first instance, but, through use or removal of certain boards, by direction of the foreman, it had become racked, insecure and unsafe, a servant without knowledge of such defective condition cannot be charged with negligence in not investigating, even though he had an equal opportunity with the master to make an investigation and discover the defect and danger. *Ib.*

A servant who proceeds with reasonable care to enter and remain upon a scaffold in the prosecution of his work has a right to assume that the master has performed his duty of providing and maintaining a safe place and is not required to investigate to determine whether such scaffold is safe; such servant is not chargeable with negligence unless the defect and danger is obvious or unless he has been advised of the failure of the master to perform his duty or of such facts as would cause a reasonably prudent man to investigate the scaffold himself before going upon it. *Ib.*

The doctrine of fellow servants cannot be applied to car inspectors, and other employees, or woven into the statute, 87 O. L., 149, so as to defeat its provisions respecting presumptive knowledge of and presumptive negligence in the use of defective appliances. Therefore, the employment of a competent chief car inspector will not exonerate a railroad company from liability for negligence of his subordinates, on the ground that the latter are fellow servants of other railroad employees. Actual and proper inspection, or its equivalent, whether the inspector is a chief or a subordinate, is necessary to overcome the presumption arising from the law in question. *Michigan Cent. Rd. v. Waterworth.*

621

Where such case was tried by plaintiff on the theory that the rules of the club forbidding its employees to ride on an elevator were habitually violated with the knowledge of the club, it is not prejudicial error to permit an employee to testify that the managers of the club had told him not to allow the men to ride thereon. *Strasser v. Club.*

715

In such action it was error to refuse to permit plaintiff to testify that it was his practice to ride up and down on the elevator sometimes when loaded and sometimes when empty, to the knowledge of his foreman, and that the rule forbidding riding on the elevator was habitually broken. *Ib.*

A porter employed in a club house for several years and familiar with the surroundings, cannot in an action against the club for personal injuries from falling down an elevator shaft, charge it with negligence in failing to light a passageway to the shaft, or to provide appliances to keep persons from entering the shaft, when the elevator was not there, or in want of any rule as to the operation of the elevator, or of signals to indicate when the elevator was removed, when these facts were known to him at the time of his injuries. *Ib.*

An elevator is in many respects a dangerous machine and though it may primarily be intended only as a freight elevator, yet if employees, in the course of employment are authorized or permitted to use the elevator as a means of transportation, the employer using or controlling the operation of the elevator is required to exercise care and caution.

Master and Servant.

both in the construction and operation of the machine to render it as free from danger as careful foresight and precaution may reasonably dictate. *Frolich v. Cranker.* 592

The lessee of a storeroom on the third floor of a building, having the use of an elevator, is liable as an employer for injuries sustained by an employe in the performance of his duties, by reason of defects in the cable of the elevator (which cable, in case at bar, broke, and the elevator dropped to the cellar and caused the injuries complained of), where it appears that no inspection of such elevator was made by the employer, and that had a reasonable inspection been made the defect would have been discovered. *Ib.*

An employer having leased the third floor of a building cannot avoid his duty and responsibility as such to his employes, and refuse to inspect or neglect to make examination of the condition of the machinery of an elevator of which he has the use, and which he requires or permits employes to use, by the claim that he did not lease the elevator and did not control that portion of the building where the propelling power was located. *Ib.*

An employe, in the absence of knowledge of defects, who is required or permitted to use an elevator in a building leased by his employer, in conveying goods to the third floor, and who is permitted or directed to ride in such elevator, while in the performance of such duties, does not assume the risk of injury resulting from his employer's negligence in not performing his duty as an employer to furnish safe machinery and a safe place to work. And in the absence of directions to the contrary, the employes of such person would be justified in riding up and down in such elevator, in the performance of their duties, and would have a right to assume that it would be safe for such purposes. *Ib.*

Where an employe in an iron foundry, whose duties required him to go to and from a cupola, was familiar with conditions and accustomed to go back and forth in daylight and after dark, he cannot recover for injuries received from falling while descending from the ladder to a platform, on the ground that the lights were turned out just as he was in the act of swinging

upon the ladder. *Beucker v. Baker.* 642

A rule of the railroad company to the effect that the only thing a fireman is bound to do, as between himself and the engineer, is to obey the latter in the proper use of fuel and in the matter of firing, and that in all other things the engineer and the fireman are independent of each other, if applicable to a train equipped with a sufficient force to properly manage it, is not applicable to a train sent out, in charge of an engineer, without conductor or brakeman. *Pennsylvania Co. v. Hickley.* 373

An engineer who is sent out with a fireman and a force of section men, but without a conductor or brakeman, and who has charge of the movements of the train, receiving his orders from the superintendent and train dispatcher, is the superior of the fireman, and where the latter, being directed to couple a car, and being inexperienced in such work, is injured by the negligence of the engineer in moving the train, the railway company is liable. *Ib.*

The question whether a fireman was guilty of negligence in or assumed the danger of going out with a train in charge of an engineer, without conductor or brakeman, is, ordinarily, a question for the jury. To charge such fireman with negligence or assumption of risk, under such circumstances, which would defeat his right to recover for injuries, it must appear that he knew, when he went out, that the train could not be safely handled without a conductor and brakeman. *Ib.*

A railroad employee knowing of a defective or unblocked switch or frog, who remains in the service of the company and continues to use such frog or switch, without giving notice thereof to the company, should be deemed to have assumed the risk of all danger reasonably to be apprehended from such use and is not entitled to recover for injuries resulting therefrom. *C. C. C. & St. L. Ry. v. Ullom.* 321

Where it appears that decedent brakeman had worked about the flat cars referred to when they were put into the train and that he had exactly the same opportunities for knowing the condition that such cars were in as any other employee, he must be held to have assumed the risk of injury therefrom, al-

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though the accident was not one which he could have anticipated from the manner in which the cars were loaded. *Toledo & O. C. Ry. v. Beard.* 406

The use of a flat car, for hauling stone, without side boards or end boards or standards, to prevent the stone from falling off and wrecking the train, is not the use of a defective car or a car with defective appliances, within the meaning of the act of April 2, 1890, 87 O. L., 149. *Ib.*

Where a brakeman is not negligent in duty, and where he is not forewarned that it will be essential to his safety to maintain a position upon the center of the car, such brakeman may, without being negligent, occupy a sitting position upon the edge of the car. *Wainright v. Railway Co.* 530

A brakeman may keep his face turned from the locomotive to avoid the smoke, cinders and gases, or he may look in another direction through indifference or inattention, when not required to do otherwise by his duties, and if not warned by word or circumstance, or former knowledge or observation, that to do so while sitting upon the car will be unsafe, cannot be said to have been negligent in thus acting. *Ib.*

The fact that the rules of the company required the brakeman to be standing, and that if he had been standing the whipping-straps or tell-tales would have warned him that the train was approaching the tunnel, are not sufficient to defeat a recovery, where it appears that if such brakeman had been so warned by the whipping-straps or tell-tales, he might still have assumed that it would have been entirely safe, in view of the character of the warnings received, to sit upon the car and that that would be all he would be required to do to be safe. *Ib.*

A caution given to an inexperienced man upon his employment as a brakeman by a railroad company, to the effect that it would be unsafe for him to stand upon box cars while passing through tunnels or under bridges, carries with it the implication that it would be safe to sit upon such cars while passing through or under such obstructions. *Ib.*

The fact that a brakeman received warning only that it would be unsafe to stand upon a car, that

he had passed under other structures in safety while sitting upon the same car, and that no whipping-straps or tell-tales warned him of a lower structure, and the reliance which he might base upon the assumption that the company would do its duty by warning him of anything dangerous, may tend to justify such brakeman in not looking ahead. *Ib.*

A brakeman who has not been cautioned that, for his safety, he must stand, or that in order to be warned by whipping-straps or tell-tales he must stand, but only that he must stand in order that he may perform his duties, is not guilty of negligence in sitting down, when it does not appear that there was any duty incumbent upon him requiring him to stand. *Ib.*

It is no defense to an action for the wrongful death of a brakeman who was put at work where he would be required to pass through such tunnel on the top of box cars, and without warning that he could not safely sit upon such cars, that the railroad company maintained whipping-straps or tell-tales on either end of the tunnel, where it appears that such straps or tell-tales did not hang low enough to reach a person sitting upon a box car. *Ib.*

Where, in order to pass safely through a certain tunnel upon the top of a box car, it would be necessary to take a recumbent position, it is negligence for the railroad company to put an inexperienced man at work as a brakeman, where he will be required to pass through such tunnel upon the top of such cars, without giving him specific warning, by word of mouth or otherwise, that it will not be safe for him to sit upon the cars. *Ib.*

It is negligence for a railroad company to put in its train a box car considerably higher than ordinary cars of that class, and upon which, in order to safely pass through a certain tunnel, a person on the top of such car would be required to take a recumbent position, without giving specific warning to a brakeman who has been in their employ only a few days and who has been over the line only three times, and never upon a train with such a car, and who may go upon such car in the performance of his duties that he must not go upon that car, or, if he does, that it will be necessary, in pass-

Master and Servant—Mortgages.

ing through such tunnel, for him to lie down or get into a position lower than that which he would be in by sitting upon the car. *Ib.*

A peril that might be visible and apparent to a person in a favorable position and under favorable circumstances might not be obvious to another person in the same sense or degree, whose position is less favorable to observation and appreciation of the danger. Therefore, whether a servant was guilty of negligence in failing to note and avoid a peril of which he had no previous knowledge, or whether he would be entitled to notice thereof, must depend upon whether in the exercise of ordinary care under all the circumstances he should have discovered it in time to avoid it. *Ib.*

A charge which directs the jury that if the dangers could be readily observed, or were open, apparent or obvious to a man of ordinary observation, or if they could be readily seen and appreciated, then the company was not under obligation to give warning to its employees, without qualifications as to time or circumstances, or opportunity for observation, in view of duties to be performed, is objectionable. *Ib.*

A brakeman in passing through a tunnel or under an overhead structure upon a moving train cannot be required to make such an estimate as will register in his mind that if he should pass through or under such structure on a car somewhat higher than the one upon which he is riding, he could not sit up with safety. *Ib.*

Where the negligence of a superior servant or officer and that of a fellow servant combine and the two together cause the injury, the master is liable. *Lake Shore & M. S. Ry. v. Feller.* 799

Where a duty that the master is required to perform in the way of furnishing a safe place to work, or safe and sufficient appliances or machinery, is delegated to a servant, such servant stands in the place of the master. The master cannot delegate such duty and thus protect himself against negligence. *Ib.*

Where the assistant general yard master of a railroad company directed the division yard master to remove cars from a certain track, which would be required for an approaching train, and the latter failed to comply with such order and

sought to warn the engineer of the approaching train by leaving word with a switchman, the latter is not a fellow servant of a brakeman on such train, but stands in the relation of the master; and where such switchman failed or forgot to notify the engineer, and by reason of such failure the approaching train, entering the yards after dark and under a signal that everything was all right, collided with the cars in question, the railroad company is liable for resulting injuries to a brakeman. *Ib.*

Where a servant, having full knowledge of a stamping machine, notified his foreman on the day previous to the accident that the machine did not work properly, in that the press would not revolve or come down when the lever was pressed, whereupon the latter remedied the defect, and, on the following day, being informed by the servant that the machine "made too much noise," replied that it would be all right when steam was up and it could be operated faster, whereupon the servant went forward with his work without other assurance as to the condition of the machine, such servant is not entitled to recover from the master for injuries resulting from the fact that there were two revolutions or drops of the press from one pressure of the lever, where it does not appear that employer or employee had any knowledge that the machine was liable thus to revolve or that it had ever so revolved before. *Record v. Dean.* 808

MECHANICS' LIENS—

See VENDOR'S LIENS.

MINORS—

See VENDORS' LIENS.

MORTGAGES—

The testimony of a wife that the signature to a mortgage of her real estate is a forgery, corroborated by the fact that the handwriting is wholly unlike that in her signature to another instrument, admitted to be genuine, and bears a striking resemblance to the handwriting of her husband, who negotiated the loan, and by the testimony of one of the witnesses to the mortgage that her signature is also a forgery, which is also corroborated by a comparison of handwriting, supported by the further fact that a witness repre-

Mortgages—Municipal Corporations.

MORTGAGES—Continued—

senting the mortgagee is unable to identify the wife as the person who accompanied the husband when he returned the mortgage to the office signed and acknowledged, and, in the absence of any testimony on the part of the husband, or other evidence in support of the validity of the mortgage, is sufficient, under the foregoing rule, to overcome the certificate of acknowledgment of the notary, since deceased, and the mortgage should be declared void. *Feagles v. Tanner.* 173

The record or certified copy of a mortgage introduced in evidence makes a *prima facie* case that the instrument was in fact executed and acknowledged as therein stated. The certificate of the notary that it was duly signed and acknowledged is not conclusive where fraud or forgery is established but the certificate is given such weight that to overcome it, the evidence must be clear and convincing; a mere preponderance is not sufficient. *Ib.*

Under the circumstances stated, where the mortgaged property was purchased by the corporation which assumed and agreed to pay the mortgage, it is the same as if the corporation had become a party to the mortgage subsequently to its execution by the original mortgagor and it therefore became not only the right but the duty of the trustee to proceed by all proper methods to the foreclosure of the mortgage and to the ascertainment and determination of any and every question that might be legitimately determined in an action of foreclosure, including the ascertainment and determination of the obligation of the corporation arising out of its assumption of the debt. *Gaw v. Glass Co.* 32

Where it appears that, in the purchase of a manufacturing plant, the representative of the purchasing corporation, upon whom the company relied, knew that the deed of the property, in the warranty against encumbrances, excepted a certain mortgage or bonded indebtedness, the corporation is chargeable with notice thereof and by excepting the deed upon the statement of its representative that it was "all right," the corporation is, in absence of fraud or imposition, bound by a stipulation contained therein assuming and agreeing to pay such indebtedness. *Ib.*

The assumption of indebtedness by the corporation, in the purchase above referred to, gave the bondholders a right of action against the corporation, but this right of action is subject to any defense or counterclaim that might be interposed by the corporation at the proper time, if grantor were the holder of the claims and seeking their enforcement. *Ib.*

See also JUDGMENTS.

MOTIONS AND ORDERS—

Where a witness for the plaintiff, upon cross-examination was asked and answered a question in reference to a matter competent for the defendant to prove, in support of its defense, but not inquired about upon direct examination, and a motion was made and sustained to strike out the answer of the witness, the grounds of the motion and the reason of the court for sustaining the same not appearing, it will be presumed that the court sustained the motion for the reason that the testimony was being introduced out of its order, the order of the introduction of testimony being discretionary with the court. *Circleville v. Sohn.* 193

See CORPORATIONS; amendment, see NEW TRIALS.

MUNICIPAL CORPORATIONS—

A municipal corporation is not liable for an injury caused by the recent accumulation of ice and frozen snow on an alley crossing, which it knew or ought to have known was defective or out of repair, and which accumulation of ice and frozen snow on said crossing, in its defective condition, combined with its icy and slippery condition, caused the injury complained of, unless such accumulation of ice and frozen snow might reasonably have been anticipated as the natural and probable result of such defective construction or lack of repair. *Circleville v. Sohn.* 193

In an action to recover damages from a municipal corporation on account of its negligence, it is necessary that the evidence should show that the plaintiff exercised that degree of care that an ordinary careful and prudent person, under the same or similar circumstances, would have exercised, and an instruction which makes the degree of care to

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be used dependent upon the apprehension of danger entertained by the plaintiff is misleading. *Ib.*

Where the plaintiff claims to have been injured by falling on a defective crossing, it is necessary, in order to make a municipal corporation liable for damages, that it should have had notice of such defect, or that the defect existed for such length of time that it is presumed to have had such notice, and an instruction to the jury which does not contain such qualification as to the liability of a municipal corporation is erroneous. *Ib.*

A municipal corporation is not liable for an injury caused by reason of the improper plan of an alley crossing adopted by it until it be shown that it had notice that the plan so adopted by it was not reasonably safe for use under ordinary circumstances. *Ib.*

Under paragraph 34 of Sec. 1692, Rev. Stat., which confers upon municipal corporations the power "to acquire by purchase or otherwise and to hold real estate or any interest therein and other property, for the use of the corporation, and to sell or lease the same," the city of Toledo has power to sell its natural gas plant. *Kerlin Bros. Co. v. Toledo.* 56

The sale of such property must be effected under paragraph 34 of Sec. 1692, Rev. Stat., and in accordance, so far as real estate is involved with the limitation placed upon that section by Sec. 2673a, Rev. Stat., requiring two weeks publication and a three-fifths vote of the council, in "any city or village which has not a board of improvements or board of public works," which includes Toledo. *Ib.*

A resolution, although of a general or permanent nature to come within the purview of Sec. 1694, Rev. Stat., requiring a reading on three different days, or a suspension of the rules, must be a necessary resolution. It must not only be or provide for a necessary step toward the ultimate object, but it must be a step which cannot be otherwise taken. *Ib.*

The acceptance by a city council of a bid for the purchase of its natural gas plant, which bid was conditioned that the purchaser should have the right to operate the plant and to fix the price of gas in the city, did not give that right to the bidder, but amounted simply to

an acceptance upon the condition that if the city and the bidder failed to come to an agreement upon a contract fixing the bidder's right to operate and the rates to be charged, the bid on the one hand and the acceptance on the other would fail. *Ib.*

Where the object to be attained could be accomplished by a mere motion or order and the city council adopts the form of a resolution, it is not thereby required to pursue further unnecessary formalities in subsequent proceedings. *Ib.*

To accomplish a sale in pursuance of Secs. 1692 and 2673a, Rev. Stat., an ordinance must be passed and published, but legislation, though denominated a resolution, accepting a bid for the property, made in pursuance of an advertisement therefor, and directing that the price bid shall be received and that proper conveyance shall be made, amounts to an ordinance and is sufficient for the purpose. (*Hull, J., dissents—opinion.*) *Ib.*

A preliminary resolution directing the city clerk to advertise for bids for the sale of part of a natural gas plant, the city reserving in the notice the right to reject any or all bids, amounts to a mere order or direction to the clerk, and is not a resolution of a general or permanent nature within the meaning of Sec. 1694, Rev. Stat., requiring three readings or a suspension of rules. (*Hull, J., dissents—opinion.*) *Ib.*

In view of Sec. 1691, Rev. Stat., providing that a city council "shall not enter" into any contract which is not to go into full operation during the term for which all members of such council are elected," a condition contained in an accepted bid for the purchase of a natural gas plant, providing that the bidder shall have the right to operate the plant and to fix the price of gas, cannot be waived by the bidder, so as to validate a sale, after the expiration of the terms of office of some of the members of the council which accepted the bid. *Ib.*

The form adopted in municipal legislation is not a matter of consequence. If a legislative act should be and in substance is an ordinance, and all the rules prescribed for the adoption or passage and publication of ordinances have been observed, the legislation takes effect as an or-

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dinance and *vice versa* as to a resolution. *Ib.*

To justify a court in interfering with the action of a city council in a sale of the property of the city on the ground of insufficiency of the price, when the council has proceeded within the statutes, the price received must be so much less than would probably be obtained by again offering the property, as to establish clearly that the acceptance of the bid amounted to a reckless and improvident act. (Hull, J., dissents from holding sale valid under facts in this case—opinion.) *Ib.*

By the provision in paragraph 34 of Sec. 1692, Rev. Stat., that "in addition to the powers specifically granted in this title and subject to the exceptions and limitations in other parts of it, cities and villages shall have the general powers enumerated in this section and the council may provide by ordinance for the execution * * * of the same," the power to sell is vested in the council alone and the concurrence of natural gas trustees is unnecessary. *Ib.*

The power conferred by Sec. 2835, Rev. Sta., on municipalities, townships and counties to levy to levy taxes for special improvements upon an affirmative vote of two-thirds of the electors at a general election, is independent of the limitation in Sec. 2689, Rev. Stat., which refers to taxes for general purposes only; and taxes for such special improvements may be levied even though the total taxes levied exceed the limitation fixed by Sec. 2689, Rev. Stat. *Walsh v. Sisler.*

29

There is no obligation upon the authorities of a municipal corporation towards any one of its citizens to exercise the legislative discretion with which they are invested, to enact ordinances prohibiting any specific act concerning the streets and sidewalks of the city or village. Such matters are discretionary, and a right of action against a city or village does not accrue to one who was injured by a person riding a bicycle on the sidewalk, because the authorities had failed to prohibit such riding. *Custer v. New Philadelphia.*

9

In an action against a municipal corporation to recover damages for injuries sustained from being

struck by a bicycle, ridden on the sidewalk of a public street, an allegation in the petition that the city, its officers and agents had unlawfully, carelessly and negligently, and in disregard of their duty, caused and permitted bicycles to be operated and run upon the sidewalks, may be construed, in view of the whole pleading, as an allegation that the authorities took no steps to prevent such riding. *Ib.*

Such corporation is not liable for an injury to a pedestrian by being struck by a bicycle ridden on the sidewalk, although Sec. 2640, Rev. Stat., provides, that the council shall have the care, etc., of the streets, "and shall cause the same to be kept open and in repair, and free from nuisance," and it will make no difference that the authorities of such corporation, with knowledge of such use of the sidewalks, took no steps to prevent the same; the word "nuisance" in this connection does not include a running bicycle, but refers to something which is, in a sense, fixed or permanent, as a defect in the street or sidewalk. *Ib.*

In relation to the exercise of legislative powers and privileges, which are to be exercised by a municipal corporation for the care and control of its streets and sidewalks, such corporation is, in the absence of statutory provision to the contrary, the agent of the state, and is not liable for a failure to perform, or negligence in performing, duties in that particular imposed by statutes. *Ib.*

A municipal corporation is not liable for injuries to a pedestrian resulting from being struck by a bicycle ridden on the sidewalk thereof; or for the failure to pass an ordinance prohibiting such use of its sidewalks. *Ib.*

The fact that a corporation, after suit is commenced to enjoin an improvement on the ground of the insufficiency of the petition, by reason of the unauthorized signature of the corporation, ratifies the acts of its officers in signing the same, though it might estop the corporation from subsequently denying the validity of the acts of its officers in that regard, does not affect the rights of other parties or validate the act of the authorities in authorizing the improvement upon a petition which was insufficient. *Minor v. Board of Control.*

16

Municipal Corporations.

A corporation cannot be counted as among the petitioners for a street improvement when it does not appear that the signature was within the scope of the powers of the officer making it, nor that there had been any ratification, either express or implied, of previous similar acts.

Ib.

Where a petition is presented by abutting owners asking for a specific street improvement, municipal authorities have no power, acting upon such petition, to lengthen or decrease the improvement and if such a change is made, the proceedings are invalid.

Ib.

The fact that the cost of a proposed street improvement will fall upon the city, by reason of such irregularities in the preliminary proceedings as would render invalid an assessment upon the abutting owners, is sufficient ground for a taxpayer's action to enjoin the improvement, the city solicitor having refused to bring the action.

Ib.

Before a municipal corporation can levy an assessment upon land in bulk, either according to appraised value, or according to the front foot, it must give to the land to be assessed the average lot depth in the neighborhood, and after having fixed the taxing district, the land must be given a value for taxation, in order that the limitations of Sec. 2270, Rev. Stat., may be applied. The council is not permitted to depart from this rule or to levy an assessment by the front foot deeper than lots in the neighborhood or above the average value of lots in the neighborhood. *Bailey v. Zanesville.*

20

In determining whether a particular parcel of land, for purposes of assessment, is land in bulk or city lots within the meaning of Section 542 of the municipal code of 1869, now Sec. 2269, Rev. Stat., regard must be had not merely to the recorded plat of the town, but to the size of lots generally in the municipal corporation; and where the property is not the size of lots generally in the city or in the neighborhood, it must be regarded as land in bulk.

Ib.

The liability of a city in a case where it has granted permission to a property owner to make a dangerous excavation in a sidewalk, is precisely the same as if the excavation were made by the city itself; and in either case the city must re-

spond in damages to one who is injured by reason of the unprotected condition of the walk, regardless of whether it had any actual knowledge of such unguarded condition. *Hewitt v. Cleveland.*

710

It is the duty of a municipal corporation to make an examination of sidewalks from time to time, and to look after latent as well as patent defects; and where it appears that a walk had been out of repair, having boards which were loose at one or both ends, and would fly up when stepped upon, for over two years, the city must be held to have been negligent; and an instruction which, in substance, directed the jury that if, when plaintiff attempted to pass over such walk, it appeared to be in good condition, or that the defect was latent, the plaintiff could not recover, constitutes prejudicial error. *Matthews v. Toledo.*

375

The statutes do not confer upon municipal corporations the right to improve private property for street purposes without condemnation or consent of the owner, and much less to assess upon individual property the cost of an improvement which was not desired nor solicited. *Baker v. Norwood.*

371

A municipal corporation is not an insurer that its streets are free from danger, but it is required to keep them in such condition that a person exercising ordinary care in passing over them may be reasonably safe from injury arising from their condition. *Durbin v. Napoleon.*

534

An ordinance granting to a corporation the right to the use of the streets for pipes or conduits for the purpose of supplying compressed air, to transmit packages of the various individuals who may apply and pay for such service, is not within Sec. 2651-17, Rev. Stat., authorizing franchises for the transmission of heat and power. Such ordinance does not authorize the conveyance of compressed air as a power for the benefit of the inhabitants of the municipality, as required by the terms of that section. *Ampt v. Cincinnati.*

805

Such ordinance should also prescribe the number, size, dimensions and material of the pipes or conduits, and the manner in which they shall be laid, or the details necessary to a complete conduit system, so that the city may know beforehand exactly what is to be built and

Municipal Corporations—Negligence.

MUNICIPAL CORPORATIONS—Con.
may protect itself against abuses or unreasonable construction. *Ib.*

And if in other respects valid, an ordinance for purposes mentioned should fix a maximum and uniform rate to be charged the public for the service contemplated. Otherwise it would be unreasonable and against public policy. *Ib.*

A franchise for such a length of time as "the public shall be served by the delivery of power, etc.," and as long as the company shall pay to the city a certain percentage of its gross receipts, is perpetual and the act of the city, in thus surrendering control over its streets, is *ultra vires*. *Ib.*

See also **BRIDGES**.

MUTUAL BENEFIT ASSOCIATION—

See **INSURANCE—LIFE**.

NATURAL GAS PLANTS—

See **MUNICIPAL CORPORATIONS**.

NEGLIGENCE—

The distinction between negligence and contributory negligence is, that in negligence the person acts and operates alone, while contributory negligence operates with something else to create it. *Toomey v. Stamping Co.* 216

The doctrine of imputed negligence would not arise in such case unless the occupants of the wagon notified the driver of the approaching train in time to stop and the latter failed to do so; in such event the railway company would be liable to the occupants for injuries resulting from its negligence. *Toledo & O. C. Ry. v. Eatherton.* 253

It is the duty of the occupants as well as the driver of a wagon in approaching a known railroad crossing to look and listen for approaching trains; and where the evidence shows that the occupants as well as the driver failed to do so, the occupants are guilty of negligence which will defeat their recovery. *Ib.*

Where a locomotive is being moved about in railroad yards where men are at work, and where their duty calls them and where they may be expected to be upon the tracks, the question, in an action for injuries or wrongful death, whether or not it was negligence for an engineer to omit ringing his bell, and

loud enough to give reasonable warning, and constantly, is one for the jury to determine. *Wabash Ry. v. Fox.* 143

Where the evidence showed that the plaintiff, driving a vehicle, and a street car of defendant company running at a lawful rate of speed, were traveling close together in the same direction for some distance, and that plaintiff suddenly, without warning or precaution, turned to cross the track on an intersecting street, when the car was but fifteen feet away, the motorman being unable to avoid a collision, the court held that plaintiff's negligence should defeat his recovery. *Cincinnati St. Ry. v. Jenkins.* 130

Where the evidence tends to show that the plaintiff was himself negligent, the jury should be clearly instructed that before plaintiff can recover it must be shown that the proximate cause of the injury was the negligence of the defendant after he became aware, or should have become aware of the plaintiff's peril. And a charge which makes no distinction as to whether the negligence of the plaintiff contributed directly or remotely to the injury, or whether it arose before or after the plaintiff was placed in a position of danger, is held to have been misleading. *Ib.*

In an action for damages, where one of the issues is the contributory negligence of the plaintiff, an instruction which measures and limits the degree of care to be used by the plaintiff's apprehension of danger, is misleading. *Circleville v. Sohn.* 193

A person employed in building a tunnel under a lake cannot recover for injuries resulting from the sliding of earth from the face of the tunnel, where it does not appear to have been caused by the negligence of which he complains, *i. e.*, non-support of the roof and withdrawal of air pressure, and it is not alleged and does not appear that there was negligence in guarding the face of the tunnel, but that the injuries were the result of an accident for which neither employer nor employee, each knowing the condition of the face of the tunnel and dangers incident to the work, was responsible. *Shaller Co. v. Corcoran.* 599

A refusal to charge in such action, that if the jury should find

Negligence.

that defendant could have avoided injuring plaintiff, he could recover, though negligent, was proper. *Strasser v. Club.* 715

If, in such case, plaintiff's negligence contributed to his injury, which would not have happened except for defendant's negligence, such contributory negligence will not defeat the action unless it was the proximate cause of the injury. *Ib.*

Actionable negligence must be alleged before it can be made a ground for recovery and cannot be introduced into the case for the first time by the charge of the court. Where the actionable negligence alleged in the petition consists mainly of the charge that the railway company failed and neglected to give any signals of warning of the approach of its trains to a grade crossing with the highway, it is error for the court to instruct the jury that it was the duty of the defendant company to give proper warning by bell and whistle, not less than eighty rods distant from the crossing, and where one or both could be distinctly heard at said crossing. *Lake Shore & M. S. Ry. v. Reynolds.* 701

A pedestrian in crossing a village street at a place other than a regular crossing is not guilty of negligence *per se* which will preclude her from recovering for injuries sustained by reason of the negligence of the village in leaving the street in a dangerous condition. Such person does not assume the risk of injury, without his fault, from defects, obstructions or nuisances which have been negligently permitted to remain in the streets. *Durbin v. Napoleon.* 584

The rule that a pedestrian is not guilty of negligence *per se* in attempting to pass over a street at a place other than a crossing, which will defeat a recovery for the injuries from defects, obstructions or nuisances which have negligently been permitted to remain in the streets, is not in conflict with *Dayton v. Taylor's Admr.*, 62 Ohio St., 11. *Ib.*

The fact that it is charged, in an action for personal injuries or wrongful death, that the defendant railway company has omitted to do or perform some act, or discharge some duty which is imposed upon it by statute, does not change the rule of law of the state in regard to the contributory negligence that may be charged against the party

receiving injuries. This rule, as to contributory negligence, applies to a failure to block frogs or switches, except on bridges as directed by the act of 1888, 85 O. L., 105. *C. C. C. & St. L. Ry. v. Ullom.* 321

A defective or unblocked frog is not within the rule of the act of 1890, 87 O. L., 149, providing that if a person is injured by a defect in a car or locomotive, or in any of the machinery or attachments there to the company is charged with knowledge of such defect, and that it makes a *prima facie* case of negligence on the part of the railway company. So far as a defective frog or defective road bed is concerned, the rule is, that to charge the railroad company, it must have either actual knowledge of the defect or the defect must have existed for such a length of time that knowledge of it should be presumed from the opportunity to know of it. *Ib.*

Starting a horse suddenly while another occupant of the wagon had his face to the rear of the wagon, is not such negligence as will render the driver liable, where it appears that the person thrown from the wagon heard the driver call to the horse to "get up," and it does not appear that such person might not have guarded himself against falling off, and that the falling off was the probable or necessary result of starting the horse. *Flannagan v. Holloway.* 373

Unless the negligence of a person injured contributed directly to or was a proximate cause of the injury, it does not preclude a recovery. Under this rule it is improper for the court, in an action for injuries resulting from a defective sidewalk, to instruct the jury that "if plaintiff contributed in any degree" to the injury, he cannot recover. *Matthews v. Toledo.* 375

A railroad company in sending out a train, though not a regular one, without a sufficient force of trainmen (without conductor or brakeman in case at bar) to assist in giving signals for the protection of employees engaged in switching, and coupling and uncoupling cars, is guilty of negligence. *Pennsylvania Co. v. Hickley.* 379

A charge in an action against a city for damages caused by permitting a culvert to become obstructed, and after one recovery upon the same cause of action that "in making repairs after the rendi-

Negligence—New Trials.

NEGLIGENCE—Continued—

tion of the judgment in the former case, it was the duty of the plaintiff to exercise reasonable care and forethought to avoid recurrence of the injury. If you find that the subsequent injury to plaintiff's property was the result of negligence, partly of the city and partly of the plaintiff, your verdict must be for the defendant, however slightly such negligence contributed to said injury," does not correctly state the law. Unless plaintiff's negligence contributed directly to the injury, it does not preclude a recovery, because the negligence of the plaintiff in not providing stronger walls and digging trenches around the same may have increased the damage occasioned by the overflow from the street and yet not be a concurring cause, without which no damage would follow. *Johnson v. Cincinnati*. 318

While a property owner, after recovery from the city for damages caused by permitting a culvert to become obstructed, thus diverting water to plaintiff's premises and causing houses to slip and settle, is bound to exercise ordinary care in building and restoring the premises, he is not required to anticipate and provide against the negligence of the city. *Ib.*

Unless circumstances are such as to excuse a person of ordinary care and prudence from looking and listening, it is negligence as a matter of law to approach and cross a known railroad crossing without looking and listening for approaching trains. *Koester v. Railway Co.* 283

Although a party may testify that he looked and listened, upon approaching a known railroad crossing, if the circumstances were such that by looking and listening, in the exercise of ordinary care, he must have seen an approaching train, such party will be held guilty, as a matter of law, of contributory negligence, notwithstanding his testimony that he looked and listened. *Ib.*

Where it appeared that plaintiff, driving in a top buggy, with side curtains down, and at an ordinary gate, was struck and injured by a freight train which approached at ordinary speed, at the crossing, the court held that if he had looked he must have seen the train or if he

had listened he must have heard it, and that if he did look and listen, he must be deemed to have been so careless and negligent as to constitute contributory negligence which will defeat his recovery; and that the trial court properly directed a verdict for the defendant. *Ib.*

In cases where the testimony is such that the minds of reasonable men might differ as to whether a party has been guilty of negligence or not, the question should be submitted to the jury and it is improper for the court to interfere. *Ib.*

The fact that a deaf person was guilty of negligence in walking on the track of an electric railway company will not defeat his recovery if it appears that the motorman, after discovering such person's danger, and the fact that he paid no attention to warning signals, might, in the exercise of ordinary care, have stopped the car and thus avoided the injury. *Griffin v. Railway Co.* 749

As long as an individual or a railway company uses in its business the same appliances that are in use generally in the same line of business, it cannot be held that such individual or company is guilty of negligence. *Toledo & O. C. Ry. v. Beard*. 406

See also PLEADING; MASTER AND SERVANT; RAILROADS; WRONGFUL DEATH.

NEW TRIALS—

Section 5306, Rev. Stat., as supplemented 93 O. L., 217, providing that the same court shall not grant more than one new trial on the weight of evidence against the same party in the same case, is for the regulation of new trials in the trial court. *Firemen's Ins. Co. v. Stern*. 818

Where the trial court has overruled a motion for a new trial upon the weight of evidence and the circuit court has reversed the judgment because of the error in overruling such motion, the circuit court is not precluded by the clause of Sec. 5306, Rev. Stat., as supplemented 93 O. L., providing that the same court shall not grant more than one new trial upon the weight of evidence, from again passing upon all errors appearing on the record, including the one that the verdict is not sustained by sufficient evidence. *Ib.*

An application for leave to file an amendment to a motion for a new trial, which relates to matters

New Trials—Parent and Child.

occurring after the rendition of the verdict and which were not claimed to have influenced counsel in arguing the motion for new trial (certain alleged threats made by plaintiff to counsel for defendant when about to argue the motion for new trial), was properly overruled. *Shaller Co. v. Corcoran.* 599

NOTICE—See also GAS AND OIL LEASES.

OFFICES AND OFFICERS—

A superintendent of public schools as designated in Sec. 3982, Rev. Stat., relating to election of superintendents, etc., is an employe of the board of education and not an officer within the purview of the constitution prohibiting any change in the salary of an officer during his existing term. *Ward v. Board of Ed.* 671

Under Sec. 3981, Rev. Stat., 43 O. L., 48, a person elected to such office has ten days after the annual organization in which to qualify, which includes the filing of his certificate of election with the clerk of the board. Thus a person elected on April 2 who qualifies and files such certificate within ten days after the annual organization of the board on the third Monday in April, is entitled to hold the office; and his right thereto is not affected by a failure to file statements of expenses within ten days after nomination and election respectively. *State v. Jaquis.* 91

The statute having pointed out the specified offenses on account of which one may forfeit his office, a court is not authorized to add other causes and declare that for such acts or omissions one may forfeit or be deprived of his office. Therefore, inasmuch as the Garfield law requiring statements of nomination and election expenses to be filed within ten days, contains no express provision that one who fails to comply therewith shall forfeit his office, a court has no power to so declare. *Ib.*

Under the foregoing interpretation, an elector, residing within the limits of an incorporated village which, with other territory, composes a special school district, may, during the term for which he was elected and while acting as a member of the village council, be elected to and exercise the office of member

of the school board for such district. *State v. Kinney.* 261

The legislature, by amended Sec. 69 of the Municipal Code of 1869, codified and now Sec. 1717, Rev. Stat., providing that "no member of council shall be eligible to any other office or to any board provided for in this chapter or created by any law or ordinance of council * * *" intended to render councilmen ineligible to the same class of offices as those contemplated by Sec. 93 of the act of 1869 which provided that no person should be eligible as a member of the council who at the same time held any municipal office or was an employe under the government of the corporation. *Ib.*

Where the member of a municipal department is charged with the violation of a rule of the department requiring members to promptly pay their debts, and the specification filed charges the failure to pay a certain claim, evidence that such member has failed to pay other debts is incompetent. *State v. Hyman.* 559

Section 1545, Rev. Stat., of the federal plan law of Cleveland, providing that no member of the "police, fire or sanitary police force, shall be removed or reduced in rank, except for cause" contemplates, to authorize removal, a power and sufficient cause. The mere fact that a member of a department owes a small debt, which he has neglected to pay, would not justify his removal, under a rule of the department requiring members to promptly pay their debts, particularly where it does not appear how long he has owed the debt or that he has ever refused to pay it. *Ib.*

See also FEES.

OIL AND GAS—See GAS AND OIL LEASES.

OPERATIVES—See CORPORATIONS.

ORDINANCES—See MUNICIPAL CORPORATIONS.

PARENT AND CHILD—

A father cannot be deprived of the custody of his child on account of cruel and unlawful punishment inflicted by a step-mother in his absence, unless it appears that the father countenanced or encouraged such ill-treatment. *Muench, In re.* 124

When the father is dead the mother is liable for the maintenance

Parent and Child.

PARENT AND CHILD—Continued—

of her minor child; but when the estate of the child is sufficient for its support and exceeds that of the mother, the child should be maintained out of its own estate. *Wing v. Hibbert*. 190

An order of the character named does not extinguish but merely holds the father's right in abeyance, and, for the cause apparent to the court, makes the mother's right to the custody of the child superior to the father's right to its custody. *Coons, In re*. 208

An order made by the court of common pleas in a divorce proceeding giving control of the minor child to the mother until the further order of that court is a continuing order; and as between the parties to it retains the child in the arms of the law, but does not confer such authority upon the mother as empowers her, by her last will, to appoint a guardian for the child under Sec. 6266, Rev. Stat., or relating to cases where the father is dead or gone to parts unknown. *Ib*.

But when all else is equal, and no present reason exists for departure from the rule, the right of the father to the custody of his minor child is superior to that of any other person. *Ib*.

As between the father and one whose right does not arise out of the order, he is not compelled to seek modification of such order in the court that made it, but may invoke the writ of *habeas corpus* and submit his claim to the court from which the writ issues. *Ib*.

In a controversy as to the custody of the child, the paramount object which governs the court is the benefit to the child, and all rights must yield to that consideration. *Ib*.

The act of April 14, 1884, amending Sec. 3108, Rev. Stat., by new Secs. 3108 and 3109, Rev. Stat., repealing the limitation imposed upon a tenant by curtesy is, therefore, retroactive and invalid as to vested rights of children. *Cameron v. Goebel*. 118

The provisions of the statutes above referred to, preventing a sale or encumbrance by the husband or preventing the property being taken for the debts of the husband, during the life of any of the children, being intended for the protection of the children or remaindermen, may be waived. *Ib*.

Where the father, upon separation from the mother, placed his children with their grandparents, under contract to pay a stipulated price for their care and support, and subsequently took them away and placed them in a convent, and the mother afterwards, without the father's consent, returned the children to their grandparents, where they remained for four years, the father visiting them frequently and knowing that no compensation was being paid for their care and support, the father is liable, upon implied contract (if returning the children to the grandparents did not revive the original contract), for a reasonable sum for such care and support. *Murphy v. Quigley*. 638

In the case above stated, the reviewing court declined to disturb a verdict, for board and care of the children, of six dollars a week and interest, because in a previous hearing another jury allowed five dollars a week for the same time, the latter being the amount specified in the express agreement above referred to. *Ib*.

A petition in an action against a parent for board and support of his children, which sets up two causes of action, the first upon an express agreement as to the price and the other upon a *quantum meruit*, is not objectionable and plaintiff cannot be compelled to elect upon which ground he will proceed, especially where both grounds may be true and he is not certain which may be established by the evidence. It is proper in such case to submit the question to the jury upon the pleadings and evidence for their determination. *Ib*.

While it will not be presumed that services of a child in taking care of and nursing a parent are to be compensated, yet such compensation should be allowed, without express agreement, where it appears that the circumstances were such that the child, who was in needy circumstances, was justified in assuming that she would be compensated for such services, and it also appears that the father, who was abundantly able to pay, required all of the daughter's services, and compelled her to give up working for others, and also that he received such services expecting to pay for them, but died without making provision therefor. *Skelton, In re*. 372

Parties—Partnership.

See also DESCENT AND DISTRIBUTION.

PARTIES—

Where a strip of abandoned canal land was sold by the owner to a railroad company, which built its road thereon, and thereafter another railroad company appropriated for its road all of such land not conveyed to such first company, and subsequently its lessee and grantee sold to a third company a portion of such strip lying between the tracks of the first two roads, and said third company built its tracks partly on the part of such strip so sold to said first company, in an action by the third company to quiet its title to said land against one to whom the original owner had quitclaimed, the first company is a proper party, and by cross-petition may seek the same relief, especially when the line between such companies is in dispute. *Pittsburg & W. Ry. v. Garlick.* 337

One who has no interest in a judgment or order of court is not entitled to interfere therewith. Thus an application for a writ of mandamus to compel a judge to accept a surety on an appeal bond in an action against the "Hygeia Medical College," made by one named as "trustee of the Hygeia Medical College," without averments showing that he, as such trustee, has any interest in the litigation, cannot be sustained. *State v. Spiegel.* 313

A village corporation is a proper party, as relator, in an action for a writ of mandamus to compel the county auditor to enter a municipal tax upon property of territory annexed to the village. *State v. Craig.* 348

Such an action, seeking to restrain the city from allowing and the corporation from using the streets, is not a joinder of separate causes of action against several defendants, or a case in which it is necessary to proceed by *quo warranto* against the private corporation. The action is to enjoin alleged misuse of streets and the defendant company and all parties against whom relief is sought may be joined as defendants. *Ampt v. Cincinnati.* 805

Upon the refusal of corporation counsel to bring suit for an injunction against the city to prevent it from allowing, and to prevent a private corporation from using, its public streets for certain purposes (laying pneumatic tubes, for carry-

ing packages by means of compressed air and supplying compressed air) a taxpayer has, under Secs. 1777 and 1778, Rev. Stat., authority to bring such suit. *Ib.* See also PLEASING.

PARTNERSHIPS—

In order to charge the administratrix of the deceased member of a partnership as a member thereof, and liable as such for the payment of certain claims against the firm, it is necessary that an agreement in the nature of partnership contract should appear, although it need not be in writing. *Russell v. Fenner.* 754

In an action against the administratrix of a deceased member of a partnership in which such administratrix and surviving members of the firm are charged with being partners, the reviewing court will not consider the question of estoppel against the administratrix, because of her acts and holding herself out as a partner, to deny existence of partnership, where there is no averment of such a state of facts in the petition and no such question was presented to the jury. *Ib.*

The fact that from the circumstances and manner in which a business was carried on there was some holding out of a partnership relation between the administratrix of a deceased member of the firm and surviving copartners, but which was in fact merely a co-operation of the administratrix, under a mistake as to her duty, in carrying out on behalf of the estate a contract previously made by the decedent with the firm, and the obligations of which he aided in fully discharging, is not sufficient to establish a partnership as against the undisputed and positive declarations of the administratrix and members of the firm, that no such relation existed. *Ib.*

The statement of an administratrix that she would pay or see that certain labor claims connected with a business in which her decedent was a partner were paid, would simply amount to a guaranty, and not to holding herself out as a member of such partnership, or as being so jointly interested in the business as to justify her being held as a principal. *Ib.*

Statements of the attorney of an administratrix that she was intending to come down and settle the estate of her decedent, and would see

Partnerships—Pleading.

PARTNERSHIPS—Continued—

all the claims against a partnership of which he was a member in the performance of work undertaken before his death, were paid, and in giving assurance that the work would continue to be paid for, do not amount to representation of a partnership by the agent; and if such statements were sufficient, they would impose no such liability on the administratrix unless it appeared that they were made in her presence or upon her authority. *Ib.*

Declarations made by such administratrix after the completion of the work do not bind her upon the theory that she held herself out as a partner and was estopped from denying the existence of such relation, for in order to give rise to an estoppel there must have been reliance and performance upon such declaration by the persons whose claims are asserted. *Ib.*

The holding out, in order to create liability as for partnership debts, must be of a character to fairly give reason to believe that a partnership exists. And in this case, in order to make the administratrix liable, it must have been a holding out that she was personally a partner and jointly interested personally. *Ib.*

And if the promise referred to amounted to a guaranty by an administratrix to pay certain claims of a partnership in which her decedent was a member, it cannot be enforced unless it is in writing, nor unless sued upon. Such a promise is not available in an action based upon averments that the administratrix was, by agreement or otherwise, a member of the partnership. *Ib.*

When a partnership sues in the firm name, and by proper averment brings itself within Sec. 5011, Rev. Stat., but also alleges compliance with the act of 1894, which is denied, mere failure of proof on that issue will not prevent recovery upon the cause of action set out, if that be duly established. Hence where, as in this case, what purported to be a certificate such as is provided for by section 7 of said act, was the only evidence on the question, whether it was rightly or wrongly admitted is unimportant, as in the latter event the error, if such there be, is not prejudicial. *Calvert v. Newberger.* 184

The right conferred upon a partnership formed for the purpose of carrying on a trade or business in

this state, by Sec. 5011, Rev. Stat., to "sue" in the "usual or ordinary name which it has assumed, or by which it is known," is not affected by the act of May 19, 1894, 91 O. L., 357, requiring partnerships to file certificates, giving names of members, unless it be shown that the persons constituting such firm have been "doing business as partners contrary to the provisions" of said act. *Ib.*

When an action is brought by such a partnership in the firm name, under said section 5011, to show a prima facie right or capacity to maintain it, averments of compliance with the act of 1894 are wholly unnecessary. The limitations of section 6 of said act are in the nature of exceptions to the authority given by section 5011, and the facts, therefore, showing their application in bar, constitute and are matters of defense. *Ib.*

A person purchasing property, other than that in which such firm is engaged in dealing, of a partnership doing business under style of The Taylor Coal Company, from one partner without knowledge or consent of the other, does so at his peril, and if, as between such partners, such sale was unlawful, the purchaser may be required to account to the other partner. *Plimpton v. Taylor.* 570

The name "The Taylor Coal Company" is of a character to put a would-be purchaser of property of the firm, other than that in which such company is dealing, on inquiry as to the nature of the concern, whether a corporation or a partnership. *Ib.*

One partner has no right to sell property belonging to the firm, other than that in which the firm is engaged in dealing. *Ib.*

PLEADING—

Although it has been held in this state that if the petition is defective in that it does not state a cause of action, the objection may be raised at any time in any court in which the case may be pending, and if the petition is found so clearly defective that no cause of action is stated in it, it is proper for a reviewing court to take that matter into consideration, yet where the objection to the sufficiency of the petition is raised for the first time in a reviewing court, that court should extend to the pleading a liberal construction

Pleading—Principal and Agent.

and should not render any aid in support of the objection beyond what it is compelled to. *Toomey v. Stamping Co.* 216

Where the petition fails to state a cause of action against the defendant, it is not error for the court to refuse to receive evidence offered by the plaintiff on the trial and to give judgment for defendant on the pleadings. *Lynch v. Railroad Co.* 243

Under the liberal interpretation which must be given to pleadings under the code, there was no error in overruling an objection to the admission of evidence by the plaintiff below for the reason that the petition did not state facts sufficient to constitute a cause of action, there being allegation of negligence for failing to support the roof of the tunnel in question so as to prevent the earth falling, of failing to provide a safe place to work, of not using planks of sufficient strength, and not using a sufficient number of planks, and not sufficient heads or braces, in strength or numbers, to support the roof, and without notice or warning cutting off the supply of compressed air which assisted in supporting such roof. *Shaller Co. v. Corcoran.* 599

Where in an action for personal injuries by a bricklayer who was injured by the falling of earth from the face of a tunnel in which he was at work, the negligence charged in the petition had reference solely to the material used and the manner of supporting the roof and sides of the tunnel, and the cutting off of the air pressure, no allegation of negligence relating to the condition of the face of the tunnel at the time of the accident being made, evidence descriptive of the face of the tunnel and feasibility of guarding against slides, is not competent for the purpose of laying a foundation for a recovery, although it might have been competent to describe the place where plaintiff was working; and if admitted it should have been limited to such purpose. *Ib.*

Where testimony not in accordance with the pleadings is admitted without objection the court may allow the pleadings to be amended to conform to the proof. *Knights v. Everding.* 419

It is sufficient under Ohio practice, if the names of the parties to a suit are stated in the caption of the petition, and in the body of the

petition they may be classed as plaintiffs and defendants without being again named. Where there is a qualification to be made, as where the parties are minors, after having named the parties in the caption, it should be averred. *Ib.*

Where the admission of testimony not in accordance with the pleadings is objected to, the court may allow an amendment to the pleadings, but if the opposite party makes a showing that he has been taken by surprise, or will be prejudiced by the amendment, he is entitled to time in which to make his pleadings and prepare for trial. *Ib.*

The fact that a petition sets forth facts which constitute negligent conduct and denominates them as wilful conduct, and alleges that the injury of which plaintiff complains was intentionally committed, while the evidenceshows that it was not committed intentionally, but negligently, does not constitute such a variance between the pleading and proof as to be prejudicial to the defendant. *Griffin v. Railroad Co.* 749

See also Master and Servant; Parent and child; Trial; Wrongful Death.

PLEDGES—

Where it appears that such pledge was made by a partnership without other liabilities at the time, it is not within Sec. 6343, Rev Stat., as amended 93 O. L. 290, relating to conveyances by debtors in contemplation of insolvency, or invalidated by the insolvency of one of the partners who subsequently, upon dissolution, succeeded the firm. *Stothfang, In re.* 103

A note, given to secure a surety, reciting that promisor has "deposited or pledged as collateral security for the payment of this note the same warehouse receipts for whiskey now in possession of the Atlas National Bank and pledged with said bank as collateral security for loans or their renewals of loans, and after payment of said loans or their renewals to the Atlas National Bank, then the balance of said warehouse receipts are to be held as collateral security to this note," the possession being as full and complete as the nature of the case would permit, is sufficient to vest title in the second pledgee. *Ib.*

PRINCIPAL AND AGENT—

Ignorance as to who is the real principal in a transaction does not

Principal and Agent—Railroads.

PRINCIPAL AND AGENT—Con.—

give to the claimant four years from the time of discovering the real principal in which to bring an action. *Irwin v. Lloyd.* 212

In such case, if the agent dies insolvent, leaving the amount due his principal unpaid, the stock of goods into which the trust funds can be traced passes to his administrator impressed with the trust, and the court may order the administrator to allow and pay, as a preferred claim, the debt so due the principal from the proceeds of the sale of said stock, upon the principal, among others, that the agent by the wrongful use and investment of the trust funds, increased his own estate to that extent. *Deering Harvester Co. v. Keifer.* 270

Where an agent sells the goods of his principal on commission under a contract that he will keep the entire proceeds of sales for the principal as a special deposit until fully settled for, and, in violation of the contract, uses the money in purchase of goods for his own store and in its running expenses, a court of equity may declare a trust in such stock of goods for the sum so converted and used, and order the same paid as a preferred claim out of the proceeds of sale of said stock, and for this purpose the court of common pleas has jurisdiction. *Ib.*

When such contract provided that an average of a certain amount of insurance should be furnished by the agent annually, and such contract is broken by the company after running eighteen months, the annual average during that time cannot be determined, and instruction to the jury what it would be or how to determine it, would be erroneous. *Jakowenko v. Life Assn.* 576

The habitual use of morphine by the party to a contract for services, who is to perform the services thereunder, is not of itself sufficient cause for terminating the contract, unless its effect is to prevent the performance of such services, and evidence of the general effect of drug is sufficient. *Ib.*

In an action by an insurance agent against his company for breach of contract of employment, by which he was to be allowed a commission on business secured, without any allowance for expenses such agent cannot prove as part of the damages for the breach, any ex-

penses he was put to in conducting the business. *Ib.*

See Bills and Notes.

PRINCIPAL AND SURETIES—See Bonds.

PROXIMATE CAUSE—

Where the failure to perform a duty which was devolved upon one of several defendants, in an action for personal injuries, was not the proximate cause of the accident, as a failure to have a floor provided in a building, from which simply resulted a more severe injury, such defendant is not jointly liable with the defendant whose negligence was the proximate cause of the injury, and a settlement with the former would not release the latter from liability. *Stabler v. Bridge Co.* 87

To warrant recovery of damages for death caused by wrongful act, the act assigned as the cause must be the proximate cause, with no act of decedent intervening or standing next and nearest to death. When the act of decedent intervenes and breaks the casual connection between the wrongful act complained of and the death, the act assigned cannot be said to have been the proximate cause. *Ronker v. St. John.* 434

Where a druggist sold strychnine to an intoxicated man, and neglected to put upon the package the label required by statute, as a notice and warning of its contents, and the purchaser, while still intoxicated, took the strychnine, from the effects of which he died, the act of selling the poison and neglecting to label it were not either the one or the other or both, the proximate cause of death; the proximate cause was the act of the man himself in taking the poison, and for which the druggist is not responsible in damages. *Ib.*

See also Negligence.

QUIETING TITLE—See also Wills.

QUO WARRANTO—

Injunction cannot be made to take place of—See Injunction.

RAILROADS—

Under Sec. 3324, Rev. Stat., a railroad company is liable for damages sustained in person or property in any manner by reason of the want or insufficiency of a crossing over its track. *Lynch v. Railroad Co.* 243

Railroads—Schools.

The word "crossing," as used in the section referred to, is used in a limited or restricted sense, and includes only that part of the structure immediately over the railway tracks and sufficient space on either side thereof to make a sufficient and safe way over the tracks. *Ib.*

A railway company, merely as owner of abutting lots and lands in a municipal corporation, is not liable for injuries to persons or property resulting from a defective sidewalk maintained on a street crossing its right of way. *Ib.*

Ordinary care requires a railway company to see that the brakes on freight cars, its own or those received from other roads, are strong and substantial, but the mere fact that an eye-bolt, the part of a brake going through the shaft, with a nut on one end to hold it and on the other end an eye to which the chain is attached, is a fraction or half an inch longer than the eye-bolts in a majority of brakes, does not of itself constitute negligence or make the machinery defective or dangerous. *Hunt v. Caldwell.* 562

Neglecting to remove cars from a track upon which an approaching train is directed to enter railroad yards after dark constitutes failure to discharge the duty incumbent upon a railroad company of furnishing a safe place for its employees to work. *Lake Shore & M. S. Ry. v. Feller.* 799

See also MASTER AND SERVANT; LICENSE.

RAPE—

To establish the offense of assault with intent to commit rape, the evidence must show beyond a reasonable doubt that the assault was made with intent to commit rape, against the will of the party assaulted, and to use whatever degree of force might be necessary to overcome any resistance she might make. *Patterson v. State.* 602

The intent to use whatever force might be necessary to overcome resistance, may be shown by the conduct and acts of the accused in his efforts to attain his purpose; whatever these may have been at the time of the occurrence, or immediately thereafter, are proper to be considered to determine whether such intent existed in his mind at the time of perpetration of the offense charged was attempted. *Ib.*

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REAL PROPERTY—See VENDOR AND PURCHASER.

RECEIVERS—

The circuit court, or judge thereof in his circuit, has no power under Sec. 5587, Rev. Stat., to appoint a receiver in such an action, after final judgment, to sell or take charge of the personal or real property of the decedent, during the pendency of proceedings in error, where an executor or administrator with the will annexed had been previously appointed by the probate court. *Sanker v. Mattison.* 125

A court of equity possesses the power independent of statute, to appoint a receiver to preserve property *pendente lite*; but such power can be exercised only in cases where the property is the direct subject of the action, and the judgment will act upon the specific property, and when there is no person who is at the time competent to hold and manage it during the judicial proceeding. *Ib.*

A receiver cannot appeal to the circuit court from a judgment of the common pleas sustaining exceptions to his final report. *Scheidler v. Street Ry.* 203

RES ADJUDICATA—See JUDGMENTS.

REPLEVIN—See also CHATTEL MORTGAGES.

SCHOOLS—

The same rule applies to the "confirmation" of a teacher, elected by a board of subdirectors. Hence, where a township board consisted of its clerk, and five directors, a motion to confirm the election of a teacher, which had the votes of but two directors and the clerk, does not have the number necessary to carry it, and such election is not confirmed. *Rush v. Clinton Tp.* 181

In order to constitute a legal employment of a teacher for a school within a township, by the board of education, its record must show that a majority of all the members of the board voted "aye" on the proposition. *Ib.*

In that case, the person to whom such action relates, has not thereby been employed as a teacher for any school of the township, and consequently cannot maintain an action against the board for debarring her of alleged rights as such. *Ib.*

Schools—Sewers.

SCHOOLS—Continued—

Although a teacher may have a vested right in a contract that cannot be impaired by legislation though the legislation take the form of abolishing the position, as for instance, providing for the selection of a superintendent of instruction and repealing a law providing for a superintendent of schools, yet a contract between a teacher and board of education is subject to the general rules governing contracts. *Ward v. Board of Ed.* 671

A superintendent of schools having accepted the position at a stated salary for a time certain, being under a legal contractual obligation to serve that time, has no claim against a board of education on a voluntary promise of an increase of salary, for meritorious services, during his term, there being no rescission of the original contract, no new or additional service to be rendered or other consideration moving in support of the new promise. *Ib.*

Where, after the passage of the "Niles Law," 93 O. L., 485, relating to boards of education in cities of the grade and class of Toledo, and abolishing the position of superintendent of schools and creating that of superintendent of instruction, the superintendent under the former law by accepting another position tendered him by the superintendent of instruction inconsistent with the one he was holding, voluntarily relinquished his former position and salary, and is not entitled to recover under his original contract. *Ib.*

While the payment of an increase of salary to a superintendent of schools during his existing term, under Sec. 4017, Rev. Stat., may be legal if made, yet it does not follow, that because the board of education promised it that he thereby acquires a legal claim thereto, enforceable in the courts; such promise of extra compensation is a mere *nudum pactum*. *Ib.*

A voluntary increase of the salary of superintendents or teachers in public schools, given as a reward, is not only without consideration but against public policy, for the board is dealing with public funds and acting with respect thereto as trustees for the public. *Ib.*

Laws relating to the subject matter of education and the efficiency of our public school system, both from the vital interest which all people of the state have in them,

as well as from the provisions of Sec. 2, Art. 6 of the constitution, are of a general nature. *State v. Kurtz.* 71

The act of April 10, 1900, 94 O. L., 539, providing for the creation of a pension fund for the pensioning of teachers in city districts of the second grade of the first class, and making it the duty of the treasurer of the board of education in such city to reserve ten per cent. of teachers' salaries for such purpose, is within the inhibition of Sec. 26, Art. 2 of the constitution, providing that all laws of a general nature shall have uniform operation throughout the state, and is invalid, there being but one such city in the state. *Ib.*

Section 6 of Act 94 O. L., 539, relating to the creation of a teachers' pension fund in cities of the second grade of the first class, in providing that the first election to the retiring board therein provided for, shall be held in September, 1900, determines the fact that no other city which is not of the class and grade named in the act at that time could ever come within its provisions, and, therefore, renders the law unconstitutional as lacking uniform operation throughout the state. *Ib.*

The law in question, being applicable to but one city in the state, cannot be upheld on the ground that it adds to the efficiency of the public school system, in making provision for teachers who, during long years of service, have given their best efforts to the betterment of society. That argument bears directly upon and supports the proposition that the law is of a general nature and should have uniform operation throughout the state. *Ib.*

The fact that there are certain rules employed by the board of education of the city within the class named in the law in question, not in force in other places, does not so create conditions different from those in other parts of the state as justify or uphold the law. *Ib.*

See also OFFICES and OFFICERS.

SEWERS—

All the land within a sewer district in the city of Toledo may be assessed for a general or trunk sewer constructed within such district, and the finding of the assessing committee with reference to the special benefits which will accrue to the several parcels of land within

Sewers—Streets.

the sewer district is conclusive, in the absence of fraud or great oppression. *Toledo v. Ford.* 115

SIDEWALKS—See **MUNICIPAL CORPORATIONS**; **RAILROADS**.

SPECIAL FINDINGS—See **VERDICTS**.

SPECIFIC PERFORMANCE — See **CONTRACTS**.

STATE SUPERVISOR OF ELECTIONS—

Compensation to an assistant to the board of state supervisors of elections, authorized under Sec. 2966-4, Rev. Stat., providing, in addition to specific provisions, for "all proper necessary expenses," is within Sec. 894, Rev. Stat., requiring, where the amount is not fixed by law, allowance by the county commissioners. *State v. Craig.* 557

In an action to enjoin payment of compensation to a person acting as assistant to the board of deputy state supervisors of elections, in which it does not appear what services such assistant performed, an answer averring that such person was acting "as assistant to said board and that his compensation * * * is one of the necessary expenses in the performance of the duties of said board," is sufficient to bring such expenditure within Sec. 2966-4, Rev. Stat., providing, after specific provisions, for "all proper, necessary expenses in the performance of the duties of such supervisors." *Ib.*

STATUTES—

Statutes should be construed together so far as they are material to each other. If other provisions of a law cover the question, the leaving out of a portion of a sentence or the transposition of words in the revision of a law, does not necessarily call for a different interpretation. It must plainly appear that the legislature intended a change; otherwise the same construction must be given to the statute as revised as that which had obtained previous to the revision. *Chisholm v. Shields.* 361

An act has no force until it goes into effect, and a note entitled to days of grace, made after the passage of an act abolishing days of grace but before it goes into effect, is not affected by the act. *Evans v. Lumber Co.* 543

The clerk of either house of the state legislature may certify, relative to the proceedings of the house in which he served, to the facts appearing upon the journals, but evidence in the form of a copy of an original bill, certified as a correct copy by the clerk, for the purpose of impeaching a law as it appears in the session laws on account of the omission of words, is incompetent. *State v. Jones.* 496

And if such evidence was competent, it would amount to nothing more than negative evidence that the bill was not amended by striking out the omitted words; and it is doubtful if it would go that far, where it appears to have been engrossed in the form in which it appears in the session laws and so read and put upon its passage. *Ib.*

Where the journals show that a bill was passed, and there is nothing in them to show that it was not read as the constitution requires, the presumption is that it was so read, and this presumption is not liable to be rebutted by proof. *Miller v. State, 3 Ohio St.,* 475. *Ib.*

STATUTORY LIABILITY—See **CORPORATIONS**.

STREETS—

When a telephone company, by the use of a street, substantially deprives an abutting owner of property rights, such owner is not driven to his action at law, but may pursue the remedy which repairs the wrong by removing the cause of it. And his right to this remedy is not measured by the extent of the injury, nor by the necessity or convenience of the company to whom the use is granted. *Mantell v. Telephone Co.* 274

While the council of a city may grant to a telephone company the use of streets, under the limitations of Sec. 3461, Rev. Stat., and other sections of that chapter, the use must be such as not to substantially interfere with the rights of an abutting owner. *Ib.*

An abutting property owner on a public street has, as an appurtenant of his property, rights in the street of which he can not be deprived without his consent, or upon full compensation and by due process of law. *Ib.*

Where the traveled portion of a street has been used for such a length of time as to constitute a

Streets—Trial.

STREETS—Continued—

grade by user, the grade of such traveled portion determines the grade for the whole width of the street; and whenever the whole road is found necessary for the public travel, the public has the right to improve it, to correspond with the traveled portion, without being responsible to the abutting property owners for any change in the surface of the ground where their property abuts the road. *Cincinnati v. Roth*. 95

The county commissioners have no power to grant a franchise to a street railway company over the streets and roads in a hamlet, and cannot maintain an action to enjoin the construction of the road in violation of the terms thereof. The exclusive jurisdiction over such streets is vested in the trustees of the hamlet, under Sec. 1651, Rev. Stat. *Verera v. Railroad Co.* 664

The right of an abutting property owner is not simply to the center line of a street, but extends across the street. *Madden v. Railway Co.* 571

It is not essential, in order to entitle such property owner to an injunction, that his property should actually abut upon such way. It is sufficient if it is near enough to be materially affected by closing or obstructing such way. *Ib.*

A property owner has a property right in a public way, whether the fee to such way be in the municipality in trust for public uses or in an abutting owner. Such property owner is, therefore, unless compensated, entitled to an injunction against the closing or the obstruction of a public way, obtained by prescription, across railroad tracks. *Ib.*

See MUNICIPAL CORPORATIONS.

SUBPOENA DUCES TECUM—See CORPORATIONS.

TAXATION—

It is competent for the county auditor, in ascertaining the assessed valuation of a new building, where it is claimed that an error has been made by the annual assessor in returning same for taxation, to go outside the records of his office to ascertain the facts. *State v. Lewis*. 13

A property owner having knowledge of the action of the board of equalization in making additions to the valuation of a new building as

it was completed, and having regularly paid taxes in accordance therewith, should not, at the end of five years, be permitted to obtain a refund or have the duplicate corrected by deducting additions for those years. *Ib.*

New partitions and new decorations for walls and ceilings, as an inducement to and in accordance with the tastes of tenants in a large office building, although involving large expenditures, do not constitute a new building or structure within Sec. 2807, Rev. Stat. *Ib.*

Where a person acts in good faith, believing that he has no money or credits which should be returned for taxation, the penalty of fifty per cent. should not be imposed. *Stewart v. Duerr*. 310

Debts cannot be deducted from money in bank subject to check, although the liabilities of the owner are largely in excess of his deposit in the bank. *Ib.*

When the boundaries of a municipal corporation are extended prior to the first Monday in June, no special provision is necessary to authorize the levy of the municipal tax upon the annexed property. Therefore, where territory became part of a village corporation on April 24, 1900, and on April 27, 1900, the levy for the township was certified to the auditor of the county, and on May 15, 1900, the municipal levy for the village corporation was certified to the county auditor, it became the duty of said auditor to enter upon the property of the annexed territory the municipal instead of the township levy; and, having failed to do so, he may be required to make such entry by writ of mandamus. *State v. Craig*. 343

See also ANNUITIES; BOARD OF EQUALIZATION; ESTOPPEL; MUNICIPAL CORPORATIONS.

TEACHERS' PENSION FUND—See SCHOOLS.

TRIAL—

If, at the close of plaintiff's testimony, he has offered evidence tending to prove the material allegations of the petition, the case cannot be taken from but must be submitted to the jury under proper instructions. *McCarty v. Railroad Co.* 229

Where improper remarks are made in the presence of a jury by the trial judge or by counsel in argu-

Trial—Vendor and Purchaser.

ment of the case, the effect can only be cured by prompt apology or retraction or by telling the jury in unmistakable terms that such remarks are not to be considered. Therefore, merely stating in a general charge that "this duty you will perform uninfluenced by the character of the suit or the parties to the action, or by any side remarks by the court or counsel, in the course of the trial," is not sufficient. *Cleveland, C. C. & St. L. Ry. v. Ullom.* 321

A statement by the trial judge, in the presence of the jury, assuming, without proof, that the railway company and its employes had been guilty of an attempt to suborn a witness, constitutes prejudicial error. *Ib.*

In such case it is error for the court, at the close of plaintiff's case, to take it from the jury, and direct a verdict for defendant. *Durbin v. Napoleon.* 584

In an action against a village for personal injuries by falling into a dangerous excavation in a street, which had been there for some months and which plaintiff had known of several months before the accident, the questions whether she was or was not chargeable with remembering its existence, or whether she had not the right to presume the city had made the place safe in the meantime, are to be measured by time, circumstances and conditions, and are for the jury under proper instructions. *Ib.*

There being no evidence of actionable negligence on the part of the railroad company, the court should have directed a verdict for the defendant. *Hunt v. Caldwell.* 563

In an action against a property owner and a city to recover for personal injuries from falling on an icy sidewalk, at a point where water was discharged from a spout and ice had accumulated, where plaintiff explicitly stated that the sidewalk was covered with snow and that she did not know that the ice was there, and the evidence must be weighed to determine the question of contributory negligence, it was error for the court to direct a verdict for defendant. *Leber v. Transportation Co.* 568

Where, in actions for personal injuries, the facts relating to the contributory negligence of plaintiff are undisputed, or free from doubt, and from such facts only one proper

inference can be drawn, that of negligence of plaintiff, the judge may direct a verdict. But if the facts are doubtful, or such that different minds might differ about the proper inference to be drawn therefrom, the case should go to the jury. *Ib.*

While the president of a corporation who, being inquired of by a person desiring to make an investment in the company, carelessly and recklessly made misstatements which misled such person, may be liable in damages, a charge to that effect would be improper in an action based upon charges that the statements were fraudulently made and was properly refused. *Cable v. Bowlus.* 526

When plaintiff in an action against a street railway company for personal injuries sets forth the facts complained of and denominates them "wilful conduct," if the facts so charged constitute negligence, the case should be submitted to the jury, although the evidence is insufficient to establish wilful wrong. *Griffin v. Railway Co.* 749

See also MASTER AND SERVANT; NEGLIGENCE.

TRUSTS—

A trust created for the benefit of creditors is not a technical and continuing trust which is exempt from the operation of the statute of limitations. *Irwin v. Lloyd.* 212

See also EXECUTORS AND ADMINISTRATORS; EXEMPTIONS; PRINCIPAL AND AGENT.

VARIANCE—See PLEADING.

VENDOR AND PURCHASER—

The buyer of real estate, who assumes to have special knowledge of the value and condition of the property, in regard to which the seller is ignorant, for the purpose of misleading him and inducing him to sell the same at less than its value, told him of facts and conditions calculated to depreciate the value of the premises, but omitted to disclose other facts within his knowledge which would have given correct information of their value, and by such means succeeded in buying the same at much less than their value. Such conduct on the part of the buyer is fraudulent, entitling the seller to set aside the conveyance. *Manley v. Carl.* 3

Vendor's Liens—Verdicts.

VENDORS LIENS—

The fact that the vendor of land for which the purchase price had not been paid, who had executed deeds to enable the vendee to raise money to build on the property paid, received the mortgage money and it over to the vendee, who absconded shortly after, without paying his creditors, does not make the vendor responsible therefor to holders of mechanics' liens. *Walbridge v. Barrett*. 634

A vendor's right to be paid the balance of the purchase money is superior to the lien of a material man; and if the former, for a valuable consideration, before a judicial sale of the property, conveys the legal title to another, the latter becomes vested with the rights and interests of the vendor, and the lien of such original vendor, where the property is mortgaged by his vendee, passes to the mortgagee. *Mutual Aid B. & L. Co. v. Gashe*, 58 Ohio St., 275, followed. Ib.

Under the rule that a vendor's lien, by virtue of subsequent conveyance to and mortgage by vendee, passes to the mortgagee, the latter where property was sold for part cash down and the balance to be paid in installments, and vendor conveyed to vendee to enable him to mortgage and borrow money to build on the property, and who absconded after obtaining money by mortgage, in a suit to marshal liens, is entitled to priority to the amount of the vendor's lien as against the holders of mechanics' liens, though the latter attached prior to the execution of the mortgage. Ib.

Where such vendor, after conveyance to and mortgage by his absconding vendee, received from the latter certain sums of money, proceeds of the mortgage, to apply on another contract, the money so received cannot be deducted from the amount of the vendor's lien or reached in case at bar. Ib.

An agreement by such vendor with the mortgagee of his vendee, that he would postpone his vendor's lien to the mortgage, does not extend to mechanics' liens or defeat the priority of the vendor's lien in favor of the mortgagee. Ib.

VERDICTS—

Where the statute of limitations is specially pleaded as a defense, and the jury, being instructed thereon, returns a ver-

dict which includes a finding of that fact in favor of the defendant, such verdict should be treated as a special verdict and judgment rendered thereon. *Irwin v. Christman*. 101

Requests for special findings of fact to be answered by the jury under Sec. 5201, Rev. Stat., are in time if submitted before the jury retires. *B. & O. R. R. Co. v. McCamey*, 5 Circ. Dec., 631, approved and followed. *Toledo & O. C. Ry. v. Beard*. 406

Where a verdict for plaintiff in such action was based wholly upon the testimony of the witness referred to and upon the assumption that the accident happened in a certain way, when in fact it might reasonably have happened in a way relieving the company of liability, such verdict should be set aside as not sustained by the evidence. *Hunt v. Caldwell*. 562

The fact that answers to interrogatories which a railway company, in an action for personal injuries, requested to have submitted to the jury, had they been as favorable as possible to the railway company, would not have controlled the general verdict, justified the trial judge in refusing to submit such interrogatories. *Lake Shore & M. S. Ry. v. Andrews*. 475

Where it appeared that Mrs. S., in negotiating a sale of several parcels of real estate, said she "could use the money to better advantage upon the hill by improving some property," and upon receipt of the money, \$16,000, equal to about one-half her estate, she went with her son-in-law to a bank, and after depositing the money gave him a check for \$14,300 which, after her death, he claimed was a gift, in view of the statement referred to, as opposed to those made by the son-in-law and by other persons not members of the family, and in view of the fact that Mrs. S. had a family of nine children, and a will in their favor rebuts the presumption of a lack of parental regard for them, and no good reason appears why she should have given half her estate to her son-in-law, a majority of the court holds that a verdict holding the transaction between Mrs. S. and her son-in-law to have been merely a loan, was not manifestly against the weight of the evidence. *Ringemann v. Broxtermann*. 368

Verdicts—Wills.

Where there is no dispute in regard to the facts in a case and can be no dispute upon the testimony. it is proper for the court in its discretion to direct the jury to return a verdict for the defendant, the only question being one of law as to whether there was any actionable negligence or liability on the part of defendant. *Beucker v. Baker*. 642

The particular question of fact contemplated by Sec. 5201, Rev. Stat., requiring the court, upon request of either party, to submit questions to the jury, for special findings, are such that the answers to them will establish ultimate and determinative facts, and not those which are only of a probative character. Therefore, where the questions are not such as will enable the court, in the application of the law, to determine the rights of the parties, and are those which simply tend to prove them, the court may refuse to submit them. *Strasser v. Club*. 715

A reviewing court will not disturb a general verdict if there is sufficient evidence to sustain it upon either of the two propositions, either of which would warrant the verdict. *Gates v. Storage Co.* 721

A reviewing court will not say a verdict is contrary to the evidence where there is no contradiction of the question in issue, though the evidence containing the proposition is so slight and uncertain that it is a mere straw on which to hang the verdict. *Ib.*

Determining on error whether verdict was excessive—see ERROR.

Not excessive, see DAMAGES.

WILLS—

The judgment setting aside the will leaves the parties in the situation which they would have occupied had the testator died intestate; but it does not vacate or annul the order of appointment by the probate court of an administrator of the estate. *Sanker v. Mattison*. 125

The judgment setting aside the will, and the filing of a petition in error to reverse this judgment, does not vacate the order appointing an administrator on the estate, or release the administrator from the preservation of the property, or the protection of the interest of parties during the pendency of the litigation; and the jurisdiction to make

such orders or further orders for that purpose, during the pendency of proceedings in error, remains in the probate court. The petition in error does not bring the whole property and the administration thereof, before the appellate court, but only the order adjudging the will to be void; and leaves in the probate court all jurisdiction in the cause not inconsistent with the power to reverse, vacate or modify the final order or judgment in which error is alleged. *Ib.*

Where an action is brought in common pleas court under Sec. 5861, Rev. Stat., to determine the validity of a will, the issue is confined to the question whether the writing produced is or is not the last will of the testator, and the subject of the action is the validity of the will. *Ib.*

Where in a will the word "children" is used in all the devises and bequests, and it is then provided that if any one of them "die without issue or leave no surviving issue" then that such bequests to him shall "pass to my other surviving heirs," the word "heirs" must be construed to mean "children" also, and therefore, on the death of one of the children without issue, the land devised to him goes to the children then living, exclusive of the issue of children who have died before. *Walker v. Walker*. 291

The doctrine that, where real estate is devised in terms denoting an intention that the primary devisee shall take a fee simple on the death of the testator, followed by a devise over in case of his death without issue, the latter words refer to a death in the lifetime of the testator, is not the law of this state; under the decisions of the Supreme Court such words, or words of similar import, are to be interpreted according to their popular and natural meaning, and as referring to the time of the death of the first taker, unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purpose. *Ib.*

A will by one provision giving testator's children land in fee simple, and by other provisions imposing upon devisees the burden of making large payments of money to his executors, to be used in the payment of legacies to other children, and for the payment of the debts of the testator will not be considered

WILLS—Continued—

as indicating an intention of the testator to give a fee simple title to the land devised subject only to the charges imposed. This rule only applies to cases where the devise is so indefinite that the intention of the testator can not easily be ascertained, and not where the estate is by appropriate language devised in fee simple, with the further provision that if he shall die without issue, or leaving no issue, that it shall pass to other persons. *Ib.*

Where such devisee is in possession of the lands devised, she may maintain an action to remove a cloud upon the title thereto, though it consists of claims asserted which involved a construction of the provision in the will giving the property to her. *Darlington v. Compton.* 97

Under such will, during the daughter's life, the brothers and sisters, or their heirs, can have only a future, contingent interest in such lands, without present right or title thereto. *Ib.*

Where the item in the will under which the claim asserted is set out, as against a general demurrer, the petition sufficiently shows a cloud upon the plaintiff's title by stating that the defendants claim an interest in the lands devised adverse to her right under that item of the will. *Ib.*

A devise of lands to testator's daughter, providing that in the event of her death, "leaving no legal heirs," the property so willed "is to descend to her brothers and sisters," passes to the daughter the entire estate in the lands devised. *Ib.*

Section 5961, Rev. Stat., does by implication repeal Sec. 5914, Rev. Stat., permitting a testator to bequeath his property to any person to whom he may desire, but simply places a limitation upon the general power conferred by that section. *German Mnt. Ins. Co. v. Lushey.* 52

A clause disinheriting an unborn child does not constitute a provision for the after-born child within the meaning of Sec. 5961, Rev. Stat., and the intention of testator, being contrary to law, does not control or defeat the inheritance provided for in that section. *Ib.*

Under a will bequeathing to each of testator's children one-fourth of his estate, subject to be divested in the event that either died before the

widow leaving issue surviving, and that event does not happen, each child becomes vested with a fee, subject to the widow's life estate, upon the death of the testator. *Doppler v. Clouwetter.* 374

Upon the death of a child so inheriting, without issue, her husband takes a life estate and the fee goes to her brothers and sisters, though subject to the life estate of testator's widow who still survives. *Ib.*

Where a will provides that the children of the testatrix's brother J. take the remaining half of a certain residue, said residue to be shared by them equally, and to be paid to them respectively as they arrive at the age of majority, the shares of said children to be kept at interest by the executor of the will until so paid; when at the death of the testatrix, said J. had only three children living, but after the testatrix's death and before the oldest of said three children arrived at the age of majority, two other children were born to said J., said two children are entitled to share equally with said three children in said residue; the division to be made when the eldest of the three becomes of age, and the share of such eldest child, to be then paid to it; the shares of the others to be kept at interest by the executor, until said children respectively arrive at the age of majority, when their respective shares will be due and payable to them. *Wiley v. Bricker.* 429

Where a legacy is given by will to a class of individuals in general terms, and no period is fixed for the distribution, such time for distribution is the death of the testator, and only members of the class then in being are entitled to share the legacy. But where the time of distribution is postponed by the terms of the will to some period subsequent to the testator's death, all of such class *in esse* at the time fixed for the distribution are entitled to share therein. *Ib.*

Where a devise to a class is a present bequest, the beneficiaries who are *in esse* at the death of the testator take vested interests in the fund, but subject to open and let in after-born members of such class who shall come into being before the time appointed for distribution. *Ib.*

Where the distribution of a devise to a class is postponed by the

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terms of the will until the attainment of a given age by the members of such class, the legacy applies only to those who are living at the death of the testator, and who shall come into existence before the first of such class attains the age named, this being the period when the fund is first distributable with respect to any member of such class. *Ib.*

Where, under the terms of a will, the members of a class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open, and let in after-born children, they take their vested interests in their shares, subject to the distribution of such shares as the members of the class are increased by future births, and, on the death of any of the children prior to the period for the distribution, their shares go to their respective representatives. *Ib.*

See also EXECUTORS AND ADMINISTRATORS.

WITNESSES—

Witnesses who testify that they are acquainted with street railroads in various cities, and with the character of life guards generally used on cars, are competent to testify from observation and experience that those in general use are adapted to the purpose, and that they are beneficial in the way of saving and protecting life; and also to testify as to the character of the guard used on a particular car and that it had no tendency whatever to preserve or save life. *Ashtabula Transit Co. v. Dagenbach.* 307

An employee of a railroad company, who claimed to have discovered the cause (a defective brake,) of an injury to a fellow brakeman immediately after the accident, and who remained silent during an investigation by the company and for fifteen months afterward, and then (being no longer in the employ of the railway company) appeared as a witness for plaintiff in an action against the company, and it also appeared that when his testimony was about to be taken he sought an interview with officers of the railroad company, in a somewhat peculiar manner, and wanted to know if they wished to see him before he testified, and whose positive testimony as to the location of a certain car in a train is contradicted by records made when there could be no induce-

ment to make them false, held to be unworthy of credit. *Hunt v. Caldwell.* 562

Where separate trials are awarded to parties jointly indicted, each is a competent witness for the state upon the trial of the other; and the fact of being charged as an accomplice only goes to his credibility as a witness, and does not necessarily render his testimony incredible. *Mitchell v. State.* 446

See also CONTEMPT; WRONGFUL DEATH.

WRIT AND PROCESS—

Unless set aside a defective service of summons will support a judgment, and, while subsisting, such service precludes a second service being made. *Whitman v. Sheets.* 179

An attorney at law, while acting in his professional capacity, in an action pending in a county other than the one in which he is a resident, is exempt from service of summons, and any service so made should, on motion, be set aside. *Ib.*

The limitation of Sec. 4988, Rev. Stat., providing that an attempt to commence an action shall be deemed equivalent to the commencement thereof, where the party diligently endeavors to procure a service, if such attempt is followed by service within sixty days, begins to run from the attempt to make the service, and not from the time when the court determines that the original service is defective. *Baltimore & O. Rd. v. Collins.* 334

An action for wrongful death, where service of summons upon defendant railway company was defective, and a later service was not made within sixty days from the attempted service, and not until after the expiration of the two years in which such action must be brought, is not within or saved by Sec. 4991, Rev. Stat., providing that if, in an action commenced in due time, the plaintiff fail otherwise than upon the merits, a new action may be commenced within one year. In such a case, the court is without jurisdiction. *Ib.*

In order to render service of summons, under Sec. 5044, Rev. Stat., upon the agent of a corporation valid, it must be made to appear that no chief officer of the corporation could be found in the county and that the service was up-

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WRIT AND PROCESS—Continued—

on the *managing* agent of the corporation. A return to the effect that the writ was served upon G, "*agent of said company, no chief officer being found.*" is not sufficient. *Bucket Pump Co. v. Steel Co.* 418

A letter from a corporation designating a certain person as "our Cincinnati agent," without evidence showing that such person had control or supervision over the affairs of the corporation or any portion thereof, is not sufficient to bring such person within the term "managing agent" as used in Sec. 5044, Rev. Stat., above referred to. *Ib.*

See also **ERROR.**

WRONGFUL DEATH—

In an action under Sec. 6134a, Rev. Stat., permitting an action in Ohio for a death wrongfully caused and occurring in another state, the court must look to the laws of the state where the wrongful act resulting in death occurred to determine all questions pertaining to the cause of action. *Ott v. Railway Co.* 10 Circ. Dec., 85, followed. *Wabash Ry. v. Fox.* 143

In view of the provision in Sec. 6134a, Rev. Stat., that the laws of other states may be enforced in Ohio in "all cases where such other state, territory or foreign country allows the enforcement in its courts of the statutes of this state of like character, an Indiana statute which would defeat the enforcement of Ohio laws in that state, would operate to defeat the application of Indiana laws in Ohio. The Indiana act, known as the "Employers' Liability Act," does not defeat the rule stated in the preceding paragraph. *Ib.*

Where it appears in an action against a railway company for wrongful death, that decedent was guilty of negligence which would bar his recovery, the exclusion of material and proper evidence as to the negligence of the railway company, cannot be regarded as prejudicial to the party's rights. *McCarty v. Railroad Co.* 239

In an action against a railway company for wrongful death, where it appeared that, in broad daylight, a man who had been for years in the employ of the railway company, not in an inferior capacity but as a section boss, having an unobstructed view, saw a train headed in his direction, went to work between the rails and permitted the locomotive to run over him, the court was justified in directing a verdict of the railway company; the fact that deceased was at work with his cap drawn over his ears and with a scarf or shawl wrapped around his shoulders, only increased his duty to use his sense of sight to keep out of the way of a locomotive. *Ib.*

In an action for causing death, under Secs. 6134, and 6135, Rev. Stat., evidence of the poverty of the widow and children of the decedent is incompetent, but where, as in this case, the evidence shows them to have been possessed of property valued at \$1,500, and there are no circumstances connected with such evidence calculated to excite sympathy or prejudice, its admission is not prejudicial error. *Lake Shore & M. S. Ry. v. Reynolds.* 701

In an action for wrongfully causing death based mainly on the neglect of a railway company to give proper signals of warning of the approach of its train to an exceptionally dangerous crossing of a highway, jurors, otherwise competent, are not disqualified by reason of their familiarity with the crossing and their opinion as to its dangerous character; and where its exceptionally dangerous character is a fact conceded by the pleadings, the trial court ought not, in the exercise of its discretion, to sustain challenges to such jurors. *Ib.*

In an action for wrongful death, the admission of testimony of men accustomed to riding on cars, though not railroad men, as experts, who stated that they were competent to give an opinion as to the speed of a street railway car, was not prejudicial error. *Ashtabula Transit Co. v. Dagenbach.* 307

See also **PROXIMATE CAUSE.**

